

## **EXPLANATORY STATEMENT**

Issued by authority of the Minister for Climate Change and Energy

*Offshore Electricity Infrastructure Act 2021*

*Offshore Electricity Infrastructure Amendment Regulations 2024*

### **Legislative Authority**

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

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

Subsection 29(1) of the OEI Act provides that the regulations must prescribe a ‘licensing scheme’ which relates to:

- applications for licences;
- the offering and granting of licences;
- transfers of licences;
- changes in control of licence holders;
- management plans; and
- any other matters that the OEI Act provides the licensing scheme to deal with.

Further, subsection 29(2) of the OEI Act provides that the licensing scheme may include any other provision that may, under the Act, be included in regulations. Other provisions that can be included in the licensing scheme include section 114 (management plans, including consultation requirements), section 117 (financial security), section 137 (safety zones), section 143 (protection zones) and section 243 (work health and safety) of the OEI Act respectively.

### **Purpose**

The purpose of the *Offshore Electricity Infrastructure Amendment Regulations 2024* (Amendment Regulations) is to amend the *Offshore Electricity Infrastructure Regulations 2022* (Principal Regulations) by prescribing additional matters for the purposes of the licensing scheme under section 29 of the OEI Act.

The matters set out in the Amendment Regulations give effect to certain elements of the OEI framework, including management plans, design notifications, financial securities, safety zones and protection zones, record keeping and work health and safety. These matters provide for the effective regulation of offshore renewable energy and transmissions infrastructure.

## **Background**

### The OEI framework

The OEI Act and the Principal Regulations provides a regulatory framework for offshore renewable energy infrastructure and offshore electricity transmission infrastructure.

The framework prohibits unauthorised offshore infrastructure activities, and also authorises particular offshore infrastructure projects and activities undertaken in Commonwealth waters. Those activities are authorised through a licensing regime.

The Amendment Regulations are the second stage of regulations that provides scaffolding for the licensing regime by setting requirements for licence holders in respect of projects, and giving the Regulator necessary oversight of activities planned and to be undertaken in accordance with a licence.

Broadly, the Amendment Regulations provides for the following:

- reporting requirements related to the Australian supply chain and workforce;
- procedures for surrendering a licence;
- requirements for management plans to be developed by licence holders, and revisions of management plans;
- offences related to licence holders' compliance with aspects of the licensing regime;
- requirements to give design notifications for infrastructure proposed under a licence;
- requirements and procedures related to financial security;
- procedures related to safety zone determinations and protection zone determinations;
- requirements for keeping accounts, records and other documents;
- application fees for licensing matters; and
- the modifications to *Work Health and Safety Regulations 2011* as they apply for the purposes of Part 1 of Chapter 6 of the OEI Act.

The OEI framework has been designed to operate alongside existing legislation including the *Native Title Act 1993* (Native Title Act), the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act), the *Underwater Cultural Heritage Act 2018*, the *Occupational Health and Safety (Maritime Industry) Act 1993* and the *Navigation Act 2012*.

The OEI Act applies, and modifies as necessary, the provisions of the *Work Health and Safety Act 2011* (Cth) (WHS Act).

### Licences and management plans under the OEI Act

The OEI Act requires a licence to be granted to enable the construction and operation of offshore renewable energy and electricity transmission infrastructure in the Commonwealth

offshore area. Chapter 3 of the OEI Act sets out four licences to accommodate a range of potential activities and developments:

- *Feasibility licences* authorise a licence holder to undertake exploratory and scoping work;
- *Commercial licences* authorise the development of large scale offshore renewable energy infrastructure (e.g., an offshore wind farm with fixed or floating wind turbines);
- *Research and demonstration licences* authorise short term projects to trial and test new technologies, or undertake infrastructure-based exploration and research activities, potentially in support of a future commercial project proposal (e.g., demonstration of floating solar generation or tidal generation technology); and
- *Transmission and infrastructure licences* authorise the construction and operation of offshore electricity transmission infrastructure (e.g., cables connecting an offshore renewable energy generation facility to onshore, or interconnectors between Tasmania and mainland Australia).

Section 154 of the OEI Act provides that the Offshore Infrastructure Registrar (Registrar), as established under section 153 of the OEI Act, is responsible for administering the licensing scheme, as well as maintaining a register of licences and managing the licence application process.

Section 177 of the OEI Act provides that the Offshore Infrastructure Regulator (the Regulator) is responsible for, amongst other things, compliance and enforcement activities in relation to obligations under the OEI Act, licences, work health and safety, environmental management and infrastructure integrity of offshore electricity and transmission infrastructure.

Section 114 of the OEI Act provides that the licensing scheme must provide for licence holders to prepare management plans, the licensing scheme to provide procedures for a licence holder to apply to the Regulator for the approval of the plan and the Regulator to consider and approve or refuse the plan. Details about the preparation and approval of management plans are set out in the Amendment Regulations.

Section 115 of the OEI Act provides that a management plan for a licence is a plan, for offshore infrastructure activities and other activities that are to be carried out under a licence, that has been approved by the Regulator under the licensing scheme (section 8 of the OEI Act). A management plan must set out how a licence holder will undertake their offshore infrastructure activities under their licence (i.e., the approach for consultation, installation, commissioning, operation, maintenance, and decommissioning of the offshore electricity infrastructure), including addressing work health and safety approaches and environmental approvals under the EPBC Act.

Section 117 of the OEI Act requires that when a management plan has been approved in respect of a licence, the licence holder must provide the Commonwealth with financial security sufficient to pay for costs, expenses, liabilities and debts, including those that might arise in relation to decommissioning of infrastructure, removal of property and remediation of the licence area. Financial security protects the Commonwealth from incurring the expenses or liabilities associated with decommissioning or other licence holder obligations if a licence holder is unable or unwilling to carry out its responsibilities under the OEI Act.

## Financial security

Section 119 of the OEI Act provides the Commonwealth, or the Regulator, the ability to recover costs, expenses and liabilities from the financial security provided by the licence holder. The kinds of costs, expenses and liabilities that can be recovered may be set out in regulations. The details of the financial security regime are set out in the Amendment Regulations.

## Safety and Protection Zones

Divisions 3 and 4 of Part 3 of Chapter 4 of the OEI Act provides for safety zones and protection zones to be established around eligible offshore electricity infrastructure. These zones aim to ensure the safety of offshore workers and other users of the marine environment, and to protect offshore electricity infrastructure from damage.

## Modification of *Work Health and Safety Regulations 2011*

Division 2 of Chapter 6 of the OEI Act applies and modifies provisions of the WHS Act in relation to the offshore environment. Part 7 of the Amendment Regulations applies or modifies the application of the provisions of the *Work Health and Safety Regulations 2011* (WHS Regulations) to offshore electricity infrastructure work.

## Principal Regulations

The Principal Regulations currently implement parts of the licensing scheme under the OEI Act<sup>1</sup> by prescribing fees and levies and providing spatial datum provisions and arrangements for pre-existing infrastructure. The Amendment Regulations seeks to build on this framework by providing for the administration and regulation of critical elements of the developing licensing scheme.

## **Impact and Effect**

The OEI industry is important for addressing climate change, as well as economic growth and job creation (including in regional areas). The Amendment Regulations will clarify the operation of elements of the licensing scheme supporting the operation of the OEI industry including:

- the surrender of licences;
- providing details and processes for the development and approval of management plans that will allow work to commence under OEI licences;
- the provision of financial security to the Commonwealth to protect Australian taxpayers from costs, expenses, liabilities, and unpaid debts should the Commonwealth need to step in to undertake licence holder obligations including to decommission, remove, or remediate the licence area or areas affected by activities carried out under a licence;
- processes and procedures for safety and protection zone determinations; and

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<sup>1</sup> The OEI Act contains provisions providing for the making of regulations, with the intention being that certain elements of the OEI framework would be addressed through subsequent regulations rather than established through the primary legislation.

- prescribing provisions and modifications of regulations made under the WHS Act.

Clarity in the operation of the licensing scheme is important for the community, industry, the Regulator, and the Commonwealth. The Amendment Regulations seek to clarify elements of the licensing scheme, including the surrender of licences, and add new requirements.

The management plan is a document underpinning the proposed offshore infrastructure activities and other activities to be carried out under the licence. Management plans operate to allow the licence holder to describe and detail elements of their proposed operations such that the Regulator has the capacity to oversee and approve those activities. A management plan must be approved and financial security provided to the Commonwealth, before licence activities may commence. Elements or functions of the management plan include:

- Details of the proposed licence activities and operations;
- Consultation between the licence holder and affected parties;
- A description of a management system to address the licence holder's obligations under the OEI Act, the EPBC Act, the applied WHS provisions, the conditions of the relevant licence, and the management plan for the relevant licence;
- Addressing feedback from the design notification process where relevant;
- A list and plan for the maintenance, decommission and removal of relevant structures, equipment, and property in relation to the relevant licence;
- Addressing emergency management; and
- A description of how the licence holder will comply with financial security arrangements and record-keeping arrangements.

Safety and protection zones are fundamental to enable activities authorised under a licence to proceed in a manner that minimises risk. Safety zones focus on restricting vessels from being present in the zones without approval whereas protection zones focus on restricting activities that may pose a serious risk to human safety, or offshore electricity infrastructure.

Under section 226 of the OEI Act, the WHS Act applies, as modified, to regulated offshore activities as defined under the OEI Act.

Under section 227 of the OEI Act, the WHS Act applies as if a reference to Comcare were a reference to the Regulator with the Amendment Regulations articulating the application of the WHS Regulations. This clarifies the operation of elements of the WHS regime which is adapted to the OEI environment.

### **Consultation**

Public consultation on an exposure draft of the Amendment Regulations was conducted between 12 April to 12 May 2024. A total of 107 submissions were received. Submissions not marked as private and confidential are published on the Commonwealth Department of Climate Change, Energy, the Environment and Water's (the Department's) website.

During the consultation period, the Department, along with staff supporting the Regulator, also undertook online information sessions with approximately 85 stakeholders. These stakeholders

included industry developers, state governments, consultancy and legal firms, non-government agencies and existing users of Australia's offshore marine environment.

In addition to the people and entities mentioned above, the Attorney-General's Department, the Department of Employment and Workplace Relations, were also consulted during the development of the Amendment Regulations.

In response to the feedback received during consultation, the Department made changes to the requirements set out in the Amendment Regulations, including:

- reducing administrative burden on licence holders and the Regulator by reducing timeframes for the Regulator to consider applications, reducing the number of circumstances where a management plan must be revised, decoupling the return of financial security from the management plan, and clarifying how the information required in a management plan is commensurate with the stage of an OEI project;
- improving transparency of processes to include consultation prior to the Regulator making a decision on a protection zone;
- strengthening the consultation provisions to clarify those who are to be consulted when preparing a management plan;
- improving the sequencing of the licensing scheme, such as not requiring design notification for a transmission and infrastructure licence until after exploratory work is completed; and
- improving safety outcomes by further harmonising the Amendment Regulations with the WHS model laws.

### **Details/ Operation**

The Amendment Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

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

### **Regulatory Impact**

A Regulatory Impact Statement (RIS) was prepared for the OEI Act and was included in the Explanatory Memorandum for the OEI Act.<sup>2</sup> The Office of Impact Assessment has advised that no further RIS is required for the Amendment Regulations.

### **Other**

The Amendment Regulations are compatible with the human rights and freedoms recognised or declared under section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A full statement of compatibility is set out in Attachment B.

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<sup>2</sup> Office of Best Practice Regulation reference number 06632.

## **Documents incorporated by reference**

Guidelines made by the Regulator are incorporated by reference in new regulation 168B of the WHS Regulations, incorporated by Schedule 2 to the Amendment Regulations. The guidelines are incorporated as they are in force from time to time, which is authorised by paragraph 276(3)(d) of the WHS Act, as applied by section 226 of the OEI Act (section 226 applies the WHS Act, as modified by the OEI Act, to work in the Commonwealth offshore area). Subsection 243(2) of the OEI Act allows regulations to be made for the purposes of the OEI Act under the applied provisions of the WHS Act. The guidelines can be freely accessible by the public on the Regulator's website at <https://www.oir.gov.au>.

AS/NZS 2299 (the standard) is incorporated by reference in new regulation 174B of the WHS Regulations, incorporated by Schedule 2 to the Amendment Regulations. The standard is incorporated as it is in force from time to time, which is authorised by paragraph 276(3)(d) of the WHS Act, as applied by section 226 of the OEI Act (section 226 applies the WHS Act, as modified by the OEI Act, to work in the Commonwealth offshore area). Subsection 243(2) of the OEI Act allows regulations to be made for the purposes of the OEI Act under the applied provisions of the WHS Act. The standard is available for purchase by the public from Standards Australia at <https://www.standards.org.au/>. Standards Australia also offers limited no-fee access to the entire catalogue of Australian Standards for non-commercial purposes through its Reader Room.

**Details of the *Offshore Electricity Infrastructure Amendment Regulations 2024***

**Section 1 – Name**

This section provides that the name of the instrument is the *Offshore Electricity Infrastructure Amendment Regulations 2024* (Amendment Regulations).

**Section 2 – Commencement**

This section provides for the commencement of provisions of the Amendment Regulations.

Table item 1 provides that sections 1 to 4 of the Amendment Regulations, and anything not covered in table items 2, 3 and 4, commence the day after the Amendment Regulations are registered.

Table item 2 provides that Part 1 of Schedule 1 to the Amendment Regulations commences the day after the Amendment Regulations are registered.

Table item 3 provides that Part 2 of Schedule 1 to the Amendment Regulations commences immediately after the commencement of the provisions covered by table item 2.

Table item 4 provides that Schedule 2 to the Amendment Regulations commences immediately after the commencement of the provisions covered by table item 2.

Subsection 2(2) provides that any information in column 3 of the table is not part of the Amending Regulations but may be inserted or edited in any published version of the instrument.

**Section 3 – Authority**

This section provides that the Amendment Regulations are made under the *Offshore Electricity Infrastructure Act 2021* (OEI Act) and the *Offshore Electricity Infrastructure (Regulatory Levies) Act 2021*.

**Section 4 – Schedules**

This section provides that each instrument that is specified in a Schedule to the Amendment Regulations is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to the Amendment Regulations has effect according to its terms.

## **SCHEDULE 1 – GENERAL AMENDMENTS**

### **PART 1 – RENUMBERING**

#### ***Offshore Electricity Infrastructure Regulations 2022***

Part 1 renumbers certain provisions and Parts of the *Offshore Electricity Infrastructure Regulations 2022* (Principal Regulations) to account for the amendments made under Part 2 of the Amendment Regulations and makes minor amendments to the *Offshore Electricity Infrastructure (Regulatory Levies) Regulations 2022*.

#### **Item 1 – Section 4 (definition of ‘commercially confidential information’)**

This item provides that section 48G in the definition of ‘commercially confidential information’ is changed to section 157.

#### **Item 2 – Section 4 (definition of ‘general licence application information’)**

This item provides that section 48A in the definition of ‘general licence application information’ is changed to section 151.

#### **Item 3 – Part 3**

This item provides that Part 3 of the Principal Regulations is renumbered as Part 10.

#### **Item 4 – Section 45**

This item provides that section 45 of the Principal Regulations is renumbered as section 146.

#### **Item 5 – Section 46**

This item provides that section 46 of the Principal Regulations is renumbered as section 147.

#### **Item 6 – Section 46**

This item provides that section 45 in section 46 of the Principal Regulations (renumbered by item 5 as section 147) is changed to section 146.

#### **Item 7 – Part 4**

This item provides that Part 4 of the Principal Regulations is renumbered as Part 11.

#### **Item 8 – Section 47**

This item provides that section 47 of the Principal Regulations is renumbered as section 149.

#### **Item 9 – Section 48**

This item provides that section 48 of the Principal Regulations is renumbered as section 150.

#### **Item 10 – Part 4A**

This item provides that Part 4A of the Principal Regulations is renumbered as Part 12.

#### **Item 11 – Section 48A**

This item provides that section 48A of the Principal Regulations is renumbered as section 151.

#### **Item 12 – Section 48B**

This item provides that section 48B of the Principal Regulations is renumbered as section 152.

#### **Item 13 – Section 48B**

This item provides that reference to section 48A in section 48B of the Principal Regulations is changed to section 151.

#### **Item 14 – Section 48C**

This item provides that section 48C of the Principal Regulations is renumbered as section 153.

#### **Item 15 – Section 48C**

This item provides that reference to section 48A in section 48C and of the Principal Regulations is changed to section 151.

#### **Item 16 – Section 48D**

This item provides that section 48D of the Principal Regulations is renumbered as section 154.

#### **Item 17 – Section 48D**

This item provides that section 48A in section 48D of the Principal Regulations is renumbered to section 151.

#### **Item 18 – Section 48E**

This item provides that section 48E of the Principal Regulations is renumbered to section 155.

#### **Item 19 – Section 48E**

This item provides that the reference to section 48A in section 48E in the Principal Regulations is changed to section 151.

**Item 20 – Section 48F**

This item provides that section 48F of the Principal Regulations is renumbered to section 156.

**Item 21 – Section 48F**

This item provides that the reference to section 48A in section 48F in the Principal Regulations is changed to section 151.

**Item 22 – Subsection 48F(4) (note)**

This item provides that the reference to section 48G in the note to subsection 48F(4) of the Principal Regulations is changed to section 157.

**Item 23 – Section 48G**

This item would renumber section 48G of the Principal Regulations as section 157.

**Item 24 – Section 48H**

This item provides that section 48H of the Principal Regulations is renumbered as section 158.

**Item 25 – Part 5**

This item provides that Part 5 of the Principal Regulations is renumbered as Part 13.

**Item 26 – Section 49**

This item provides that section 49 of the Principal Regulations is renumbered as section 159.

**Item 27 – Section 50**

This item provides that section 50 of the Principal Regulations is renumbered as section 160.

**Item 28 – Part 6**

This item provides that Part 6 of the Principal Regulations is renumbered as Part 14.

**Item 29 – Section 51**

This item provides that section 51 of the Principal Regulations is renumbered as section 164.

***Offshore Electricity Infrastructure (Regulatory Levies) Regulations 2022*****Item 30 – Section 9 (note)**

This item provides that reference to section 48 in section 9 of the *Offshore Electricity Infrastructure (Regulatory Levies) Regulations 2022* is changed to section 150.

## PART 2 – MAIN AMENDMENTS

### *Offshore Electricity Infrastructure Regulations 2022*

Part 2 sets out the main amendments made by the Amendment Regulations to the Principal Regulations.

#### **Item 31 – Section 4**

This item inserts definitions of key terms used in the Amendment Regulations into section 4 of the Principal Regulations. The following definitions have been inserted:

- ***Activities subject to consultation*** has the meaning given in new section 63.
- ***Design notification*** has the meaning given in new sections 96 and 97.
- ***Eligible safety zone infrastructure*** has the meaning given by subsection 136(1) of the OEI Act.
- ***Initial plan approval application*** has the meaning given in new section 47.
- ***Licence activity***, in relation to a licence or a proposed commercial licence, means an offshore infrastructure activity or other activity carried out, or to be carried out, in the licence area under the licence or the proposed commercial licence.
- ***Periodic revision day***, for a relevant licence, has the meaning given by the new subsection 56(2), which is subject to new sections 58 and 59.
- ***Plan revision approval application*** has the meaning given in new section.
- ***Proposed commercial licence***, in relation to a feasibility licence, means a commercial licence:
  - (a) that:
    - (i) the holder of the feasibility licence has applied for, where the application has not been granted or refused; or
    - (ii) the holder of a feasibility licence proposes to apply for; and
  - (b) that is proposed to have a licence area that consists of, or is entirely within, the licence area of the feasibility licence.
- ***Protection zone application*** has the meaning given in new section 130.
- ***Protection zone determination*** has the meaning given in new section 126
- ***Relevant licence*** is defined as a licence or a proposed commercial licence, and:
  - (a) in relation to a management plan—means the licence (including a proposed commercial licence) that the management plan is approved for; and
  - (b) in relation to an initial plan approval application for the Regulator to approve a plan as the management plan for a licence (including a proposed commercial licence)—means that licence; and

(c) in relation to a plan revision approval application for the Regulator to approve a revised management plan as the management plan for a licence (including a proposed commercial licence)—means that licence.

- ***Relevant structures, equipment and property*** has the meaning given in new subsection 87(1).  
A note is provided below this definition that states that the ‘relevant structures, equipment and property’ in relation to a relevant licence must be listed in the management plan for the licence under new section 87. However, a structure, equipment or other property mentioned in new subsection 87(1) is a relevant structure, equipment or property whether or not it is listed in the plan.
- ***Safety zone application*** has the meaning given in new section 117.
- ***Safety zone determination*** has the meaning given in new section 113.

### **Item 32 – Part 2 (heading)**

This item repeals the heading of Part 2 of the Principal Regulations and substitutes it with a new heading: “**Part 2 – Licensing scheme: licences**”. This substitution clarifies that Part 2 of the Principal Regulations is primarily related to the application process for offering, granting, extending, varying and surrendering feasibility licences, commercial licences, research and demonstration licences, and transmission and infrastructure licences.

### **Item 33 – Section 5**

This item repeals section 5 of the Principal Regulations and substitutes it with a new section 5 titled “**Operation of this Part**”. New section 5 provides that for the purposes of section 29 of the OEI Act, Part 2 of the Principal Regulations prescribes the licensing scheme in relation to:

- (a) applications for licences; and
- (b) the offering and granting of licences; and
- (c) transfers of licences; and
- (d) changes in control of licence holders; and
- (e) other matters.

### **Item 34 – Paragraph 9(3)(b)**

This item omits “day on or before” in paragraph 9(3)(b) of the Principal Regulations, and substitutes “time before”. This amendment provides that the Minister must, in inviting applications for feasibility licences, identify a more precise deadline time (in addition to the day) by which the application must be submitted. This amendment assists the Registrar in supporting and administering the submission of licence applications within the specified invitation period.

### **Item 35– Paragraph 10(2)(b)**

This item omits “on or before the day” in paragraph 10(2)(b) of the Principal Regulations, and substitutes “before the time”. This amendment is connected to and consistent with the amendments provided for by item 34 of the Amendment Regulations above relating to paragraph 9(3)(b) of the Principal Regulations.

### **Item 36 – At the end of subsection 10(2))**

This item inserts a note at the end of subsection 10(2) of the Principal Regulations that cross references section 146 (see item 53 of the Amendment Regulations), which prescribes the application fees. The note further describes that an application for a feasibility licence is only taken to have been made if the appropriate fee has been paid by the applicant consistent with section 147.

### **Item 37 – Subsection 10(3)**

This item omits “the day specified in the invitation under paragraph 9(3)(b)” in subsection 10(3) of Principal Regulations, and substitutes “the day on which the time specified in the invitation under paragraph 9(3)(b) falls”. This amendment is consequential to the amendments provided for by items 34 and 35 of these Regulations.

For clarity, the invitation to apply for feasibility licence provided for in section 9 of the Principal Regulations may specify a time in a particular time zone, and mention what that time is in other time zones for illustrative purposes. For example, the invitation may specify that applications for feasibility licences must be received by Friday, 15 November 2024 at 4:00pm AWST (5:00pm ACDT and 8:00pm AEDT ).

### **Item 38 – Subsection 12(4)**

This item omits “day specified in the invitation under paragraph 9(3)(b) were a reference to the day” in paragraph 12(4) of the Principal Regulations and substitutes “time specified in the invitation under paragraph 9(3)(b) were a reference to the end of the day”. This amendment is consequential to the amendments provided for by items 34 and 35 of these Regulations.

### **Item 39 – At the end of subsection 17(2)**

This item inserts a note at end of subsection 17(2) of the Principal Regulations that cross references the new section 146, which prescribes the application fees. It further describes that an application for a commercial licence is only taken to have been made if the appropriate fee has been paid by the applicant consistent with the new section 147.

### **Item 40 – At the end of subsection 18(2)**

This item inserts a note at end of subsection 18(2) of the Principal Regulations that cross references the new section 146, which prescribes the application fees. It further describes that an application for a research and demonstration licence is only taken to have been made if the appropriate fee has been paid by the applicant consistent with the new section 147.

#### **Item 41 – At the end of subsection 21(2)**

This item inserts a note at end of subsection 21(2) of the Principal Regulations that cross references the new section 146, which prescribes the application fees. It further describes that an application for a transmission and infrastructure licence is only taken to have been made if the appropriate fee has been paid by the applicant consistent with the new section 147.

#### **Item 42 – At the end of subsection 27(3)(f)**

This item omits “amounts” in paragraph 27(3)(f) of the Principal Regulations, and substitutes “the amount”. This amendment clarifies that a financial offer amount is intended to be a single payment.

#### **Item 43 – At the end of Subdivision C of Division 4 of Part 2**

This item inserts new section 28A at the end of Subdivision C of Division 4 of Part 2 of the Principal Regulations.

#### **Section 28A – Commercial licences—Minister may only grant licence if financial security requirement complied with**

This section applies if a feasibility licence holder has applied for a commercial licence and the application is being considered.

This section provides that, for the purposes of paragraph 42(1)(j) of the OEI Act, the Minister may only grant a commercial licence if the eligible person has provided the Commonwealth with financial security pursuant to section 117 of the OEI Act. This circumstance may occur where there is existing infrastructure in a proposed commercial licence area that was installed under a related feasibility licence, and that infrastructure is to remain in situ at the point of commercial licence grant.

New section 103 of the Amendment Regulations gives licence holders the flexibility to provide amounts of financial security in relation to the installation of particular infrastructure at different stages of the project’s development.

#### **Item 44– At the end of subsection 30(2)**

This item inserts a note at the end of subsection 30(2) of the Principal Regulations that cross references the new section 146, which prescribes the application fees. The note further clarifies that an application to extend the term of a licence is only taken to have been made if the appropriate fee has been paid by the applicant consistent with section 147.

#### **Item 45 – At the end of subsection 31(1)**

This item inserts a note at the end of subsection 31(1) of the Principal Regulations that cross references the new section 146, which prescribes the application fees. The note further clarifies that an application to vary a licence is only taken to have been made if the appropriate fee has been paid by the applicant consistent with section 147.

## **Item 46 – Paragraph 33(4)(d)**

Section 33 of the Principal Regulations sets out that, as a condition of licences issued under the OEI Act, all licence holders are required to report to the Registrar or the Minister in accordance with section 33. Reports are to be provided annually for the term of the licence with a final report to be provided if a licence holder surrenders a licence.

Subsection 33(4) of the Principal Regulations sets out matters that must be included in an annual report, which includes how the licence holder has continued to meet and continues to meet the merit criteria, which provides the Registrar with visibility over how licences holders are delivering with the claims they made in their licence applications.

Item 46 repeals paragraph 33(4)(d) of the Principal Regulations and substitutes with a requirement that a licence holder reports on how the offshore infrastructure project carried out, or to be carried out, under the licence (including, in the case of a feasibility licence, any proposed commercial licence that the licence holder has applied for, or proposes to apply for, on the basis of the feasibility licence) is contributing, or will contribute, to the Australian economy and local communities, including in relation to:

- (iii) regional development; and
- (iv) job creation; and
- (v) Australian industries; and
- (vi) the use of Australian goods and services.

New paragraph 33(4)(e) provides that the annual report must also include any other information or documents that a condition of the licence (other than the condition in this section) requires the annual report to include.

This provision acknowledges the importance of leveraging opportunities to build the capacity of Australian businesses to service the new offshore renewables industry. Item 46 requires licence holders to detail how their project contributes to the Australian economy and benefits the local community. These details must be provided in the annual report given to the Registrar, as required by subsection 33(2) of the Principal Regulations.

The requirement provided for in paragraph 33(4)(d) (as amended) applies to existing licences.

## **Item 47 – At the end of Division 6 of Part 2**

This item inserts section 33A at the end of Division 6 of Part 2 in the Principal Regulations.

### 33A Feasibility licences – Australian supply chain and workforce analysis report

New subsection 33A(1) provides that, as a condition of the feasibility licence, the licence holder must give the Registrar a report under this section within 2 years after the day the licence came into force (or such further period as allowed by the Registrar).

This condition will ensure that there is early engagement between licence holders and Australian businesses and workers to identify opportunities to participate in, and benefit from, the Australian offshore renewable energy supply chain and to encourage collaborative approaches to build local industry capability to support both the construction and operation phase of projects.

The note accompanying subsection 33A(1) provides that for feasibility licences in force at the commencement of this section, see subsection 33A(8) below.

New subsection 33A(2) provides matters that must be included in the report. These matters include:

- (a) a description of the proposed commercial offshore infrastructure project; and
- (b) a description of the proposed supply chain and workforce needs of the project; and
- (c) a description of the opportunities for Australian businesses and workers that may arise from the project; and
- (d) a description of consultation that has occurred in respect of economic opportunities directly arising from the project with:
  - (i) Australian businesses, including businesses owned or operated by Aboriginal and Torres Strait Islander peoples; and
  - (ii) local governments of areas adjacent to, or near the project; and
  - (iii) workers and their representatives, such as bodies that could reasonably be regarded as representing the interests of the types of workers that could be employed in the project; and
  - (iv) any forums or committees representing business owners and workers located in areas adjacent to, or near the project, that could reasonably be considered to offer goods or services applicable to, or receive employment in, the project.
- (e) a description of how the project will maximise its contributions to the Australian economy and Australian communities, including in relation to regional development, job creation, workforce training and skills development, Australian industry and the use of Australian goods and services. This should also include how the project will benefit communities adjacent to areas in which the licence activities will be carried out.

New subsection 33A(3) provides that the Registrar may direct the licence holder to review and update the report and give the updated report to the Registrar before the end of the period specified in the direction. This direction must be in writing and specify a time period by which the licence holder is to provide the updated report to the Registrar.

New subsection 33A(4) provides that the licence is subject to the following conditions:

- (a) the licence holder must comply with any direction given to the licence holder under subsection 33A(3); and
- (b) any updated report that the licence holder gives to the Registrar in accordance with such a direction must be in accordance with subsection 33A(2).
- (c) New subsection 33A(5) provides that if a licence holder gives the Registrar a report under this section, the Registrar must within 60 days, decide whether the report accords with subsection 33A(2) and either give the licence holder a notice stating that the report must be published in accordance with subsection 33A(6) or give a notice to revise and resubmit the report and setting out the information that must be included in the report.

New subsection 33A(6) provides that if the report must be published, it must be published on the licence holder's website within 30 days after receiving the notice and keep it there for as long as the feasibility licence remains in force.

New subsection 33A(7) provides that before publishing the report, the licence holder must remove from the report any information that the licence holder reasonably considers to be a trade secret or that would adversely affect any person's business, commercial or financial affairs.

New subsection 33A(8) is a transitional provision which applies to any feasibility licence that is in effect at the time this provision commences. It provides that the licence holder of such a feasibility licence must give the Registrar the first report under this section before the end of 2 years after the day this section commences, as opposed to the time specified in section 33A(1).

#### **Item 48 – Subsection 35(1) (note)**

This item inserts two notes at the end of subsection 35(1) of the Principal Regulations.

Note 1 cross references section 69 of the OEI Act which provides that an application to transfer a licence must be made to the Registrar.

Note 2 cross references the new section 146, which prescribes the application fees. It further describes that an application to transfer a licence is only taken to have been made if the appropriate fee has been paid by the applicant consistent with section 147.

#### **Item 49 – At the end of subsection 39(1)**

This item inserts a further note at the end of subsection 39(1) of the Principal Regulations that cross references the new section 146, which prescribes the application fees. It further describes that an application for approval of change in control of a licence holder is only taken to have been made if the appropriate fee has been paid by the applicant consistent with section 147.

## **Item 50 – After Division 8 of Part 2**

This item inserts new “**Division 8A – Surrendering licences**” after Division 8 of Part 2 of the Principal Regulations. New Division 8A includes new section 39A.

### Section 39A – Application for consent to surrender licence, and notice of surrender

A licence granted under the OEI Act remains in force until the end day specified in the licence, unless it is cancelled under section 73 of the OEI Act or it is surrendered under section 74 of the OEI Act. While a licence is in force, the licence holder will be required to comply with the obligations set out in the OEI Act, OEI Regulations and the conditions of the licence, such as submitting annual reports and paying annual levies.

Under section 74 of the OEI Act, a licence holder may apply to the Minister to request the Minister’s consent to surrender the whole licence area or a part of the licence area. For example, a licence holder may seek to surrender their whole licence area subject to a feasibility licence if the licence holder does not intend to seek a commercial licence, or to reduce their licence area to remove unused space.

The new section 39A prescribes additional matters that an application for consent to surrender a licence and notice of surrender of licence must comply with for the purposes of subsections 74(1) and (4) of the OEI Act.

New subsection 39A(1) provides that an application under subsection 74(1) of the OEI Act must be made in the manner and form approved by the Registrar and published on the Registrar’s website and must be accompanied by any information or documents required by the form.

New subsection 39A(2) provides that a notice under subsection 74(4) of the OEI Act must be in the manner and form that is approved by the Registrar and published on the Registrar’s website and must be accompanied by any information or documents required by the form.

The Minister must consent to the surrender if the matters in section 74(3) of the OEI Act are met. The notice of surrender must also be accompanied by the notice of the Minister’s consent to the surrender of the licence in respect of the area, as required by subsection 74(4) of the OEI Act.

The effect of this section does not impact the application of subsections 74(2) and (4) of the OEI Act.

## **Item 51 – At the end of section 41**

This item inserts new subsection 41(6) into the Principal Regulations, which provides that, for the avoidance of doubt, the Registrar may make more than one request for further information under section 41 of the Principal Regulations and may make further requests if the Registrar or the Minister is not satisfied with the information provided in response to a request.

## Item 52 – After Part 2

This item inserts new Part 3 titled “**Part 3 – Licensing scheme: management of infrastructure**” after Part 2 of the Principal Regulations.

The purpose of new Part 3 is to prescribe the licensing scheme in relation to management plans and other matters and includes the requirements for making initial plan and plan revision approval applications, how the Regulator deals with applications, the matters that a management plan must address and the design notification scheme.

An OEI licence holder seeking to undertake activities that involve construction, installation, commissioning, operating, maintaining or decommissioning, the licence holder must have an approved management plan in place. A management plan sets out:

- Details of the proposed licence activities and operations;
- Consultation between the licence holder and affected parties;
- A description of a management system to address the licence holder’s obligations under the OEI Act, the EPBC Act, the applied WHS provisions, the conditions of the relevant licence, and the management plan for the relevant licence;
- Addressing feedback from the design notification process where relevant;
- A list and plan for the maintenance, decommissioning and removal of relevant structures, equipment and property in relation to the relevant licence;
- Addressing emergency management; and
- A description of how the licence holder will comply with financial security arrangements and record-keeping arrangements.

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

The OEI Act sets out certain matters that a management plan must address. These Amendment Regulations prescribe the remaining requirements for management plans for the purposes of section 29 of the OEI Act. These include:

- the application process for approval of a management plan or revision of a management plan;
- the Regulator’s process for approving or refusing to approve a management plan;
- consultation requirements for licence holders when preparing a management plan;
- ongoing stakeholder engagement requirements throughout the life of an OEI project; and

- management plan summaries for public release on the Regulator’s website.

## ***Division 1—Operation of this Part***

### Section 45 – Operation of this Part

This section outlines the operation of new Part 3 of the Principal Regulations, which is to prescribe the licensing scheme in relation to management plans and other matters for the purposes of section 29 of the OEI Act.

## ***Division 2 – Licence activities must comply with management plan***

### Section 46 – Licence activities must comply with management plan

This section provides that a licence holder commits an offence of strict liability if they carry out licence activities in a way that is contrary to the relevant management plan. The maximum penalty for this offence is 50 penalty units.

A person commits a separate “continuing offence” for every day that the person continues to carry out licence activities in a way that is contrary to the relevant management plan. The maximum penalty that can be imposed for each day an offence continues is 10% of the maximum penalty amount (50 penalty units).

50 penalty units is proportionate because this is a high-level offence provision which may have the potential to impact human health and safety, infrastructure integrity and environmental health. In this context, it is important to recognise that management plans establish a critical framework for how a licence holder will conduct their licence activities. Licence holders are responsible for ensuring the proper management of all aspects of their offshore infrastructure project as expressed in the management plan.

Section 46 establishes a strict liability offence, which means there are no fault elements for any of the physical elements of the offence. However, as set out in paragraph 6.1(2)(b) of the *Criminal Code Act 1995* (Criminal Code), the defence of mistake of fact under section 9.2 of the Criminal Code is available in relation to these elements. This means where the accused produced evidence of an honest and reasonable, but mistaken, belief in the existence of certain facts which, if true, the conduct would not have constituted the offence, it will be incumbent on the prosecution to establish that there was not an honest and reasonable mistake of fact.

The framing of this offence as one of strict liability in a regulatory context where the public interest in ensuring that regulatory schemes are observed, the sanction of criminal penalties is justified. The offence arises where a persons can reasonably be expected to know the legislative requirements and comply with them because they prepared the management plan. For that reason, the mental, or fault, element can justifiably be excluded. Further, any person liable for this offence has control of the activities undertaken under the licence and can be expected to be aware the requirements related to complying with management plans, as opposed to an offence where members of the general public are liable.

### ***Division 3—Application for approval of plans (including revised plans)***

#### ***Subdivision A—Initial plan approval applications***

##### **Section 47 – Making an initial plan approval application**

An application made under this section is an initial plan approval application.

This section, which gives effect to section 114 of the OEI Act, allows the holder of a feasibility licence, a research and demonstration licence or a transmission and infrastructure licence to apply to the Regulator for approval of a plan as the management plan for the licence. A plan is not considered a management plan until it has been approved by the Regulator.

The section also provides that the holder of a feasibility licence who has applied for, or proposes to apply for, a commercial licence on the basis of the feasibility licence may also apply to the Regulator for approval of a plan as the management plan for the proposed commercial licence.

The note to this section clarifies that if there is already a management plan for the relevant licence, the licence holder may make a plan revision approval application instead under section 50.

The application to approve a management plan must be made in accordance with Subdivision A of Division 2 of new Part 3.

##### **Section 48 – Requirements for application**

This section provides that an initial plan approval application must be made in the manner and form approved by the Regulator and published on the Regulator's website and be accompanied by the plan and any other information or documents required by the form.

Subsection 48(2) provides that consultation must be carried out in accordance with Subdivision D of Division 2 of new Part 3.

Note 1 accompanying subsection 48(2) cross references the new section 146, which prescribes the application fees. It further describes that an initial plan approval application is only taken to have been made if the appropriate fee has been paid by the applicant consistent with section 147.

Note 2 outlines the additional requirement for the licence holder to comply with under section 96 if the licence is a proposed commercial licence. This additional requirement is that the licence holder must give the Regulator a design notification before making the initial plan approval application.

## Section 49 – Application taken to be withdrawn if further application made

This section provides that an initial plan approval application in relation to a licence will be taken to be withdrawn if the licence holder makes a further initial plan approval application in relation to the licence while the Regulator is dealing with the application.

### ***Subdivision B—Plan revision approval applications***

## Section 50 – Making a plan revision approval application

This section provides the application process for the making of plan revision - a ***plan revision approval application***. It applies if there is a management plan for the licence. It also applies to the holder of a feasibility licence if the licence holder has applied or proposes to apply for the Minister to grant a commercial licence on the basis of the feasibility licence, and the Regulator has approved a management plan for the proposed commercial licence.

To make a plan revision, subsection 50(3) provides that the licence holder may prepare a revised management plan and apply to the Regulator, in accordance with Subdivision B of Division 2 of new Part 3, for approval of the revised management plan. If approved, the revised management plan would become the management plan for the relevant licence. The effect the Regulator's approval is that the prior version of the management plan for the licence would no longer be in force.

This section is forms part of the licensing scheme consistent with paragraph 114(2)(b) of the OEI Act.

## Section 51 – Requirements for plan revision approval application

This section provides that a plan revision approval application is to be made in the manner and form approved by the Regulator and published on the Regulator's website. That form is to be accompanied by the revised plan and any information or documents required by the form.

Management plans are designed to be updated as an OEI project progresses, including if the Regulator directs a licence holder to do so, in certain circumstances (for example, if there is a significant change to activities), and at least once every five years.

Note 1 to this section directs the reader to sections 146 and 147 relating to application fees.

Note 2 to this section directs the reader to relevant information regarding design notifications in new subsection 96(3).

## Section 52 – Application taken to be withdrawn if further application made

This section provides that a plan revision approval application in relation to a licence will be taken to be withdrawn if the licence holder makes a further plan revision approval application in relation to the licence while the Regulator is dealing with an earlier plan revision approval application.

### ***Subdivision C—Requirements to revise management plan and apply for approval***

#### **Section 53 – Regulator may direct licence holder to revise management plan**

This section allows the Regulator to direct a licence holder to revise the management plan and make a plan revision approval application for the Regulator to approve as the management plan for the relevant licence. The Regulator may issue a direction at any time when an approval of a management plan for the licence is in effect. For example, if the Regulator conducts an inspection or investigation and finds that a licence activity is not adequately provided for in the approved management plan, the Regulator may then direct the licence holder to revise their management plan, and make a plan revision approval application.

Before giving a direction, section 55 provides the Regulator must give the licence holder written notice of the proposed direction to be issued under section 53, and provide the licence holder with an opportunity to make submissions.

If the Regulator issues a direction, it must be in writing, set out the matters to be revised in the management plan and associated reasons for those revisions and specify when the plan revision approval application is to be made by.

A direction issued under this section may include a requirement for the licence holder to carry out consultation under Subdivision D of Division 2 of new Part 3 of the Amendment Regulations before making the plan revision approval application. If this is the case, the Regulator may specify in the direction that the consultation can be reduced in scope to specified licence activities carried out or to be carried out under the licence, and with specified persons, organisations, government entities, communities or groups of the kinds mentioned in new subsection 64(1) of the Regulations.

New subsection 53(7) requires the licence holder to comply with the direction on or before the day specified in the direction.

This direction power enables the Regulator to direct consultation in circumstances where deficiencies in consultation have been identified, to ensure consultation occurs appropriately in accordance with the regulatory requirements.

Merits review is not available in respect of a decision made by the Regulator to issue a direction to revise the management plan under new section 53, as the decision is procedural in nature, and unlikely to have substantive consequences. The costs of merits review and the expected low incidence of such decisions means that merits review was not considered necessary for this provision. The costs associated with merits review is disproportionate to the significance of the decision under review. In this case, costs associated with making a revision application are likely to be small.

This is consistent with the Administrative Review Council's guide, "*What decisions should be subject to merits review?*" that decisions which have such limited impact that the costs of review cannot be justified should not be subject to merits review.

## Section 54 – Failure to comply with direction to revise management plan

This section provides that a failure to comply with a direction to revise the management plan under new section 53 of the Amendment Regulations by the day specified under paragraph 50(2)(d), will result in either a strict liability offence or a civil penalty. The time limits in new paragraphs 54(1)(b) and (2)(b) are subject to any variation of the time limit made under new paragraph 53(7)(a) of the Amendment Regulations.

A person will commit a continuing contravention for every day that the person continues to contravene section 53. The maximum penalty that can be imposed for each day of the continuing contravention is 10% of the maximum penalty amount (40 penalty units).

The penalty amount for the strict liability offence and the civil penalty amount for the civil penalty are the same - 40 penalty units. This is necessary and proportionate to the contravention of section 53. Compliance with section 53 is an important part of the scheme to ensure that management plans and licences are effective and up to date.

The strict liability offence should be considered in a regulatory context where there is a strong public interest in ensuring that compliance with the scheme is taken seriously by licence holders, and where the sanction of criminal penalties for non-compliance is justified. The offence arises where licence holders can reasonably be expected to know what standard of conduct is expected of them as a participant in the OEI scheme and have ample opportunities to consider, respond to, and implement directions from the Regulator. For that reason, the mental, or fault, element can justifiably be excluded. Further, any person liable for this offence has control of the activities undertaken under the licence and can be expected to be aware of the requirements of a direction, as opposed to an offence where members of the general public are liable.

## Section 55 – Proposed decision to give direction

This section requires the Regulator to give the licence holder written notice of the proposed direction before giving a direction under new subsection 53(1) of the Amendment Regulations.

New subsection 55(2) sets out the requirements of the notice, including that it must invite the licence holder to make a written submission about the proposed direction, and new subsection 55(3) requires the day specified in the notice for which the licence holder may make a submission to be reasonable.

If the licence holder makes a submission within time, new subsection 55(4) requires the Regulator to take into account the licence holder's submission when determining whether or not to give the direction under new section 53. If the Regulator decides not to give the direction, the Regulator may give a different direction under new subsection 53(1) instead, and if so, does not need to give the licence holder written notice under new section 55 of the proposed decision to give a different direction.

## Section 56 – Periodic plan revision approval applications

This section provides that a licence holder must revise the management plan and make a plan revision approval application, on or before the day that is 5 years after the most recent of the following:

- (a) the approval of a management plan or revised management plan took effect;
- (b) a direction given under new section 53;
- (c) an exemption under new section 57 has ceased to have effect;
- (d) a deferral under new section 58 has ceased to have effect;
- (e) a determination under section 59 has ceased to have effect.

This requirement will not apply if an exemption is in effect under the new section 57 in relation to the licence.

Each time the Regulator approves a plan or a revised plan as the management plan for the relevant licence, there will be a new periodic revision day 5 years after the day the approval takes effect, unless this day is deferred under the new section 58 or a different day is determined under the new section 59.

New subsection 56(3) clarifies that an approval of a management plan for a relevant licence does not cease to be in effect merely because of a failure to comply with new subsection 56(1).

New subsection 56(4) provides that it is an offence of strict liability if a licence holder does not revise their management plan and make a plan revision approval application in accordance with this section, unless an exemption is in effect under the new section 57 in relation to the licence with a continuing offence being committed in respect of each day during which the offence continues.

It is necessary and appropriate to impose a penalty for a failure to not periodically revise a management plan because the management plans form a fundamental part of the scheme to ensure licence holders are planning their projects in a way to manage risks and comply with obligations. Submission of a revised management plan every 5 years ensures that it is up to date and accurate with current licence holder activities. The purpose of the offence provision is to deter non-compliance and impose a penalty on a person who fails to comply with their obligations. The penalty of 40 penalty units is consistent with other provisions of a commensurate severity in the Amendment Regulations and OEI Act. The continuing offence provision is also limited to a maximum penalty for each day of 10% of the maximum penalty (40 penalty units) that can be imposed for the offence.

The strict liability offence should be considered in a regulatory context where there is a strong public interest in ensuring that compliance with the scheme is taken seriously by licence holders, and where the sanction of criminal penalties for non-compliance is justified.

The offence arises where a person can reasonably be expected to be familiar with the legislative requirement to keep the management plan up to date. For that reason, the mental, or fault, element can justifiably be excluded. Further, any person liable for this offence has control of the activities undertaken under the licence and can be expected to be aware of the requirements for keeping the plan up to date, as opposed to an offence where members of the general public are liable. A person would still be able to rely on a defence of honest and reasonable mistake of fact if applicable.

The inclusion of the requirement for 5-yearly periodic plan revision approval applications is intended to ensure that the management plan remains contemporary. The period of 5 years was chosen after consideration of a wide range of feedback provided during consultation on the Exposure Draft of the Amendment Regulations. This balances any administrative burden on the Regulator and licence holder with the requirement for continuous and updated information.

To further reduce costs and administrative burden, flexibility has been provided to the 5-yearly periodic plan revision approval application process under the new sections 57, 58 and 59.

#### Section 57 – Exemption from periodic plan revision requirement

New section 57 provides that a licence holder may apply to the Regulator for an exemption to the 5-year revision requirement in new section 56 on the grounds that no licence activities are occurring under the management plan and that there is no licence infrastructure in the licence area.

The note to this section clarifies that if an exemption under the new section 57 is in effect with regards to a licence, the periodic review obligation under subsection 56(1) does not apply. However, sections 53 and 60 continue to apply to the licence.

An exemption would only be approved in very limited circumstances. For example, an exemption may be granted where a feasibility licence holder has concluded all feasibility activities, has removed all related infrastructure from the licence area, intends to apply for a commercial licence, and is preparing a commercial licence application and related management plan. In this circumstance there is no benefit to requiring a periodic revision to the management plan for the feasibility licence as no further activities would be undertaken under that licence.

An exemption granted under this section is taken to be revoked if the Regulator gives the licence holder a direction under section 53 in relation to the relevant licence.

#### Section 58 – Deferral of periodic plan revision requirement

New section 58 provides that a licence holder may apply in writing to the Regulator for a deferral of the periodic revision day for the relevant licence to a later day. The application must set out the reasons for the deferral, including an explanation of why the deferral is

necessary and appropriate, and propose a deferred periodic revision day for the relevant licence.

The Regulator may grant a deferral of the periodic revision day for the relevant licence if the Regulator is satisfied that the licence holder is reasonably likely to comply with the management plan for the period of the deferral, and the deferral is necessary.

An example of grounds to defer the periodic revision day may be that the licence holder is awaiting critical information relevant to future activities that will not be available for 6 weeks after a periodic revision application is due. Rather than requiring the management plan to be revised shortly after submitting the periodic revision application, for administrative simplicity the Regulator may grant a deferral of the periodic revision.

A deferral granted under this section is taken to be revoked at the end of the day specified in the written notice for the purposes of subsection 58(4), or if the Regulator gives a direction under section 53 in relation to the relevant licence.

#### Section 59 – Regulator may determine different periodic revision day

New section 59 provides that the Regulator may determine a different periodic revision day if the Regulator has granted a revision approval application under new section 71.

This is to provide the Regulator with the flexibility to either bring forward or defer a periodic review depending on the circumstances.

An example of grounds for the Regulator to change the date in which a periodic review is due may be if the Regulator identifies there are emerging risks posed by certain activities and an earlier revision date is warranted.

The Regulator may revoke a determination made under this section by giving a direction under section 53 in relation to the relevant licence.

#### Section 60 – Other circumstances in which licence holder must make a plan revision approval application

New section 60 outlines other circumstances in which a licence holder must prepare a revised management plan and make a plan revision approval application for the Regulator to approve the revised management plan.

It is critical that management plans remain up to date as this will drive continuous improvement in the management of licence activities, maintain an adequate and appropriate amount of financial security, and will contribute to effective compliance monitoring. As such, revision triggers have been set out in new subsection 60(2) to mandate revisions in relation to matters such as significant changes to licence activities, incorrect information or increased hazards.

The revision triggers require the licence holder to revise the management plan when a specified circumstance occurs. The circumstances specified in subsection 60(2) are

significant changes, where the Regulator should be aware of those circumstances. The licence holder's revision of the management plan in the specified circumstances will enable the Regulator to consider, assess and if necessary, respond to new or changed activities that may impact on the management of licence activities and to monitor compliance with the OEI Act, and in particular that financial security information remains contemporary.

New subsection 60(4) clarifies that a management plan does not need to be revised and a plan revision approval application does not need to be made if the management plan already provides for the circumstance and the circumstance does not, and is not likely to, result in the licence holder failing to comply with the management plan. This may be the case where a minor change is made to how the activity is being undertaken, but the management plan already provides a contingency for such a change and establishes the necessary arrangements for managing that change.

#### Section 61 – Offences of failing to make a plan revision approval application in certain circumstances

New section 61 provides for an offence of strict liability if a licence holder does not prepare a revised management plan and make a plan revision approval application, as soon as reasonably practicable, in accordance with new section 60 in circumstances where:

- (a) the licence holder reasonably ought to know that a circumstance in new subsection 60(2) (in which licence holder must make a plan revision approval application) applies in relation to the licence, and
- (b) the circumstance results, or is likely to result, in the person failing to comply with the management plan.
- (c) The person does not, as soon as reasonably practicable after paragraph (a) above, prepare a revised management plan and make a plan revision approval application for the Regulator to approve the revised management plan as the management plan for the licence.

Subsections 61(2) and (3) clarify that a person who commits an offence under subsection 61(1) commits a separate “continuing offence” in respect of each day (including a day of a conviction for the offence or any later day) during which the offence continues. The maximum penalty for each day that an offence continues is 10% of the maximum penalty that can be imposed in respect of that offence.

It is necessary and appropriate to impose a penalty for contraventions of section 61 as management plans are a fundamental part of the scheme for monitoring compliance with obligations. Submission of a revised management plan upon the circumstances set out in section 61 ensures that it is up to date and accurate with current licence holder activities timely and allows for effect compliance with the scheme. The purpose of the offence provision is to deter non-compliance and impose a penalty on a person who intentionally fails to comply with their obligations. The penalty of 40 penalty units is consistent with other provisions of a commensurate severity in the Amendment Regulations and OEI Act. The

continuing offence is also limited to a maximum penalty for each day of 10% of the maximum penalty (40 penalty units) that can be imposed in respect of the offence.

The strict liability offence should be considered in a regulatory context where there is a strong public interest in ensuring that compliance with the scheme is taken seriously by licence holders, and where the sanction of criminal penalties for non-compliance is justified. The offence arises where a persons can reasonably be expected to know the legislative framework. For that reason, the mental, or fault, element can justifiably be excluded. Further, any person liable for this offence has control of the activities undertaken under the licence and can be expected to be aware the requirements related to complying with management plans, as opposed to an offence where members of the general public are liable. A person would still be able to rely on a defence of honest and reasonable mistake of fact if applicable.

### ***Subdivision D – Consultation***

The Amendment Regulations aim to ensure persons, organisations, communities or groups that may be affected by OEI licence activities are consulted in the preparation of a management plan under Subdivision D for the duration of licence activities on an ongoing basis in accordance with new section 82 (addressed in more detail below). Consultation should be undertaken in a meaningful and timely manner. This is consistent with best practice consultation principles and can help build social licence for the developing OEI industry.

Subdivision D provides for how licence holders are to undertake consultation and report on the outcomes of consultation when preparing their initial management plan, before that plan can be approved. It also provides for how licence holders are to consult on an ongoing basis throughout the life of their licence activities, after initial approval of the management plan.

Consultation should be commensurate and proportionate with the licence activities proposed to be undertaken under the licence as described in the management plan. Consultation should reflect the stage of the project under the licence and its likely impacts. For example, it is appropriate that consultation being undertaken by a feasibility licence holder is appropriately focused on the feasibility activities, without undue focus on potential future activities for which licences have not yet been granted. Licence holders should establish ongoing consultation arrangements with stakeholders where appropriate.

The provisions in Subdivision D create a legally enforceable framework around consultation on licence activities. The framework is designed to ensure that licence holders are providing persons being consulted with sufficient information on matters which may affect them, giving them an opportunity to be meaningfully heard, and appropriately addressing and responding to issues raised by who were consulted.

As an example, if a licence holder is consulting on an activity to be authorised in an initial management plan (such as installing meteorological recording equipment), they need to provide enough context and details about that activity for those being consulted to provide informed comments.

To enable the development of their stakeholder engagement strategy, a licence holder will also need to consult with persons, organisations, communities or groups described in Subdivision D on when consultations should be planned for activities that may be conducted in the future (– explained in new section 82 below). The management plan requirements are not intended to prevent the licence holder from consulting on the full project if they so wish (and it may be more efficient for the licence holder to do this if they have sufficient information). However, the management plan should not need to detail the outcome of the consultation for activities that cannot yet be fully addressed due to the stage of the project.

Subdivision D sets out that consultation will be undertaken by the licence holder to determine what impact licence activities may have on persons, organisations, communities or groups who fall within described scope of this section and what measures could reasonably be put in place through the management plan to address any impacts arising from the licence activities. The subject of this consultation should be the activities to be conducted under the relevant licence for which the licence holder is seeking approval under their management plan, reflecting the stage of the OEI project and be commensurate with those activities.

### Section 62 – Operation of this Subdivision

This section provides that the consultation requirements apply in the following circumstances in accordance with Subdivision D of Division 2 of new Part 3:

- (a) Before making an initial plan approval application under new subsection 48(2).
- (b) When directed by the Regulator under new subsection 53(3) before a plan revision approval application is made.

Note 1 accompanying this section provides a reference to new section 81 that the management plan for the relevant licence must include information about consultation carried out in accordance with Subdivision D.

Note 2 provides that the conditions on the relevant licence may require consultation to be carried out.

### Section 63 – Consultation—activities subject to consultation

This section provides that the “activities subject to consultation” for consultation that relates to a proposed initial plan approval application are those that would be authorised under the proposed plan, if approved.

If consultation is required to be carried out as a result of a direction under new subsection 53(1), and the direction or notice specifies that consultation only needs to relate to specified licence activities, then the consultation requirements attach to those specified licence activities.

The activities subject to consultation under new section 63 are intended to be those that the licence holder is seeking authorisation for as described under new section 80 (other than those identified in accordance with new section 73) – that is, all licence activities the licence

holder has fully addressed in the management plan and which they are reasonably certain they will carry out, or intend to carry out, under their licence. This is particularly important for feasibility licences where initial surveys need to be carried out to inform how future activities will be undertaken.

#### Section 64 – Consultation—who is to be consulted

This section outlines the persons, organisations, communities and groups to be consulted. The onus is on the licence holder to make reasonable efforts to identify and consult the following:

- (a) Under paragraph 64(1)(a), each Department of State, agency or authority of the Commonwealth, a State or a Territory that has functions that relate to the activities subject to consultation. This means a licence holder must make reasonable efforts to consult with Commonwealth, State or Territory authorities whose functions relate to the impacts of the licence activities. This is likely to include for example the Australian Maritime Safety Authority, and State environment and heritage protection agencies.
- (b) Under paragraph 64(1)(b), Aboriginal or Torres Strait Islander people or groups that the licence holder reasonably considers may have native title rights and interests (within the meaning of the Native Title Act) in relation to the licence area or areas of land or water that are adjacent to the licence area.
- (c) Under paragraph 64(1)(c), Aboriginal or Torres Strait Islander organisations that are established under a law of the Commonwealth, a State or a Territory and that the licence holder reasonably considers to have functions related to managing, for the benefit of Aboriginal or Torres Strait Islander people, land or water in the licence area or areas of land or water that are adjacent to the licence area.
- (d) Under paragraph 64(1)(d), Aboriginal or Torres Strait Islander organisations or groups that the licence holder reasonably considers to be parties to agreements related to land and water rights for Aboriginal or Torres Strait Islander people under the Native Title Act or any law of a State or Territory, where the land or water rights relate to land or water in the licence area or areas of land or water that are adjacent to the licence area.
- (e) Under paragraph 64(1)(e), the holder of any other licence granted under the OEI Act where the licence area of the other licence covers wholly or partly the same area as the licence area of the relevant licence, or there is licence infrastructure in relation to the other licence in or near the licence area of the relevant licence.
  - (i) This paragraph uses the phrase “granted under the Act” to avoid confusion with licences referred to in subparagraph 64(1)(f)(ii) and is not intended to raise any doubts about whether other references to “licence” elsewhere in this instrument are meant to be affected by the definition of licence under section 8 of the OEI Act.

- (f) Under paragraph 64(1)(f), people or organisations that the licence holder reasonably considers may, in or near the licence area of the relevant licence, carry out activities (i) for a commercial purpose; and (ii) under a licence or permit (however described) issued under a law of the Commonwealth or a State or Territory; and (iii) in a way that may directly interact with the activities subject to consultation. This provision should enable consultation with, for example, tour operators and commercial fishers.
- (g) Under paragraph 64(1)(g), communities (i) that are located adjacent to the licence area; and (ii) that the licence holder reasonably considers may be directly affected by the licence activities subject to consultation.
- (h) Under paragraph 64(1)(h), any organisation representing recreational fishers whose activities the licence holder reasonably considers may be directly affected by the activities subject to consultation. For the avoidance of doubt, the term ‘recreational fishers’ is intended to cover game fishers.

A note under new subsection 64(1) clarifies that there are separate consultation requirements relating to the health and safety of workers under item 9 of Schedule 1 (which modifies the WHS Regulations, as those Regulations apply for the purposes of Part 1 of Chapter 6 of the OEI Act).

New subsection 64(2) provides that if a direction under new subsection 53(1) (Regulator may direct licence holder to revise management plan) is given by the Regulator to conduct consultation, and the direction or notice includes a statement that specified persons, organisations, communities or groups need to be consulted, then the licence holder must make reasonable efforts to consult with the specified persons, organisations, communities or groups and subsection 64(1) does not apply.

New subsection 64(3) provides that a licence holder does not need to consult a person, organisation, community or group if another person, organisation, community or group that they have already consulted could reasonably be regarded as representing the interests of that a person, organisation, community or group.

The persons identified and consulted under section 64 should also form the basis of those to be consulted on an ongoing basis under the stakeholder engagement strategy under new section 82.

New section 64 generally reflects the broad range of persons, organisations, communities or groups that may have different interests, rights and concerns in relation to OEI licence activities. The consultation framework requires licence holders to actively and meaningfully engage with those stakeholders. Section 64 aims to strike a balance between recognising there may be various groups that could interact with different licence activities that a licence holder ought to reasonably consult on and engage with, and the need for certainty around who exactly licence holders are required to consult with.

## Section 65 – Consultation—manner of consultation

This section provides for the manner in which consultation under new section 64 must be undertaken. The licence holder must give each person, organisation, community or group being consulted sufficient information to allow an informed assessment of any reasonably foreseeable effects that the activities subject to consultation may have on:

- (a) the functions of a Department, agency or authority mentioned in new paragraph 64(1)(a); or
- (b) the Native Title rights and interests (within the meaning of the Native Title Act) mentioned in new paragraph 64(1)(b) for people and groups; or
- (c) the functions mentioned in paragraph 64(1)(c) for organisations; or
- (d) the rights mentioned in paragraph 64(1)(d) for organisations or groups; or
- (e) the licence activities in relation to another licence holder’s licence mentioned in new paragraph 64(1)(e); or
- (f) the activities of a person or organisation mentioned in new paragraph 64(1)(f); or
- (g) a community mentioned in paragraph 64(1)(g); or
- (h) the activities of an organisation mentioned in paragraph 64(1)(h).

New subsection 65(2) clarifies that new subsection 65(1) does not require the licence holder to disclose information that could reasonably be expected to substantially prejudice the commercial interests of the licence holder or any other person.

New subsection 65(3) requires the licence holder to allow a person, organisation, community or group a reasonable period for the consultation.

Section 65 links the manner of consultation directly to the impact between the licence activities and the stakeholder activities identified in section 64 of the Amendment Regulations.

### ***Division 4 – Dealing with applications***

#### ***Subdivision A – Operation of this Division***

### Section 66 – Operation of this Division

This section provides that Division 4 of new Part 3 of the Amendment Regulations applies if a licence holder makes an initial plan approval application or a plan revision approval application for the Regulator to approve a plan or a revised plan as the management plan.

## ***Subdivision B – Consideration of application***

### **Section 67 – Time for making decision on application**

This section specifies that the Regulator must make a decision on an initial plan approval application or a plan revision approval application before the end of the period of 60 days after the day the application is made.

New subsection 67(2) allows the Regulator to, by written notice, extend the decision period as specified in the notice including reasons for the extension (new subsection 67(3)). New subsection 67(4) allows the Regulator to extend the decision period more than once. The Regulator may need to utilise the extension power in circumstances where applications or management plans are complex.

New subsection 67(5) provides that a failure by the Regulator to make a decision on the application within 60 days or within the period specified in the notice does not affect the validity of the Regulator's decision. This provides certainty as to the validity of decisions made by the Regulator and does not have any effect on the rights of parties to judicial review.

The decision period does not expire if there is an outstanding notice. Even if this is not the case, the Regulator is not required to comply with the decision period.

### **Section 68 – Regulator may require further information**

This section allows the Regulator to, at any time while considering an initial plan approval application or a plan revision approval application, by written notice, require the licence holder to provide further information if the Regulator is not satisfied that the application or the plan contains sufficient information for the Regulator to grant the application.

The notice must be made in accordance with new subsection 68(2). The day specified in the notice by which the information is to be given must be reasonable (new subsection 68(3)), and this day may be varied to a later day by the Regulator if asked in writing by the licence holder, although this request may be refused by the Regulator (new subsections 68(4) and (5)).

If the licence holder does not comply with the notice on or before the day specified for the purposes of paragraph 68(2)(b), the Regulator may refuse to grant the application (see new section 74).

New subsection 68(6) requires that the further information provided in response to the request becomes part of the management plan if the licence holder gives information to the Regulator in accordance with the notice. The Regulator must have regard to the information as if it has been included in the plan when the application was given to the Regulator in assessment of the plan and for future compliance monitoring.

New subsection 68(7) allows the Regulator to give multiple notices under new section 68, including if the Regulator is not satisfied with the information given in response to a notice given under this section.

## Section 69 – Regulator may require licence holder to amend and resubmit plan

This section allows the Regulator to, at any time while considering an initial plan approval application or a plan revision approval application, require the licence holder, by written notice, to amend the plan and resubmit the plan to the Regulator if:

- (a) the Regulator is not satisfied that the plan can be approved as the management plan;  
and
- (b) considers that the plan could be amended in a way that may make it able to be approved as the management plan.

This section enables a licence holder to make changes to certain specified elements of the management plan as required, as opposed to requiring a revision to the entire management plan. For the avoidance of doubt, a requirement to amend and resubmit the plan is not considered a new application and therefore does not attract a new application fee. The use of such a requirement is limited to where changes need to be made to an application that has already been made and is currently before the Regulator for consideration.

A notice under this section must be made in accordance with new subsection 69(2) and must set out the matters in relation to which the Regulator considers the plan could be amended, the notice must specify the day on or before which the amended plan must be resubmitted. The day specified in the notice by which the amended plan must be resubmitted must be reasonable (new subsection 69(3)), and this day may be varied to a later day by the Regulator if asked in writing by the licence holder, although this request may be refused by the Regulator (new subsections 69(4) and (5)).

If the licence holder does not comply with the notice on or before the day specified for the purposes of paragraph 69(2)(b), the Regulator may refuse to grant the application (see new section 74).

New subsection 69(6) allows the Regulator to give multiple notices under new section 68, including if the Regulator is not satisfied with the amendments made in response to a notice given under this section.

## Section 70 – Licence holder may withdraw application

This section allows a licence holder who has made an initial plan approval application or a plan revision approval application to, by written notice to the Regulator, withdraw their application prior to the Regulator granting or refusing to grant the application. If an application is withdrawn, the licence holder is still liable for fees for the application and any assessment costs incurred by the Regulator.

### ***Subdivision C – Decision on application***

## Section 71 – Decision to approve or refuse to approve management plan

This section provides that the Regulator may, by written notice, grant an initial plan approval application or plan revision approval application (in accordance with new section 72) and approve the plan, or the revised plan, as the management plan for the relevant licence.

This section also provides that the Regulator may refuse to grant the application (in accordance with new section 74) and refuse to approve the plan, or the revised plan, as the management plan for the relevant licence. New subsection 71(2) provides that an approval of the plan takes effect on the day specified in the notice or otherwise when the notice is given.

New subsection 71(3) provides that when an approval under new paragraph 71(1)(a) takes effect the plan, or the revised plan, approved under that paragraph becomes the management plan for the relevant licence; and if the application was a plan revision approval application, the management plan for the licence immediately before the approval took effect ceases to be the management plan for the licence.

If the granting of the application is refused, new subsection 71(4) requires the Regulator to set out the reasons for the refusal.

As noted in the Explanatory Memorandum for the Offshore Electricity Infrastructure Bill 2021, the Regulator’s decisions in relation to management plans will be subject to review under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act). The Amendment Regulations set out criteria against which a management plan must be assessed by the Regulator. Where these criteria are met, the Regulator must approve the management plan and, where the criteria are not met, the Regulator must refuse to grant the application and refuse the plan.

While the Regulator will make an assessment on the criteria about whether the criteria are met or not, the Regulator is also equipped with powers to request further information (section 68) and request that the plan is amended and resubmitted (section 69). Those powers are designed to accord procedural fairness to the licence holder, by providing further opportunities to provide further details or information so that a plan meets the necessary criteria.

This is consistent with the Administrative Review Council’s guide, “*What decisions should be subject to merits review?*” that decisions which have such limited impact that the costs of review cannot be justified should not be subject to merits review.

## Section 72 – Requirements for grant of application and approval of management plan

This section sets out the requirements that the Regulator needs to be satisfied of when granting the application and approving the management plan. The Regulator may only grant the application if satisfied:

- (a) that the plan addresses the matters mentioned in section 115 of the OEI Act (including the matters prescribed in this instrument for the purposes of paragraph 115(1)(h) of

the OEI Act, and any matters required by the Regulator under subsection 115(3) of the OEI Act); and

(b) that approving the plan would be consistent with:

- (i) the OEI Act (including the Principal Regulations as amended by the Amendment Regulations); and
- (ii) any conditions of a declaration that apply to the relevant licence or will apply to a proposed commercial licence under section 20 of the OEI Act, noting that subsection 23(5) of the OEI Act operates so that a variation to a declaration does not apply to a licence in force at the time the variation is made (i.e., a pre-existing licence); and
- (iii) any direction given to the licence holder, and any determination or requirement that applies to the licence holder, under the OEI Act (including the Principal Regulations as amended by the Amendment Regulations); and

(c) that the applicant has:

- (i) carried out the consultation required by new subsection 48(2) of the Principal Regulations; and
- (ii) complied with any requirements to carry out consultation imposed by the Regulator under new subsection 53(3) or new subsection 69(1); and

(d) if section 96 requires the applicant to give the Regulator a design notification, that the applicant has complied with the requirement and the Regulator has given feedback on the design notification under section 99; and

(e) if the relevant licence is in force and the application is an initial plan approval application—that the licence holder has provided, in accordance with the plan, any financial security required by section 117 of the OEI Act in relation to the licence activities (subject to new section 103); and

(f) if the relevant licence is in force and the application is a plan revision approval application—that the licence holder has provided, in accordance with the plan as proposed to be revised, any financial security required by section 117 of the OEI Act in relation to the licence activities (subject to new section 103); and

(g) if the relevant licence has been granted (whether or not the relevance licence is in force)—that approving the plan would be consistent with any conditions on the relevant licence; and

(h) of the other matters that provisions of Division 5 of new Part 3 require the Regulator to be satisfied of in order to approve the plan.

New subsection 72(2) requires the Regulator, in considering whether to grant the application, to have regard to:

- (a) the purpose of the relevant licence; and
- (b) the nature and scale of the licence activities; and
- (c) the stage that the offshore infrastructure project to be carried out under the relevant licence is at; and
- (d) if the relevant licence is not a commercial licence or a feasibility licence—how similar the offshore infrastructure project described in the plan is to the proposed project for the relevant licence as described in the application for the relevant licence; and
- (e) if a design notification has been given in relation to the design of licence infrastructure for the relevant licence and the Regulator has given feedback on the design notification—whether the licence holder has adequately addressed the feedback; and
- (f) any other matters the Regulator considers relevant.

#### Section 73 – Matters that cannot be fully addressed because of stage of project

This section provides that if the plan cannot fully address a matter because of the stage that the offshore infrastructure project to be carried out under the relevant licence is at, the plan must:

- (a) identify the matter; and
- (b) explain why the plan cannot yet fully address the matter; and
- (c) explain how and when it will be possible for the plan to fully address the matter; and
- (d) include a requirement, for the purposes of new paragraph 60(2)(i), for the licence holder to prepare a revised management plan and make a plan revision approval application when it is possible for the plan to fully address the matter; and
- (e) include a requirement that any licence activities directly related to the matter must not be carried out until the licence holder has prepared a revised management plan and made a plan revision approval application as mentioned in paragraph (d) above, and the Regulator has granted the application.

There will only be one management plan in force for each licence. However, that management plan will need to be periodically revised for various reasons (see new sections 53, 56 and 60). Noting that the duration of a licence may be long, and a management plan will need to span across various phases in the project lifecycle, a management plan only needs to address a matter to the extent possible based on the stage of the OEI project with

new section 73 allowing that if a management plan cannot fully address a matter, that matter can be more fully addressed at a later stage of the project.

Section 73 was included on the basis that licence holders might not have all of the operational details of their project available at the early stages of that project, particularly for commercial-scale projects, where management plans must be submitted prior to the grant of a commercial licence. The Amendment Regulations seek to provide flexibility for the management plan to be tailored to reflect the stage a licence holder is up to in their project.

#### Section 74 – Refusal of application

This section allows the Regulator to refuse to grant the application only if:

- (a) the Regulator is not satisfied of the matters in new subsection 72(1), having had regard to the matters in new subsection 72(2); or
- (b) the Regulator has given the licence holder a notice under new subsection 68(1) (requirements for further information), and the licence holder does not comply with the notice on or before the day specified in the notice for the purposes of new paragraph 68(2)(b); or
- (c) the Regulator has given the licence holder a notice under new subsection 69(1) (requirements to amend and resubmit plan), and the licence holder does not comply with the notice on or before the day specified in the notice for the purposes of new paragraph 69(2)(b); or

The Regulator may only refuse to grant the application if the Regulator has complied with new section 75 and the day specified for the purposes of new paragraph 75(3)(c) has passed (whether or not the licence holder has made a submission about the proposed decision).

#### Section 75 – Proposed decision to refuse application

This section sets out the requirements that the Regulator must meet when proposing to make a decision to refuse to grant the application. New subsection 75(2) provides that the Regulator must give written notice to the licence holder of the proposed decision and that notice must be made in accordance with new subsections 75(3) and (4).

The notice must set out the reason for the decision, invite the licence holder to make a written submission about the decision and specify a day on or before the submission must be made (which must be reasonable). The Regulator must take any submissions made by the licence holder on or before the day specified in the notice into account in deciding whether to grant, or refuse to grant, the application.

In addition to the iterative assessment interactions provided under new sections 68 and 69, this provides a formal opportunity for the applicant to make submissions and for the Regulator to take those into account. This is an important step in ensuring transparency, procedural fairness and a final opportunity for the applicant to clarify and correct issues of concern.

## ***Subdivision D – Summary of management plan***

### Section 76 – Licence holder must provide summary of management plan

This section requires a licence holder to provide the Regulator, before the end of 30 days after the day the approval takes effect, a summary of the management plan if the circumstances under new subsections 76(1) or (2) apply. A management plan summary will not have to address everything in a management plan, but only the matters listed in new section 77.

Failure to provide a summary in accordance with new section 76 will result in an offence of strict liability of 50 penalty units, with a separate “continuing offence” being committed in respect of each day during which the offence continues.

The aim of this process is to support public transparency by ensuring the public has access to accurate information on OEI projects. This includes contact details for the licence holder.

Publishing a plan summary provides an opportunity for persons who may be impacted by a proposed project and who may not have been identified during development of the management plan to make themselves known to the licence holder. Further establishing consultation opportunities and building trust with the community.

It is necessary and appropriate to impose a penalty for a failure to provide a summary in accordance with new section 76 because the management plan summary will be published on the Regulator’s website and forms a fundamentally important part of transparency. Submission of a summary of a management plan before the end of 30 days after the approval takes effect will ensure timely and relevant information about offshore infrastructure projects can be shared with the public. The purpose of the offence provision is to deter non-compliance and impose a penalty on a person who intentionally fails to comply with their obligations. The penalty of 50 penalty units is consistent with other provisions of a commensurate severity in the Amendment Regulations and OEI Act. The continuing offence is also limited to a maximum penalty for each day of 10% of the maximum penalty (50 penalty units) that can be imposed in respect of the offence.

Strict liability is necessary and reasonable as requiring proof of fault would undermine deterrence of persons not assisting the Regulator, and the importance of the Regulator having the summary of the management plan outweighs the detriment. A person would still be able to rely on a defence of honest and reasonable mistake of fact if applicable.

### Section 77 – Requirements for summary of management plan

This section sets out the requirements for a summary of a management plan which must include a summary of the matters addressed in the management plan under the provisions listed in new subsection 77(1). The matters listed in new subsection 77(1) were selected for inclusion in the summary of the management plan as they are the matters that support transparency and are the matters that are in the public interest. The matters that have not been

included are those which are technical or commercially sensitive, such as specific details about the financial security.

The summary is not required to include information that could reasonably be expected to substantially prejudice the commercial interests of the licence holder or any other person (new subsection 77(2)) which balances the need for industry to protect its commercial activities with the need for public transparency. The use and disclosure of any personal information contained in summaries should also comply with relevant requirements under the *Privacy Act 1988*.

New subsection 77(3) requires a summary to also include contact details for the licence holder, including a telephone number and an email address, as well as the business address or addresses of any premises where the records specified in subparagraphs 77(3)(b)(i)-(iii) are required to be kept under a provision of the management plan mentioned in paragraph 115(1)(f) if the OEI Act.

The licence holder may nominate the business address or addresses of any premises in Australia as the related onshore premises (as defined in section 228 of the OEI Act), where, under the management plan, records relating to the regulated offshore activities are required to be kept.

This will enable affected parties and the general public to contact licence holders, if necessary, for further information about the project.

#### Section 78 – Regulator may direct revision and resubmission of summary

This section allows the Regulator to direct a licence holder to revise and resubmit their management plan summary to the Regulator. This may occur if the Regulator is not satisfied that the summary includes the information required by new section 77 or is not satisfied that the summary is suitable for publication on the Regulator’s website. The Regulator’s direction must meet the requirements in new subsection 78(2) and specify a reasonable day on or before which the revised summary must be resubmitted (subsection 78(3)). The Regulator may give more than one direction, including if the Regulator is not satisfied with the revisions made in response to a direction (subsection 78(4)).

Failure to comply with the direction will result in an offence of strict liability of 50 penalty units (subsection 78(5)), with a separate “continuing offence” being committed in respect of each day during which the offence continues.

It is appropriate to impose a penalty for a failure to comply with a direction to revise and resubmit the summary in accordance with new section 78 because the management plan summary will be published on the Regulator’s website and forms a fundamentally important part of transparency about licence activities.

Compliance with a direction and the provision of a revised summary of a management plan will ensure timely and relevant information about offshore electricity infrastructure projects can be shared with the public. The purpose of the offence provision is to deter non-

compliance and impose a penalty to a person who intentionally fails to comply with their obligations. The penalty of 50 penalty units is consistent with other provisions of a commensurate severity in the Amendment Regulations and OEI Act. The continuing offence is also limited to a maximum penalty for each day of 10% of the maximum penalty (50 penalty units) that can be imposed in respect of the offence.

Strict liability is necessary and reasonable as requiring proof of fault would undermine deterrence of persons not assisting the Regulator, and the importance of the Regulator having the revised summary of the management plan outweighs the detriment. A person would still be able to rely on a defence of honest and reasonable mistake of fact if applicable.

Merits review is not available in respect of a decision made by the Regulator to issue a direction to revise and resubmit the summary of the management plan under new section 78. The costs of merits review and the expected low incidence of such decisions means that merits review was not considered necessary for this provision. The costs associated with merits review is disproportionate to the significance of the decision under review. There is no additional fee incurred to submit or resubmit a summary and it is unlikely to be a matter that incurs significant project costs.

This is consistent with the Administrative Review Council's guide, "*What decisions should be subject to merits review?*" that decisions which have such limited impact that the costs of review cannot be justified should not be subject to merits review.

### ***Division 5 – Matters that management plan must address***

#### **Section 79 – Purpose of this Division**

This section sets out the purpose of Division 4 of new Part 3, which is that it prescribes, for the purposes of paragraph 115(1)(h) of the OEI Act, matters that a plan (including a revised plan) for a relevant licence must address in order to be approved as the management plan for the relevant licence.

Division 4 also includes other provisions relating to the Regulator's consideration of whether to approve the plan as the management plan for the relevant licence.

#### **Section 80 – Plan must describe activities and operations**

New section 80 sets out the matters that the management plan must address for the purposes of paragraph 115(1)(a) of the OEI Act. New subsection 80(1) provides that the plan must describe the environment, including the physical environment and the general operating conditions, for the licence activities; and specify the location or locations of the licence activities; and include details of the layout of all licence infrastructure; and include an outline of the operational details of the licence activities.

Paragraph 115(1)(a) of the OEI Act provides that a management plan for a licence must address how the licence holder is to carry out offshore infrastructure activities and other activities under the licence.

This will assist the Regulator in understanding and having visibility on what the licence holder intends to do and promotes compliance with the management plan. Having an understanding of the proposed activities also enables the Regulator to have oversight over, and promote safety, integrity of infrastructure and environmental management.

New subsection 80(2) provides that the plan must include a timetable for the licence activities and require the licence holder to notify the Regulator at least 30 days (or another agreed period) before a licence activity specified in the timetable is to commence, and require the licence holder to notify the Regulator no more than 30 days (or another agreed period) after a licence activity specified in the timetable has been completed. This supports proactive compliance monitoring by the Regulator. This also supports the operation of the financial security arrangements as the Regulator can have regard to what is happening and about to happen and ensure that the financial security properly reflects the licence activities, with the licence holder to provide financial security in accordance with section 117 of the OEI Act.

In some circumstances, the actual timing of the activity may differ from that originally proposed in the management plan (such as, for example, if poor weather delayed the commencement of an activity). In such a case, the Regulator may not be aware that an activity is occurring, or when it has ceased. This could have ramifications for compliance inspections and planning, as well as resulting in the Regulator not receiving important information about the timing of activities.

#### Section 81 – Plan must address consultation carried out

New section 81 provides that licence holders must include in their management plan material describing the process used to identify those consulted, a list of those consulted and a report on the outcomes of the consultation undertaken in the course of preparing a management plan in accordance with new Subdivision D of Division 3.

A note under new subsection 81(2) clarifies that the management plan may also address other consultation carried out, whether it be in accordance with Subdivision D of Division 2 or as required by a licence condition.

This will ensure that there has been a point in time capture, via the report, of the Subdivision D consultation undertaken prior to the commencement of OEI activities, including consultees, claims raised and responses to those claims. This consultation and reporting will then feed into the ongoing consultation required in the stakeholder engagement strategy set out in new section 82. This process provides whole of life consultation and transparency with stakeholders and ensures that the Regulator has visibility over the measures that are put in place to address claims made including when management plans are revised.

New subsection 81(3) provides that the report on the outcomes of the consultation must:

- (a) include a summary of any claims raised about any adverse effects that the licence activities might have on the persons, organisations, communities and groups consulted; and

- (b) for each claim, include an assessment of the merits of the claim, and a statement of whether the licence holder considers the claim to have reasonable merit.

Under new subsection 81(5), the Regulator may only approve the plan if the Regulator is satisfied that any assessments or statements in the report under paragraph 81(2)(b) are reasonable and each claim has reasonably appropriate measures. Including a report on the outcomes of the consultation in the plan ensures matters become enforceable and will promote compliance with the measures the licence holder states will be used to address claims. If the plan does not detail the measures, it is reasonable in the circumstances for the licence holder not to implement measures under paragraph 81(5)(b).

As an example, the holder of a commercial fishing licence may claim that construction activities may introduce navigation risks or other limitations to fishing operations and request a higher level of engagement and operational coordination with the licence holder while certain activities are underway. If the claim was considered to have merit, the report might detail the measures for communication and coordination and any other measures that are reasonably appropriate to minimise navigation risks, interactions and interference.

The consultation process required by the OEI Act does not negate nor interfere with processes required under the EPBC Act by re-prosecuting matters that the Minister has already had regard to in making a decision and cannot be used to change EPBC Act conditions set by the Minister. For example, EPBC Act obligations must be addressed as required by new section 85.

#### Section 82 – Plan must describe stakeholder engagement strategy

New section 82 provides that the management plan must describe a stakeholder engagement strategy that the licence holder will implement to consult with relevant stakeholders (listed in new subsection 82(1) in relation to licence activities).

New subsection 82(2) requires that the stakeholder engagement strategy sets out the parameters for ongoing consultation in accordance with the paragraphs under this subsection.

The stakeholder engagement strategy will sit separately to the management plan and will not need to be submitted to the Regulator for approval. Rather, the Regulator will only need to approve the description of the stakeholder engagement strategy in the management plan, including the arrangements for how the licence holder will maintain and update the strategy.

The usual practice for developers of large projects is to have a project-wide engagement strategy. The separation of the stakeholder engagement strategy from the management plan will allow flexibility so that licence holders may integrate the requirements of section 82 as part of their project-wide engagement strategy.

The Regulator may only approve the management plan if satisfied that the description of the stakeholder engagement strategy would be reasonably likely to provide for ongoing engagement with stakeholders.

Licence holders should be guided by consultees in determining the manner, frequency and focus of ongoing consultation including the types and format of information that consultees may require.

The management plan, in accordance with subsection 82(4), must also require that the stakeholder engagement strategy and any changes made be published on the licence holder's website before the end of 30 days after the management plan is approved and keep it there until the licence ceases to be in force, or the licence is transferred.

### Section 83 – Plan must include description of management system

New subsection 83(1) provides that the management plan must include a description of a management system to address the licence holder's compliance with all obligations that apply, or will apply to the licence holder in relation to, the OEI Act or any instrument made under the OEI Act, the EPBC Act or regulations, the applied WHS provisions, any conditions on the relevant licence and the management plan for the relevant licence, and which relate to the offshore infrastructure project for the relevant licence.

The description of the management system must set out how the licence holder is to do the matters listed in new subsection 83(2). This list is not exhaustive and does not limit subsection 83(1) but seeks to provide guidance as to what may need to be described in the management system highlighting key areas of risk and oversight. These matters are consistent with those set out in international standards for development and implementation of management systems. These include, for example:

- (a) implementing an ongoing process to identify, assess and deal with any hazards, impacts or risks that might arise in relation to the licence activities (new subparagraph 83(2)(a)(i)), use those results to develop new or additional measures to ensure the licence holder meets the relevant obligations (new paragraph 83(2)(b)) and establish and implement processes for managing changes in circumstances over time (new paragraph 83(2)(c));
- (b) making reasonable efforts to inform any person or organisation involved in the licence activities of their obligations, where compliance or non-compliance with those obligations might affect the licence holder's compliance with the relevant obligations (new paragraph 83(2)(e));
- (c) establishing protocols to ensure that the licence holder is informed, in a timely manner, of any incident or circumstances that might lead to the licence holder failing to comply with the relevant obligations (new paragraph 83(2)(i));
- (d) ensuring that any person involved in the licence activities has the qualifications, competencies and supervision necessary to ensure that the licence holder complies with the relevant obligations (new paragraph 83(2)(j));
- (e) demonstrating continuous improvement in the licence holder's performance in relation to relevant obligations by identifying and implementing opportunities which

may arise for example with industry maturation or in response to changes in international standards.

New subsection 83(3) provides that the plan must require the licence holder to implement the management system described in the plan.

Subsection 83(4) provides that the Regulator may only approve the plan if the Regulator is satisfied that the management system described in the plan will be reasonably likely to ensure that the licence holder meets, and will continue meeting, the relevant obligations.

It is important that the Regulator has oversight over the processes the licence holder will put in place to manage their project, any hazards, impacts and risks that may arise, and how they intend to remain in compliance with obligations they may have under the OEI Act, Principal Regulations and other legislation.

The description of the management system provides regulatory oversight of the offshore infrastructure project for the relevant licence. The information provided will assist the Regulator to assess risk and promote safe outcomes while ensuring compliance with the licence holders obligations including the management plan.

#### Section 84 – Plan must address compliance with conditions of licence

The OEI Act provides that, when granting a licence, the Minister may impose such conditions on the licence as the Minister thinks fit (see subsections 35(2), 45(2), 54(2), and 63(2) of the OEI Act). These conditions may be used in a variety of ways to inform the operation of the management of licence activities under a management plan.

New section 84 relevantly provides that the management plan must address compliance with conditions of the relevant licence that relate to licence activities by describing the measures that the licence holder is to implement to ensure compliance with the conditions and requiring the licence holder to implement those measures.

New subsection 84(2) only allows the Regulator to approve the plan if the Regulator is satisfied that the measures are reasonably likely to ensure compliance with the conditions. The note accompanying subsection 84(2) provides a reference to paragraph 115(1)(b) of the OEI Act to note that the plan must also comply with the requirements under that section.

#### Section 85 – Plan must refer to any obligations under the *Environment Protection and Biodiversity Conservation Act 1999*

Offshore infrastructure activities, as defined under section 8 of the OEI Act, are subject to environmental approval requirements under the EPBC Act. Approvals under the EPBC Act are required if an activity meets defined thresholds for significant impacts on matters protected under Part 3 of the EPBC Act, including the Commonwealth marine area.

New section 85 applies if the licence holder has EPBC Act obligations (new subsection 85(1)) and requires the management plan to describe the licence holders EPBC Act

obligations and the measures that the licence holder is to implement to comply with the obligations (new subsection 85(2)).

New subsection 85(3) provides that the management plan must require the licence holder to implement measures described in new paragraph 85(2)(b).

The links between the OEI Act and EPBC Act allow the Regulator to monitor the licence holder's implementation of the measures set out in their management plan to address environmental protection and management obligations. Where the Regulator becomes aware of a licence holder's potential non-compliance with their management plan that may also represent non-compliance with obligations under the EPBC Act, the Regulator will share this information with the Department (in accordance with sections 293 and/or 294 of the OEI Act, the Department has regulatory responsibility for the EPBC Act). Any enforcement actions under the EPBC Act will be the responsibility of the Department, while any enforcement actions under the OEI Act or Regulations will be the responsibility of the Regulator. Where a matter may represent a potential breach of both laws, the agencies will then work together to establish an appropriate course of action. for encouraging and enforcing compliance with requirements. The interface arrangement between the EPBC Act and OEI Act supports regulatory oversight by the Australian Government through leveraging the on-ground presence and proactive compliance monitoring of the Regulator.

#### Section 86 – Plan must include information about design notification

New section 86 provides that if the licence holder has given the Regulator a design notification (in accordance with new section 96) the management plan must set out:

- (a) any feedback provided by the Regulator on the design notification;
- (b) describe how the feedback has been addressed by the licence holder;
- (c) state whether or not the way the offshore infrastructure project is being carried out, or is to be carried out, under the relevant licence is broadly consistent with the design notification; and
- (d) if the way the offshore infrastructure project is being carried out, or is to be carried out, under the relevant licence is not broadly consistent with the design notification identify the extent of the inconsistencies and evaluate and describe how and why the way inconsistencies have affected the offshore infrastructure project.

To ensure that the licence holder has appropriately taken feedback on the design from the Regulator into account new subsection 86(2) provides that if the Regulator has given feedback on the design notification, the Regulator may only approve the plan if the Regulator is satisfied that the licence holder has adequately addressed that feedback.

New section 96 provides that before making an initial plan approval application for a proposed transmission and infrastructure licence when the licence holder is proposing to undertake activity for the purposes of paragraph 58(b) of the OEI Act, and under a

commercial licence, a licence holder must give the Regulator a design notification. The contents of a design notification are set out at new section 98 (it is noted that a similar process is available on a voluntary basis for applicants for research and demonstration licences).

The design notification is intended to allow the Regulator to provide feedback to the licence holder before the licence holder submits a management plan application for a commercial licence or a transmission and infrastructure licence when the licence holder is proposing to undertake activity for the purposes of paragraph 58(b) of the OEI Act. This will help ensure that best practice safety, integrity and environmental management principles are built into project designs from the earliest stage. Design notification will enable industry to engage early with the Regulator on design and concept-selection matters and will encourage consideration of alternative concepts that may provide for improved safety, infrastructure integrity and environmental outcomes prior to construction commencing.

A design notification sets out a licence holder's intended design, layout and engineering selection for their OEI project infrastructure. This includes the processes used to determine the suitable type of infrastructure with consideration for safety, infrastructure integrity, environmental management and on water interactions within the licence area. The design notification must be submitted to the Regulator at a preliminary design stage prior to approval of a licence for consideration and feedback. The intention of having a design notification process at this stage of the design is to allow the Regulator early engagement on the proposed design to enable early identification of issues of concern and potential risk and for the Regulator to raise questions, concerns, and issues such that these can be addressed by the licence holder prior to the detailed design and engineering phase for the infrastructure proposed under the applicable licence type.

Further information about the design notification scheme is provided in Division 7 of Part 3, below.

#### Section 87 – Plan must include list of relevant structures, equipment and property

This section provides that the management plan must include a list of all relevant structures, equipment and property:

- (a) that are in the licence area, were brought into the licence area of the relevant licence and are being, are to be or have been used in connection with activities authorised or required by or under the OEI Act; or
- (b) that are to be, brought into the licence area by, or with the authority of, the licence holder and are to be used in connection with activities authorised or required by or under the Act.

The list must include the following details (subsection 87(3)):

- (a) a concise description of each item;

- (b) the location(s) in the licence area where each item is being, will be or has been used;
- (c) how each item is being, will be or has been used;
- (d) how each item is being, or has been decommissioned, if applicable.

New subsection 87(4) provides that the list and details do not need to be updated for the purposes of a plan revision approval application unless the list or the details are significantly incorrect.

This provision serves several purposes, including:

- (a) providing the Regulator with up-to-date information on relevant structures, equipment and property that is in the licence area enabling transparency and oversight of potential risk.
- (b) informing the Regulator's assessment of whether the calculation method and amount of financial security is appropriately scoped to satisfy the requirement that the licence holder must cover costs, expenses or liabilities in relation to decommissioning, removal of property and remediation.
- (c) informing the Regulator's compliance monitoring throughout the life of the project for safety, integrity and environmental management matters and to monitor compliance with the provision of financial securities in accordance with the timetable established under section 103.

#### Section 88 – Plan must describe maintenance of relevant structures, equipment and property

This section provides that the management plan must describe measures for maintaining relevant structures, equipment and property in relation to the relevant licence. New subsection 88(2) describes what the management plan must describe, although this list is not exhaustive.

Under new subsection 88(3), the plan must also require the licence holder to implement the measures described in the plan and carry out inspections, testing, maintenance and repair of the relevant structures, equipment and property.

New subsection 88(4) allows the Regulator to only approve the management plan if the Regulator is satisfied that the matters included in the plan under this section are reasonably likely to result in the relevant structures, equipment and property being maintained in good condition and repair.

This section operates to ensure that the Regulator has transparent oversight of proposed maintenance and the appropriateness of the proposed maintenance measures.

## Section 89 – Plan must describe decommissioning of licence infrastructure

This section provides that the management plan must describe how the licence holder intends to decommission and remediate the licence area (new subsections 89(1) and (2) respectively). New subsection 89(3) provides that the management plan must require the licence holder to give effect to the decommissioning and remediation.

Licence holders should plan towards full removal of licence infrastructure. Unless other arrangements, such as leaving infrastructure in place, have been detailed in the management plan in accordance with paragraph 116(6)(d) of the OEI Act, it will be expected that the licence holder will fully remove all infrastructure, structures, equipment and property, and remediate the licence area at the end of the project. This should, in most cases, result in the environment being returned to, or close to, the original condition. Where decommissioning and remediation would result in a better environmental outcome by leaving some infrastructure in place this can be detailed in the management plan in discussions with the Regulator.

To ensure that the Commonwealth and the Regulator can be confident about the outcomes of decommissioning and remediation, the updated to details as to what relevant structures, equipment and property are in the licence area is important.

New section 89 does not limit the operation of new section 90. This is in accordance with paragraph 115(1)(d) of the OEI Act, and section 116 of the OEI Act noting that there is a strict liability offence should a person breach the requirements in section 116 of the OEI Act.

## Section 90 – Plan must address removal of relevant structures, equipment and property, and remediation

This section provides that the management plan must describe how relevant structures, equipment and property in relation to the relevant licence are to be removed from the licence area if they are neither used nor intended to be used in connection with the activities in which the licence holder is or will be engaged; and that are authorised or required by or under the OEI Act. New subsection 90(2) provides that the management plan must describe how the licence area is to be remediated in relation to the removal of relevant structures, equipment and property.

New subsection 90(3) provides that the management plan must require the licence holder to give effect to the provisions included in the plan under subsections 90(1) and (3); and any arrangements set out in the plan under subsection 90(2).

Note 1 to subsection 90(3) outlines that in considering whether to approve the plan, the Regulator must have regard to the stage that the offshore infrastructure project is at (see paragraph 72(2)(c)). This may result in the matters included in the plan under this section becoming more detailed as the project progresses.

Note 2 to subsection 90(3) provides that a significant change in the relevant structures, equipment or property may result in the plan needing to be revised (see paragraph 60(2)(b)),

and the matters addressed in the plan under this section may need to be updated. This section operates to ensure that the Regulator has up to date information regarding what is in the licence area, what may or may not need decommissioning, how the area will be remediated and whether or not financial security is sufficient for the purposes of the OEI Act.

### Section 91 – Plan must address emergency management

New section 91 provides that the management plan must address emergency management in relation to all licence activities.

New subsection 91(2) provides that the management plan must identify, and include an analysis of, each kind of emergency that could reasonably foreseeably arise in relation to the licence activities, describe measures to reduce the likelihood of each kind of emergency identified (in paragraph 91(2)(a)) occurring, describe an emergency response plan for responding to each kind of emergency identified, require the emergency response plan to do the following for each kind of emergency identified:

- (a) describe the capabilities, roles and responsibilities of the licence holder and any other person or organisation in relation to that kind of emergency;
- (b) set out processes to quickly and effectively respond to that kind of emergency;
- (c) set out processes to ensure timely notification to, and effective communication with, workers, responders, emergency service providers and other persons and organisations in the event of that kind of emergency.

The management plan must also require the licence holder to prepare, maintain and implement an emergency response plan that is consistent with the description and complies with the requirements included in the plan, describe measures for monitoring the effectiveness of the emergency response plan, including arrangements for testing the emergency response plan and describe how the licence holder will provide appropriate information, training and instruction, including a copy of the emergency response plan, to persons and organisations who could reasonably foreseeably be involved in an emergency in relation to the licence activities.

New subsection 91(3) provides that the testing arrangements described in the plan must include a schedule of tests of the emergency response plan, which must require the response plan to be tested at least when the emergency response plan is introduced, when the emergency response plan is significantly modified, and in any case at least once in any period of 12 months. New subsection 91(4) provides that the testing arrangements must also describe the objectives of the tests, how the outcomes of the tests are to be measured, and how the licence holder is to use the results of tests to improve the emergency response plan.

New subsection 91(5) provides that the Regulator may only approve the plan if the Regulator is satisfied that the emergency response plan described in the plan will be reasonably likely to ensure that the licence holder is able to respond to those kinds of emergencies described in the plan.

The emergency response plan operates to ensure that as far as possible kinds of emergencies are identified, the risks assessed and response plans put in place. Further that these approaches are regularly monitored and tested to ensure currency and efficacy. This also gives the Regulator insight into the risks and proposed responses and a capacity to respond to this as necessary should the plan be inadequate.

#### Section 92 – Plan must address compliance with financial security requirements

Under section 117 of the OEI Act, licence holders with a management plan in place are required to provide financial security to the Commonwealth. The financial security must be sufficient to cover certain costs, expenses, liabilities, including those that might arise in relation to decommissioning of infrastructure, removal of property and remediation of the licence area. New section 92 lists the information requirements licence holders must provide in a management plan to demonstrate how they are, or will, comply with financial security obligations under section 117 of the OEI Act.

New subsection 92(2) requires that the management plan must set out the method used to calculate the amount of financial security amounts and describe how that method was verified. The type of verification used should be commensurate to the scale and complexity of the calculation method, the amount of financial security calculated and the nature of the underlying project. New section 108 below provides for the Regulator to direct a licence holder to provide independent third-party verification of the method referred to in subsection 92(2).

The management plan must also state any amounts of financial security that the licence holder is to provide and describe the form or forms in which it is to be provided. (These forms are further addressed at new sections 109 and 110 below). The management plan must also describe any Ministerial determinations made under new section 102 and how these will be complied with. New paragraph 92(2)(f) also provides that if financial security is to be provided at different times then the management plan must include the material mentioned at new section 103 including a timetable.

Without limiting the matters that the method set out under new paragraph 92(2)(a) may deal with, new subsection 92(3) provides that the method must identify and calculate the costs, expenses and liabilities that may arise in connection with, or as a result of, the following:

- (a) the decommissioning of licence infrastructure;
- (b) removing relevant structures, equipment and property from the licence area;
- (c) removing things from a vacated area that would be relevant structures, equipment or property if the vacated area was still part of the licence area of the relevant licence;
- (d) the remediation of the licence area and vacated areas, and any other area affected by licence activities.

The amount of financial security proposed by a licence holder must reflect potential costs, expenses and liabilities that may be incurred by the Commonwealth or the Regulator in the event that a licence holder fails to comply with their obligations. These costs, expenses and liabilities are likely to be higher than those that may be incurred by the licence holder to meet those obligations.

Costs, expenses and liabilities must include all relevant structures, equipment and property as defined at section 87. There may also be other costs, expenses and liabilities that may need to be accounted for to comply with subsection 117(1) of the OEI Act.

New subsection 92(4) provides that the method set out under paragraph 92(2)(a) must take into account any costs, expenses and liabilities that might arise from emergencies or unexpected circumstances in relation to anything mentioned in paragraph 92(3)(a), (b), (c) or (d).

New subsection 92(5) provides that the Regulator may only approve the plan if the Regulator is satisfied that:

- (a) the method set out in the plan under paragraph 92(2)(a) appropriately identifies and quantifies the costs, expenses and liabilities mentioned in subsection 117(1) of the OEI Act; and
- (b) if the Minister has made a determination under section 102 about the form or forms of the financial security—the form or forms of financial security described under paragraph 92(2)(c) and (d) of this section are consistent with the determination; and
- (c) if financial security is to be required at different times in relation to particular licence infrastructure, in accordance with section 103—the material included in the plan for the purposes of section 103 is likely to ensure that financial security that relates to particular licence infrastructure is provided before that licence infrastructure is constructed or installed in the licence area.

### Section 93 – Plan must address compliance with record keeping requirements

This section requires the management plan to address:

- (a) how the licence holder is to comply with section 142 in relation to the relevant licence; and
- (b) how the licence holder is to comply with data management directions; and
- (c) requirements to make records available for inspection under the applied work health and safety provisions.

The Regulator may only approve the management plan if, in accordance with new subsection 93(1), the Regulator is satisfied that the matters included in the management plan are reasonably likely to result in the licence holder complying with the requirements and directions in this new subsection. This ensures that the Regulator has transparent oversight of the licence holder's compliance with these obligations.

## Section 94 – Plan must address work health and safety

This section requires the management plan to:

- (a) describe the obligations that apply to the licence holder under the applied work health and safety provisions; and
- (b) describe how the licence holder is complying with, and will continue to comply with, the obligations mentioned in paragraph 94(a).

The Regulator may only approve the management plan if, in accordance with new subsection 94(2), the Regulator is satisfied that the matters included in the management plan are reasonably likely to result in the licence holder complying with the obligations in this new subsection. This ensures that the Regulator has transparent oversight of the licence holder's compliance with these obligations.

### ***Division 6 – Management plans may apply, adopt or incorporate other instruments or writing***

## Section 95 – Plan may apply, adopt or incorporate other instruments or writing as in force or existing from time to time

New section 95 allows the management plan to, for the purposes of subsection 114(3) of the OEI Act, provide for a matter by applying, adopting or incorporating, with or without modification, any matter contained in an instrument or other writing as in force or existing from time to time. This applies to management plans as initially approved by the Regulator and to management plans which have been varied or revised, as directed or approved by the Regulator.

New section 95 operates despite section 46AA of the *Acts Interpretation Act 1901* (AIA) which addresses the issue of prescribing matters by reference to other instruments. In this case, the intention is that the management plan will be able to incorporate a range of external documents and continue to adopt them as they change from time to time.

Management plans will be operational documents that will rely on external documents such as domestic and international standards or codes of practice to demonstrate compliance with regulatory requirements. For this reason, it is imperative that management plans are able to refer to external sources of information and to ensure that changes to these external sources can be appropriately carried through to management of activities under a management plan on an ongoing basis. A management plan may address a matter by adopting or referring to material from another document. This extends to other management plans: one management plan may incorporate material from another management plan, provided that both management plans are connected to the same licence holder and the management plan from which material is referenced is an approved management plan for an existing licence, not a proposed commercial licence.

Where a plan adopts or refers to material from another management plan, and this other management plan changes, the plan may need to be revised in response to the change.

### ***Division 7 – Design notifications***

Division 7 of Part 2 establishes a design notification scheme. The intention of this scheme is to allow the Regulator to provide feedback to the licence holder on certain OEI projects before the licence holder submits a management plan application. This will help ensure that best practice safety, integrity and environmental management principles are built into project designs from the earliest stage.

#### **Section 96 – Requirements to give design notifications**

This section provides requirements for licence holders, for the purposes of paragraph 114(2)(d) of the OEI Act, to give the Regulator design notifications, in accordance with section 98, in relation to the design of the licence infrastructure.

The new subsection 96(2) provides that a licence holder that proposes to make an initial plan approval application for the Regulator to approve a plan as the management plan for a proposed commercial licence:

- (a) must, before making the application, give the Regulator a notification (a design notification in relation to the design of licence infrastructure for the proposed commercial licence; and
- (b) must not make the application until the Regulator has given feedback on the design notification under section 99.

The new subsection 96(3) provides that if:

- (a) the holder of a transmission and infrastructure licence proposes to make an initial plan approval application or a plan revision approval application in relation to the licence; and
- (b) if the application were granted, the management plan for the licence would authorise the licence holder to carry out an offshore infrastructure project for a purpose mentioned in paragraph 58(b) of the OEI Act (storing, transmitting or conveying electricity or a renewable energy product); and
- (c) in the case of a plan revision approval application the existing management plan for the licence does not authorise the licence holder to carry out an offshore infrastructure project for such a purpose;

the licence holder:

- (a) must, before making the application, give the Regulator a design notification in relation to the design of licence infrastructure for the licence (other than licence

infrastructure that is only to be used for the purpose mentioned in paragraph 58(a) of the OEI Act (assessing feasibility)); and

- (b) must not make the application until the Regulator has given feedback on the design notification under section 99.

The new subsection 96(4) provides that the holder of a feasibility licence or a research and demonstration licence may (voluntarily) give the Regulator a design notification in relation to the design of licence infrastructure for the licence.

This process establishes early engagement between the Regulator and the licence holder on the proposed approach to the design of the project and its component elements. Early engagement should enable the identification of any issues, risks or concerns, and feedback from the Regulator that the licence holder must address – see new section 86.

Once the licence holder proceeds to the stage of submitting a management plan, it may be difficult or costly to make significant changes to the overall layout and design of the project. The scheme will enable industry to engage early with the Regulator on design and concept-selection matters and will encourage consideration of alternative concepts that may provide for improved safety, infrastructure integrity and environmental outcomes prior to construction commencing.

#### Section 97 – Voluntary design notifications

New section 97 the holder of a feasibility licence or a research and demonstration licence may voluntarily give the Regulator a notification, in accordance with new section 98, in relation to the design of licence infrastructure for the licence.

#### Section 98 – Contents, manner and form of design notification

New subsection 98(1) outlines the matters that a design notification must include and describe. A design notification must include a plan of the intended location, or locations, and layout of the licence infrastructure and descriptions of the seabed and subsoil at the intended location or locations of the licence infrastructure, the reasonably foreseeable meteorological and oceanographic conditions to which the licence infrastructure may be subject, how the licence infrastructure will be constructed, how the licence infrastructure will be operated and maintained, how the licence infrastructure will be decommissioned and removed, any significant risks or hazards that may arise from the location or locations, design, construction, operation, maintenance, decommissioning or removal of the licence infrastructure and proposed measures to deal with those risks and hazards.

The design notification must also explain the process used to select the design of the licence infrastructure, including by outlining the criteria, design philosophy and standards (if any) that were used to guide the process and how design considerations influenced decisions made in relation to any of the other matters, and summarising any other design options that were considered, and the reasons why they were rejected. The design notification should have regard to other relevant requirements and obligations regarding the layout and design of

infrastructure, such as conditions of approval under the EPBC Act or safety of navigation requirements.

This gives the Regulator sufficient information to assess the proposed design notification, to consider its appropriateness, the potential impacts and risks, and to provide cogent feedback to the licence holder on the proposed design.

New subsection 98(2) provides that a design notification must be given in the manner and form that is approved by the Regulator and published on the Regulator's website and must be accompanied by any information or documents required by the form.

#### Section 99 – Regulator must give feedback on design notification

This section requires the Regulator to consider a design notification and endeavour to give feedback on it within 60 days of receiving it from the licence holder under new sections 96 or 97. The Regulator may request further information under new subsection 100(1), which subsequently extends the feedback period by 30 days. Any days after the day the request is given do not count for the purposes of the feedback period, until the day the request is complied with.

#### Section 100 – Regulator may request further information about design notification

This section allows the Regulator to request, by written notice, further information from the licence holder while considering a design notification under new section 99 if the Regulator is not satisfied that the design notification contains sufficient information for the Regulator to give feedback.

The notice under new subsection 100(1) must be made in accordance with new subsection 100(2). The day specified in the notice by which the further information must be provided must be reasonable (new subsection 100(3)). New subsection 100(4) allows the Regulator to make multiple requests under new section 100, including if the Regulator is not satisfied with the information provided in response to a request.

### ***Part 4 – Financial security***

#### ***Division 1 – Operation of this Part***

##### Section 101 – Operation of this Part

This section sets out the purpose of new Part 4, which is to prescribe matters relating to the financial security that licence holders may be required to provide under section 117 of the OEI Act.

#### ***Division 2 – Financial security***

## Section 102 – Minister may require financial security to be in a particular form

This section provides that for the purposes of paragraph 117(3)(a) of the OEI Act, the Minister may determine that the financial security that is or will be required under subsection 117(1) of the OEI Act for a licence must be in a particular form, which may be a combination of different forms of financial security.

By requiring that financial security is provided in a particular form the Minister can ensure that the risk to the Commonwealth can be reduced where there is uncertainty that the Commonwealth can recover the financial security.

A note is provided under new subsection 102(1) that states that the Minister may make a determination under this subsection whether or not the licence holder has already provided financial security.

New subsection 102(9) provides that the Minister may determine that financial security that has already been provided by a licence holder in a particular form, must be provided in a different form. Where that happens, any obligation for the financial security already provided continues until the end of the day before the Minister makes the determination for the financial security to be provided in a different form.

The Minister's determination under new paragraph 102(1)(a) must be in writing and specify the day on which the determination takes effect (new subsection 102(2)), and this day must be reasonable (new subsection 102(3)).

New subsections 102(4) to (8) set out the procedure for making a determination under new paragraph 102(1)(a). The Minister must give the licence holder written notice of the proposed determination (subsection 102(4)). The notice must set out the Minister's reasons for the proposed determination, invite the licence holder to make a written submission and specify the day on or before which the submission must be made (subsection 102(5)), and this day must be reasonable (subsection 102(6)). The Minister must take any submission into account in making a determination if made by the licence holder on or before the day specified in the notice (subsection 102(7)).

This procedure provides a formal consultation opportunity for the licence holder in relation to a determination, requiring that any submission be taken into account prior to the Minister making a final decision. This supports due process and transparency in decision making.

## Section 103 – Financial security may be required at different times in relation to particular licence infrastructure

This section provides that for the purposes of paragraph 117(3)(b) of the OEI Act, the financial security may be provided at different times in relation to particular licence infrastructure if:

- (a) the management plan includes a timetable for the provision of financial security under subsection 117(1) of the OEI Act that sets out when the financial security is to be

provided and requires the financial security to be provided before that licence infrastructure is constructed or installed in the licence area; and

- (b) the licence holder is required to provide financial security to the Commonwealth in accordance with the timetable included under paragraph 103(a).

The financial security amounts required, and the timing of securities, will vary and will be assessed by the Regulator during the management plan assessment process on a case-by-case basis considering the specific project and the stage of the project and the activity. Consistent with the requirements of section 117 of the OEI Act, this section requires the management plan to set out the amounts of security that will be sufficient at various points in time over the life of the licence. Licence holders may choose to provide the maximum amounts for the entirety of the licence period, or may under new section 103, choose to set out a timetable for the provision of the amounts in their management plan.

New section 103 will also require the management plan to commit to not constructing or installing licence infrastructure until any sufficient amounts relating to that infrastructure have been provided to the Commonwealth. Note, section 118 of the OEI Act sets out the offence provisions for failing to provide financial security.

The timetable in the management plan will not require licence holders to provide specific dates for installation, rather it should include proposed activity milestones. This acknowledges the impracticality of requiring a licence holder to comply with a specific date for an activity may have been provided in the management plan several years in advance.

This section is intended to be permissive, as there is no requirement that the licence holder must include a financial security timetable, but if a licence holder provides the timetable, it enables the licence holder to provide financial security on an iterative basis.

#### Section 104 – Amount of financial security that is no longer required

New subsection 104(1) allows the Minister, for the purposes of paragraph 117(3)(c) of the OEI Act, to determine in writing that a licence holder is no longer required to provide an amount of financial security if:

- (a) the Minister is satisfied that no further such costs, expenses or liabilities are likely to arise in relation to the licence infrastructure, property or remediation activities to which the amount of financial security relates; and
- (b) the Minister is satisfied that the determination would not result in the amount of financial security provided by the licence holder in relation to the licence being insufficient to pay the costs, expenses and liabilities mentioned in subsection 117(1) of the OEI Act.

Reductions in financial security may occur in circumstances where a licence has been surrendered and no further security is required to be held or decommissioning activities are progressively completed over the life of the licence. For compliance purposes, the Regulator

may undertake an inspection to confirm that relevant structures, equipment and property have been removed, the area remediated, and no further costs are likely to arise as the licence holder has complied with their obligations under the OEI Act.

New subsection 104(2) provides that in considering whether to make a determination under subsection 104(1) the Minister must seek advice from the Regulator and must have regard to that advice. If the Minister makes a determination under subsection 104(1), new subsection 104(3) provides that the amount of financial security specified in the determination ceases to be required and the Minister must give written notice of the determination to the licence holder. If the Minister has determined that an amount of financial security is no longer required, the Commonwealth will return the security to the licence holder as soon as practicable.

#### Section 105 – Reductions in amount of financial security

New subsection 105(1) allows the Minister, for the purposes of paragraph 117(4)(d) of the OEI Act, to determine in writing that the amount of financial security provided by a licence holder may be reduced by a particular amount. This can only occur where the Minister is satisfied that the reduction would not result in the amount of financial security provided by the licence holder in relation to the licence being insufficient to pay the costs, expenses and liabilities mentioned in subsection 117(1) of the OEI Act.

In considering whether to make a determination under subsection 105(1) the Minister must seek and have regard to advice from the Regulator.

In accordance with subsection 105(3) the Minister must give the licence holder a copy of the determination within 30 days after making the determination. If the Minister has determined that financial security can be reduced the Commonwealth will return the specified amount of security to the licence holder as soon as practicable.

#### Section 106 – No other cessation or reduction of financial security obligations

This section provides that an amount of financial security provided by a licence holder in relation to a licence does not cease to be required and cannot be reduced, while the licence remains in force, otherwise than in accordance with a determination by the Minister under section 104 or 105. This is to confirm that only the Minister has the power to reduce the amount of financial security or cease the financial security in relation to a licence.

#### Section 107 – Financial security for transferred licence

New section 107 allows for financial security to be returned to the transferor once the transferee has provided financial security to the Commonwealth and the notice to transfer a licence has come into effect.

The Minister may allow for the transfer of a licence for which a management plan and financial security are in place. Under section 72 of the OEI Act, the licensing scheme may provide that financial security be in place for both the transferor and transferee for the same licence.

Subsection 107(2) provides that for the purposes of subsections 72(2) and (3) of the OEI Act, as long as the licence remains in force, all of the transferor's obligations in relation to the licence under sections 117 and 118 of the OEI Act continue until, and unless, the obligations cease under paragraph 107(6)(a). Further, both the transferor and the transferee must comply with sections 117 and 118 of the OEI Act in relation to the licence until the transferor's obligations cease under paragraph 107(6)(a). The note to new subsection 107(2) clarifies that if the Minister makes a determination under subsection 107(5), the transferor's obligations cease, while the transferee's obligations continue.

New subsection 107(3) provides that the transferor can apply for the Minister to determine that, under subsection 107(5), the transferor's obligations in relation to the licence under sections 117 and 118 of the OEI Act are to cease, and therefore financial security can be returned to the transferor.

New subsection 107(4) requires that the application must be made in the manner and form that is approved by the Minister and published on the Department's website; and must be accompanied by any other information or documents required by the form.

New subsection 107(6) provides that, if the Minister makes a determination under new subsection 107(5), the transferor's obligations in relation to the licence under sections 117 and 118 of the OEI Act cease at the later of when the Minister makes the determination or when the transfer of the licence takes effect. As the notice of transfer cannot take effect until the transferee has provided financial security to the Commonwealth there is no risk to the Commonwealth that the transferor has financial security returned before the transferee has provided financial security. The Minister must give written notice of the determination to the transferor and the transferee.

#### Section 108 – Regulator may direct licence holder to arrange verification of financial security

New subsection 108(1) enables the Regulator to give a written notice to a licence holder directing the licence holder to arrange independent verification of financial security. The Regulator's written notice could direct independent verification of any of the following: the method used, or to be used, to calculate financial security, that the amount of financial security calculated is consistent with the method used, or, any other matters that the Regulator considers need to be verified in relation to the financial security to be provided by the licence holder in relation to a relevant licence.

Subsection 108(2) requires that the licence holder must engage an entity that is suitably qualified, competent and independent to carry out the verification; and provide a written report on the verification to the licence holder. Once the written report is finalised to the satisfaction of the licence holder must give a copy of the report to the Regulator.

Independent third-party verification will help protect the Commonwealth and Australian taxpayers from the risk that the amount of financial security is not adequate by ensuring that financial security is appropriately calculated, fit for purpose, and will meet the amounts of costs, expenses, liabilities and debts to be drawn from it.

This provision operates consistently with paragraph 117(4)(c) of the OEI Act, which provides that the regulations may prescribe methods for working out the amount of financial security that a licence holder must provide under subsection 117(1). It is intended that by permitting these calculations for financial security to be led by industry but ultimately verified by independent third parties and subject to the Regulator's approval of the management, a more transparent and mutually convenient process for managing this aspect of the licensing scheme will be established.

#### Section 109 – Arrangements that may be treated as financial security

This section outlines arrangements that may be treated as financial security for the purposes of subsection 117(4) of the OEI Act, subject to new section 109.

Forms of financial security include:

- (a) an amount received by the Commonwealth as mentioned in paragraph 119(3)(a) of the OEI Act and retained in accordance with paragraph 119(4)(d) of the OEI Act;
- (b) a cash deposit held by a financial institution;
- (c) a credit facility with a financial institution;
- (d) a guarantee from a financial institution;
- (e) an insurance policy with a general insurer (within the meaning of the *Insurance Act 1973*).

For the purposes of this section a financial institution means a corporation that is an ADI (authorised deposit-taking institution) for the purposes of the *Banking Act 1959* (new subsection 109(3)).

The arrangements that may be treated as financial security have been determined because they provide the Commonwealth with assurance that the Commonwealth will be able to access financial security should the licence holder fail to comply with their obligations under section 117 of the OEI Act. The arrangements will also provide licence holders with flexibility to choose a form of security that is appropriate for their particular circumstance.

Excluding paragraph 109(1)(a), the arrangements that may be treated as financial security are provided by financial and insurance institutions that are regulated by the Australian Prudential Regulation Authority, that are based in, or have branches, in Australia. This provides further assurance for the Commonwealth that financial security can be accessed, if needed, to cover costs associated with emergency response, decommissioning, removal and remediation of a licence area.

The Commonwealth will consider each form of security offered on a case-by-case basis, taking into account any terms and conditions and to ensure that it complies with subsection 109(2) of the Regulations.

## Section 110 – Arrangements that are not to be treated as financial security

This section specifies, for the purposes of paragraph 117(4)(b) of the OEI Act, arrangements that are not to be treated as financial security for the purposes of section 117 of the OEI Act include:

- (a) an arrangement involving self-insurance;
- (b) an arrangement under which the Commonwealth is a beneficiary of a trust;
- (c) a guarantee provided by a related body corporate (within the meaning of the *Corporations Act 2001*) of the licence holder.

The arrangements that are not to be treated as financial security listed in subsection 110(1) have been included because it is considered that there is an unacceptably high risk that the Commonwealth may not be able to access the financial security in the event it becomes necessary to do so.

Subsection 110(2) also sets out circumstances in which an arrangement cannot be treated as financial security for the purposes of section 117 of the OEI Act which includes:

- (a) the arrangement does not limit the ability of persons other than the Commonwealth to recover amounts from financial security provided under the arrangement;
- (b) it is not highly certain that the Commonwealth would be able to recover amounts under the arrangement when required;
- (c) the terms of the arrangement are unclear.

Financial security arrangements will only be accepted if the terms are clear, the Commonwealth has sole access rights, has priority in all circumstance to the financial security, and that all financial agreements should be clear and certain in their construction.

As noted above, new sections 109 and 110 operate to prescribe the arrangements the Commonwealth may treat as financial security and those that are not to be accepted. Importantly, if an insolvency event may compromise an arrangement, the Commonwealth will consider that new paragraphs 110(2)(a) and (b) will rule those arrangements out. As such, licence holders should ensure that insolvency will not undermine the arrangement, licence holder should ensure that as a minimum the Commonwealth is a secured creditor or equivalent depending on the arrangement.

## Section 111 – Recovery of debts from financial security

This section provides for the circumstances in which the Commonwealth, or the Regulator may recover debts from a licence holder.

New subsections 111(1) and 111(2) provide that, for the purposes of subsection 119(1) of the OEI Act, the Commonwealth may recover debt arising due to non-compliance or unpaid fees, levy or late payment penalty from the financial security if:

- (a) a licence holder owes a debt to the Commonwealth or the Regulator under the OEI Act (other than under sections 189 or 190 of the OEI Act) in relation to the licence:  
and
- (b) the licence holder has provided financial security in relation to the licence; and
- (c) the Minister is satisfied that:
  - (i) the debt has not been recovered by the Commonwealth or Regulator; and
  - (ii) the debt is unlikely to be paid within a reasonable time; and
  - (iii) recovering the debt from the financial security is likely to be more economical than recovering the debt through other means;

the Commonwealth may recover the debt from the financial security.

New subsections 111(1) or 111(2) does not include any specified timeframe in relation to when the Commonwealth can recover the debt. However, it does require that the Minister must be satisfied before recovery via financial security that the debt has not already been recovered by the Commonwealth or Regulator, and that it is unlikely to be paid within a reasonable time.

In accordance with subsection 119(2) of the OEI Act the types of debts that may be recoverable are not limited to the costs, expenses and liabilities mentioned in subsection 117(1) of the OEI Act and may include amounts of the OEI levy.

#### Section 112 – Recovery of costs, expenses and liabilities from financial security

This section provides that, for the purposes of subsection 119(1) of the OEI Act, the Commonwealth may recover the cost, expense or liability from the financial security if:

- (a) the Commonwealth or the Regulator reasonably incurs a cost, expense or liability in relation to a licence as a result of an act or omission by the licence holder; and
- (b) the cost, expense or liability is of a kind set out in the table in subsection 112(2); and
- (c) the cost, expense or liability is not a debt that is owed by the licence holder to the Commonwealth or the Regulator; and
- (d) the licence holder has provided financial security in relation to the licence; and
- (e) the Minister is satisfied that:
  - (i) the debt is not recoverable through fees or levies under the OEI Act; and

- (ii) the cost, expense or liability is unlikely to be recovered, otherwise than in accordance with this section, within a reasonable time; and
- (iii) recovering the cost, expense or liability from the financial security is likely to be more economical than recovering the cost, expense or liability through other means; the Commonwealth may recover the cost, expense or liability from the financial security.

New section 112 does not include a specified timeframe in relation to when the Commonwealth can access financial security held to recover a cost, expense or liability. However, the Minister must be satisfied before approving recovery via financial security that the cost, expense or liability has not already been covered under any other fee or levy, and that recovery via financial security is the more economical than recovering the cost, expense or liability through other means.

New subsection 112(2) sets out a table that provides for the costs, expenses and liabilities that may be recovered from financial security. Column 1 provides a general description of the licence holder's obligations in relation to:

- (a) decommissioning of licence infrastructure.
- (b) removing structures equipment and other property from the licence area and vacated areas; remediation of the licence area and vacated areas and any other areas affected by activities carried out under the licence; maintenance and repair of structures, equipment and other property in the licence area; compliance with directions and notices.
- (c) emergencies and unplanned circumstances, arising in connection with the licence activities, that are not adequately responded to or resolved by the licence holder.
- (d) an act or omission that could result in cancellation of licence.

Column 2 of the table sets out the kinds of costs, expenses and liabilities that may be recovered by the Commonwealth to enable the Regulator or Commonwealth to undertake activities and actions where the licence holder has failed to comply with their obligations under subsections 117(1) and 119(2) of the OEI Act.

Subsection 112(3) lists the activities for the costs, expenses and liabilities that may be incurred and as such be recoverable from financial security are the following:

- (a) evaluation, inspection, monitoring, and surveillance of the licence infrastructure;
- (b) mobilisation, operation and demobilisation of vessels, aircraft or other plant and equipment;
- (c) pollution and waste management and disposal;
- (d) salvage or towage;

- (e) protecting, remediating, restoring or reinstating any physical or biological features of the environment;
- (f) repairing, replacing, relocating, removing or making safe any structures, plant, equipment or property;
- (g) planning, engineering and design;
- (h) costs of labour, specialist technical advisors or contractors;
- (i) site hire, communications, and utilities;
- (j) personal safety and medical requirements;
- (k) any compliance, legal costs, or other direct or indirect costs, expenses or liabilities arising from actions taken by, or on behalf of, the Commonwealth or the Regulator that can be reasonably considered as being taken as a result of the Commonwealth or the Regulator undertaking action in place of the licence holder.

### ***Part 5 – Safety zone determinations***

The OEI Act provides for safety zones and protection zones to be established around eligible safety zone infrastructure. It is the role of the Regulator to review applications and determine safety and protection zones, as they cannot be applied automatically. These zones are designed for the safety of workers and other users of the marine environment and to reduce the risks of damage to infrastructure from other marine users.

The OEI Act provides that the Regulator may make, vary or revoke a safety zone determination on its own initiative. Persons can apply to the Regulator to request that the Regulator makes, varies or revokes a safety zone determination. In recognition of the fact that the primary purpose of safety zones is to protect infrastructure, the Regulator will consult with licence holders if a safety zone application is made in relation to their licence area by a third party. The regulations specify that a third party cannot apply to vary or revoke a zone they did not apply for.

#### ***Division 1 – Purpose of this Part***

##### Section 113 – Purpose of this Part

This section sets out the purpose of new Part 5, which is to prescribe matters relating to determinations under subsection 136(2) of the OEI Act, which is the safety zone determination.

#### ***Division 2 – General provisions about safety zone determinations***

##### Section 114 – Information that a safety zone determination must include

This section provides that, for the purposes of subsection 136(4) of the OEI Act, a safety zone determination must:

- (a) specify the eligible safety zone infrastructure to which the determination relates; and
- (b) include the time when the determination takes effect under subsection 138(1) of the OEI Act (subject to subsection 138(2) of the OEI Act); and
- (c) if infrastructure to which the determination relates is licence infrastructure in relation to a licence—include sufficient information to identify the licence.

A safety zone is a specified area that is applied for around eligible infrastructure (to a maximum of 500 metres (in accordance with paragraph 136(5)(a) of the OEI Act) that would prohibit certain vessels from entering or being present in that area without the written consent of the Regulator. In accordance with paragraph 136(5)(b) of the OEI Act the safety zone must be entirely within the Commonwealth offshore area. Safety zone determinations are notifiable instruments.

A safety zone determination is considered to be a low impact future act under Subdivision L of the Native Title Act. The zone, once determined, will cease to have effect if a Native Title Act determination that Native Title exists is made in relation to the area covered by the zone. In the circumstance where Native Title is claimed in relation to the areas of the safety zone, the Regulator will engage with the licence holder / applicant and may, on its own initiative, or in response to an application, vary or revoke the zone determination prior to the Native Title determination being made. In this circumstance, Subdivision N of the Native Title Act may be applied including any specified notifications and procedural rights, prior to any new or varied safety zone being determined in relation to this infrastructure.

#### Section 115 – When safety zone determination continues in effect

New subsection 115(1) provides that a safety zone determination continues in effect until it is revoked in accordance with subsection 33(3) of the AIA. This provision relies on the necessary or convenient power under paragraph 305(b) of the OEI Act. A safety zone determination may provide that it ceases to have effect at a time specified in the determination, or in circumstances specified in the determination. If a safety zone determination includes a provision mentioned in subsection 115(2), the determination ceases to have effect in accordance with the provision.

To avoid doubt, new subsection 115(4) provides that a safety zone determination may continue in effect even if the eligible safety zone infrastructure in the safety zone has ceased to operate.

### ***Division 3 – Procedures for safety zone applications***

#### Section 116 – Operation of this Division

This section sets out the purpose of Division 3, which is to prescribe procedures relating to safety zone determinations for the purposes of subsection 137(2) of the OEI Act.

### Section 117 – Making a safety zone application

This section sets out the application process for making a safety zone application. New subsection 117(1) allows a person to apply to the Regulator, in accordance with Division 3, for the Regulator to make a safety zone determination for the purpose of protecting eligible safety zone infrastructure.

New subsection 117(2) also allows the person who made the application, or the holder of any licence whose licence area includes any part of the safety zone, to apply to the Regulator, in accordance with Division 3, for the Regulator to vary or revoke a safety zone determination. A note is provided under subsection 117(2) to state that the Regulator's power to make a safety zone determination includes a power to vary or revoke a safety zone determination, and that power is exercisable under subsection 33(3) of the AIA.

### Section 118 – Requirements for safety zone application—application for the Regulator to make a safety zone determination

This section provides that a safety zone application must be made in the manner and form approved by the Regulator and published on the Regulator's website and must be accompanied by any information or documents required by the form.

### Section 119 – Requirements for safety zone application—application for the Regulator to vary or revoke a safety zone determination

This section sets out the requirements for an application for the Regulator to vary or revoke a safety zone determination under new subsection 117(2). A safety zone application must either state that the application is for the Regulator to revoke or vary a safety zone determination and if the latter, describe the proposed variation. The application must also be made in the manner and form approved the Regulator and published on the Regulator's website and must be accompanied by any information or documents required by the form.

A note is inserted that cross references new section 146, which prescribes the application fees. The note further describes that an application to vary or revoke a safety zone is only taken to have been made if the appropriate fee has been paid by the applicant consistent with new section 147.

### Section 120 – Notification of certain safety zone applications

This section requires the Regulator to, by written notice, inform a holder of a licence if a safety zone application has been made by another person for that licence. The notice must meet the requirements in new subsection 120(2), including specifying the day on or before which submissions must be made, and that day must be reasonable (new subsection 120(3)).

Safety zones can affect the activities of third parties (such as other marine users). They can also help to protect or ensure the safety of third parties. For this reason, third parties can apply to the Regulator for a safety zone determination.

If this does occur, the relevant licence holder will need to be notified and invited to make a submission about the safety zone application. The Regulator must then consider the submission (if made) when reviewing the application.

For the avoidance of doubt this provision relies on both paragraph 137(2)(a) of the OEI Act and the necessary or convenient power under paragraph 305(b) of the OEI Act. Notification is considered a necessary and convenient element because an application for a safety zone by a third party may have implications for the licence holder and the licence holder should be aware of the application and be given an opportunity to make submissions in relation to that application.

#### Section 121 – Regulator may request further information

This section allows the Regulator to, by written notice, request further information from the applicant if the Regulator is satisfied that the safety zone application does not contain sufficient information for the Regulator to make a determination on the application.

The notice must specify the information required, specify the manner in which the information must be provided, and specify the day on or before which the information must be provided (new subsection 121(2)), and that day must be reasonable (new subsection 121(3)).

If the applicant provides further information in accordance with the notice, the Regulator must take the information into account in deciding whether to grant, or refuse to grant, the application.

The Regulator may make multiple requests under new section 121 including if the Regulator is not satisfied with the information provided in responses to a request.

#### Section 122 – Time for making decision on safety zone application

This section requires the Regulator to make a decision on a safety zone application within 60 days of the day the application is made.

New subsection 122(2) allows the Regulator to, by written notice to the applicant, extend the decision period by a period specified in the notice. The notice must set out the reasons for the extension (new subsection 122(3)). This situation may arise where the application is complex, involving large numbers of infrastructure, or involving multiple stakeholders and a variety of marine uses.

The Regulator may extend the decision period more than once (new subsection 122(4)). New subsection 122(5) provides that a failure by the Regulator to comply with subsection 122(1) does not affect the validity of any decision made on the safety zone application or anything done by the Regulator in dealing with the application.

### Section 123 – Applicant may withdraw safety zone application

This section provides that an application of a safety zone application may, at any time before the Regulator makes a decision on the application, withdraw the application by written notice to the Regulator.

### Section 124 – Proposed decision to refuse safety zone application

This section provides that the Regulator, if proposing to refuse to grant a safety zone application, must give the applicant written notice of the proposed decision. The notice must set out the Regulator's reasons for the proposed decision, invite the applicant to make written submissions about the proposed decision and specify the day on or before which the submission must be made, and that day must be reasonable (new subsection 124(3)). New subsection 124(4) requires the Regulator to take into account any submissions made by the applicant when deciding whether to grant, or refuse to grant, the application.

While safety zones are important and may potentially impact on the rights and interests of third parties, no internal or external merits review process has been incorporated in this process. Merits review is not considered necessary nor appropriate for this decision. Rather, the Regulator may consult specified affected parties. A process of considering submissions from the applicant has also been incorporated as appropriate in the circumstances.

### Section 125 – Decision on safety zone application

This section outlines the Regulator's processes for deciding to grant, or refuse to grant, a safety zone application. New subsection 125(1) requires the Regulator, if deciding to grant the application, to give written notice of the decision to the applicant and any licence holder that was required to be given notice under new subsection 120(1). The Regulator must also give effect to the decision by making a safety zone determination, or varying or revoking a safety zone determination, in relation to the application within 30 days of the Regulator's decision.

New subsection 125(2) requires the Regulator, in deciding not to grant the application, to give written notice of the decision to the applicant and any licence holder that was required to be given notice under new subsection 120(1).

### ***Part 6 – Protection zone determinations***

A protection zone is a specified area around OEI (to a maximum of 1,852 metres on each side, equivalent to one nautical mile) in which certain activities may be restricted or prohibited. Protection zone determinations are legislative instruments (see the note at section 119 of the OEI Act), and they are not automatic, they must be applied for and be determined by the Regulator. They are intended to protect OEI from activities that pose a risk to damaging infrastructure, rather than restricting access. It is expected that protection zones will most commonly be used to protect OEI transmission cables from damage (for example by prohibiting anchoring). Protection zones will likely last for the lifetime of the infrastructure they are intended to protect.

## ***Division 1 – Purpose of this Part***

### Section 126 – Purpose of this Part

This section sets out the purpose of new Part 6, which is to prescribe matters relating to protection zone determinations under subsection 142(1) of the OEI Act.

## ***Division 2 – General provisions about protection zone determinations***

### Section 127 – Determination of area of protection zone

This section provides, for the purposes of paragraph 142(3)(a) of the OEI Act, how an area covered by a protection zone specified in a determination is to be determined. New subsection 127(2) provides that an area of the protection zone must extend no further than 1,852 metres from the infrastructure or proposed infrastructure to which the protection zone relates, measured from each point on the outer edge of the infrastructure or proposed infrastructure.

The concept of protection zones is well-established under other frameworks for the protection of submarine cables, and the area is generally 1,852 metres, equivalent to one nautical mile. This distance provided in subparagraph 9(4)(a)(ii) of Schedule 3A of the *Telecommunications Act 1997* has been mirrored in the OEI regime for consistency.

### Section 128 – Information that a protection zone determination must include

This section provides that for the purposes of paragraph 142(3)(b) of the OEI Act, a protection zone determination must:

- (a) specify the offshore renewable energy infrastructure or offshore electricity transmission infrastructure to which the determination relates; and
- (b) include the time when the determination takes effect under subsection 146(1) of the OEI Act (subject to subsection 146(2) of the OEI Act).

A note is provided under new section 128 to state that the further requirements under the OEI Act that a protection zone determination must include (subsection 142(1) and paragraph 142(3)(a) and subsection 142(4)).

## ***Division 3 – Procedures for protection zone applications***

### Section 129 – Operation of this Division

This section sets out the purpose of Division 3, which is to prescribe procedures relating to protection zone determinations for the purposes of subsection 143(2) of the OEI Act.

### Section 130 – Making a protection zone application

This section sets out the application process for making a protection zone application. New subsection 130(1) allows a person to apply to the Regulator, in accordance with Division 3,

for the Regulator to make a protection zone in relation to offshore renewable energy infrastructure or offshore electricity transmission infrastructure that has been, or is proposed to be, installed in the Commonwealth offshore area under a licence.

New subsection 130(2) also allows the person who made the application to apply to the Regulator, in accordance with Division 3, for the Regulator to vary or revoke a protection zone determination. A note is provided under subsection 130(2) to state that the Regulator's power to make a protection zone determination includes a power to vary or revoke the determination, and that power is exercisable under subsection 33(3) of the AIA.

#### Section 131 – Requirements for protection zone application—application for the Regulator to make a protection zone determination

This section provides that a protection zone application must be made in the manner and form approved by the Regulator and published on the Regulator's website and must be accompanied by any information or documents required by the form.

#### Section 132 – Requirements for protection zone application—application for the Regulator to vary or revoke a protection zone determination

This section sets out the requirements for an application for the Regulator to vary or revoke a protection zone determination. A protection zone application must either state that the application is for the Regulator to revoke or vary a protection zone determination and if the latter, describe the proposed variation. The application must also be made in the manner and form approved the Regulator and published on the Regulator's website and must be accompanied by any information or documents required by the form.

#### Section 133 – Notification of certain protection zone applications

Protection zones can affect the activities of third parties (such as other marine users). They can also help to protect or ensure the safety of third parties by reducing risk of interactions with infrastructure. For this reason, third parties can apply to the Regulator for a protection zone determination under new section 133.

This section requires the Regulator to, by written notice, inform a holder of a licence if a protection zone application has been made by another person for that licence. The notice must meet the requirements in new subsection 133(2), including specifying the day on or before which any submissions must be made, and that day must be reasonable (new subsection 133(3)).

#### Section 134 – Regulator must invite submissions from the public on protection zone application

New section 134 provides that if a protection zone application is made under subsection 130(1), the Regulator must invite submissions on the application from the public by way of a notice published on its website.

It is appropriate for the Regulator to invite submissions on a proposed protection zone application and consider responses from the public in making a decision due to the potential for impact on the existing rights of third parties. This process will be undertaken in addition to the licence holder's consultation on its activities under the management plan.

Public comment is not considered necessary for safety zones as they are smaller in size and may apply temporarily while infrastructure is being installed to ensure safety during times of high-risk activity. However, public comment is appropriate for protection zones because the determinations restrict activities being undertaken in larger areas for a longer duration.

The notice must meet the requirements in new subsection 134(2), including specifying how submissions may be made to the Regulator and the day on or before which submissions may be made.

The notice may include any other information the Regulator considers appropriate in relation to the application or the proposed protection zone.

The Regulator must take any submissions (if made) into account in deciding whether to grant, or refuse to grant, the protection zone application.

#### Section 135 – Time for making decision on protection zone application

This section requires the Regulator to make a decision on a protection zone application within 60 days of the day the application is made.

New subsection 135(2) extends the decision period due to the publication of any notice under section 134 (submissions from the public on the protection zone application).

New subsection 135(3) allows the Regulator to, by written notice to the applicant, extend the decision period by a period specified in the notice. Such extensions may be required for complex applications and may be necessary to accommodate the public comment process to be required under new section 134. The notice must set out the reasons for the extension (new subsection 135(4)). The Regulator may extend the decision period more than once (new subsection 135(5)).

New subsection 135(6) provides that a failure by the Regulator to comply with subsection 135(1) does not affect the validity of any decision made on the protection zone application or anything done by the Regulator in dealing with the application.

#### Section 136 – Regulator may request further information

This section provides that if at any time while considering a protection zone application, the Regulator is not satisfied that the application contains sufficient information for the Regulator to decide whether or not to grant the application, the Regulator may, by written notice, request further information from the applicant.

The notice must specify the information required and specify the day on or before which the information must be provided; and specify the manner in which the information must be

provided (new subsection 136(2)). The day specified for the purposes of paragraph 136(2)(b) must be reasonable (new subsection 136(3)). If the applicant provides further information in accordance with the notice, the Regulator must take the information into account in deciding whether to grant, or refuse to grant, the application (new subsection 136(4)).

To avoid doubt, the Regulator may make more than one request under this section; and may make further requests if the Regulator is not satisfied with the information provided in response to a request (new subsection 136(5)).

#### Section 137 – Applicant may withdraw protection zone application

This section provides that a person who has made a protection zone application may, at any time before the Regulator makes a decision on the application, withdraw the application by written notice to the Regulator.

#### Section 138 – Proposed decision to refuse protection zone application

This section provides that if the Regulator proposes to refuse to grant a protection zone application, the Regulator must give the applicant written notice of the proposed decision.

The notice must set out the Regulator's reasons for the proposed decision; and invite the applicant to make a written submission about the proposed decision; and specify the day on or before which the submission must be made (new subsection 138(2)). The day specified for the purposes of paragraph 138(2)(c) must be reasonable (new subsection 138(3)). If the applicant makes a submission on or before the day specified for the purposes of paragraph 138(2)(c), the Regulator must take the submission into account in deciding whether to grant, or refuse to grant, the application (new subsection 138(4)).

Having regard to the potential impact on the rights and interests of third parties and the consultation and submission processes provided for in these Amendment Regulations, merits review is not considered necessary nor appropriate for this decision. . The costs associated with merits review is disproportionate to the significance of the refusal decision under review.

#### Section 139 – Decision on protection zone application

This section outlines the Regulator's processes for deciding to grant, or refuse to grant, a protection zone application. New subsection 139(1) requires the Regulator, if deciding to grant the application, to give written notice of the decision to the applicant and any licence holder that was required to be given notice under new subsection 133(1). The Regulator must also give effect to the decision by making a protection zone determination, or varying or revoking a protection zone determination, in relation to the application within 30 days of the Regulator's decision.

New subsection 139(2) requires the Regulator, in deciding not to grant the application, to give written notice of the decision to the applicant and any licence holder that was required to be given notice under new subsection 133(1).

## ***Part 7 – Work health and safety***

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

### Section 140 – Purposes of this Part

This section outlines the purpose of new Part 7, which is to give effect for the purposes of subsection 243(2) of the OEI Act.

### Section 141 – *Work Health and Safety Regulations 2011* apply with modifications

This section provides that the provisions of the WHS Regulations apply, with modifications set out in new Schedule 1 to the Principal Regulations, as incorporated by Schedule 2 to the Amendment Regulations, for the purposes of the WHS Act as applied by Part 1 of Chapter 6 of the OEI Act.

## ***Part 8 – Information relating to offshore infrastructure***

### Section 142 – Requirements to keep accounts, records and other documents

This section details the accounts, records and other documents that must be kept by a licence holder, the way they must be kept and impact of cessation or transfer of a licence. Keeping accounts, records and other documents is important so that they can be retrieved for regulatory, compliance and reporting purposes.

As such, for the purposes of paragraph 268(1)(a) of the OEI Act new subsection 142(1) provides that licence holders must keep any written reports of audits or inspections of licence infrastructure in relation to the licence, any written reports of audits or inspections of licence activities (whether conducted by the licence holder or another person), any accounts, records or other documents relating to the licence holder's obligations under the applied work health and safety provisions, any other records relevant to whether the licence holder has complied with the OEI Act, this instrument or the management plan (if any) for the licence.

New subsection 142(2) provides that licence holders must also keep any accounts, records or other documents that provide evidence in support of any statements included by the licence holder in an annual report under paragraph 33(4)(b) of the Principal Regulations, or a final report under paragraph 33(8)(b) of the Principal Regulations.

An account, record or other document required to be kept under new subsections 142(1) or 142(2), or under a data management direction must be stored in a place in Australia, and to

the extent that it is reasonably possible to do so be stored in a place where the licence holder makes decisions that are made in the capacity of a person conducting a business or undertaking (within the meaning of the WHS Act) at that place; and are about matters that directly affect the health or safety of people who are relevant workers (within the meaning of section 237 of the OEI Act); and must be stored in a manner that allows the account, record or other document to be easily retrievable in a timely manner; and must be stored securely, and must be stored for a period of at least 7 years after the account, record or document is generated (new subsection 142(3)).

If an account, record or other document (required to be kept under new section 142, or under a data management direction imposed under sections 263 and 264 of the OEI Act), is modified then the requirements of new subsection 142(3) applies separately to the unmodified account, record or document and to any modified versions of the account, record or document and each modified version must be stored for a period of at least 7 years after it is modified (new subsection 142(4)).

The obligations in new subsections 142(3) and (4) (except paragraph 142(3)(b)), in relation to all accounts, records and other documents that the transferor was required to keep under new section 142, or under a data management direction before the transfer took effect, must continue to be complied with:

- (a) if a licence ceases to be in force, by the person who held that licence (new paragraph 142(5)(a)); and
- (b) if a licence is transferred, by the transferor (new paragraph 142(6)(a)).

The obligation in paragraphs 142(5)(a) and 142(6)(a) continue to apply to the person or transferor respectively until a period of at least 7 years after the account, record or document is generated or modified (new paragraphs 142(5)(b) and 142(6)(b)).

For transfers, the transferee is not required to comply with subsection 142(3) in relation to any accounts, records or other documents that the transferor is keeping in accordance with subsection 142(6) (new paragraph 142(6)(c)).

### Section 143 – Requirements to keep accounts, records and other documents—offence and civil penalty provisions

This section establishes offences in relation to the keeping of accounts, records or documents in accordance with new section 142. A strict liability offence occurs if new section 142 requires the person to keep an account, record or document, and the person does not keep the account, record or document in accordance with section 142. The penalty for this offence is 40 penalty units (new subsection 143(1)).

New subsection 143(2) establishes a civil penalty provision. A civil penalty is a pecuniary (or monetary) penalty imposed by courts exercising a civil rather than criminal jurisdiction. A civil penalty of up to 40 penalty units may be imposed if section 142 requires the person to

keep an account, record or document and the person does not keep the account, record or document in accordance with section 142.

A person who commits an offence under the strict liability provisions or contravenes the civil penalty provisions commits a separate offence or contravention respectively in respect of each day (including a day of a conviction for the offence or any later day) during which the offence or contravention continues. The maximum penalty or civil penalty for each day that an offence or contravention continues is 10% of the maximum penalty or civil penalty that can be imposed in respect of that offence or contravention (new subsections 143(3) to (6)).

The penalty unit and continuing contravention for both the strict liability offence and civil penalty is 40 units. This is necessary and proportionate to the contravention of section 142. Compliance with section 142 reflects the importance of keeping up-to-date accounts, records and documents as these are critical to offshore operations and should be readily accessible and are a means for the Regulator to ensure compliance with the management plan, OEI Act and associated regulations.

Strict liability is necessary and reasonable as requiring proof of fault would undermine deterrence of persons not assisting the Regulator, and the importance of the person complying with the direction by the Regulator. A person would still be able to rely on a defence of honest and reasonable mistake of fact if applicable.

## ***Part 9 – Compliance and enforcement***

### **Section 144 – Civil penalty provisions**

Section 144 is made for the purposes of paragraphs 308(1)(b), (c) and (d) of the OEI Act and deals with enforceable civil penalty provisions.

Subsection 144(2) provides that each civil penalty provision of this instrument is enforceable under Part 4 of the *Regulatory Powers (Standard Provisions) Act 2014* (Regulatory Powers Act). The note to this subsection clarifies that 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.

Subsection 144(3) is made for the purposes of paragraph 308(1)(c) of the OEI Act and deals with authorised applicants. This subsection provides that the listed persons are authorised applicants in relation to the specified civil penalty provisions of the regulations for the purposes of Part 4 of the Regulatory Powers Act.

Subsection 144(4) is made for the purposes of paragraph 308(1)(d) of the OEI Act and deals with relevant courts. This subsection provides that each of the listed courts is a relevant court in relation to the civil penalty provisions of the regulations for the purposes of Part 4 of the Regulatory Powers Act.

Part 4 of the Regulatory Powers Act is applied to increase consistency across the Commonwealth regarding how civil penalty provisions are applied. While unusual to appear

in delegated legislation, paragraphs 308(1)(a)-(d) of the OEI Act explicitly provide for these matters to appear in regulations.

#### Section 145 – Infringement notices

Subsection 145(2) is made for the purposes of paragraph 308(1)(e) of the OEI Act and deals with provisions subject to an infringement notice. This subsection provides that the listed provisions are subject to an infringement notice under Part 5 of the Regulatory Powers Act. The note to this subsection clarifies that Part 5 of the Regulatory Powers Act creates a framework for using infringement notices in relation to provisions.

Subsection 145(3) is made for the purposes of paragraph 308(1)(f) of the OEI Act and deals with infringement officers. This subsection provides that the listed people are infringement officers in relation to the specified provisions of the regulations for the purposes of Part 5 of the Regulatory Powers Act;

Subsection 145(4) is made for the purposes of paragraph 308(1)(g) of the OEI Act and deals with relevant chief executives. This subsection provides that the listed people are the relevant chief executives in relation to the provisions mentioned in subsection 145(2).

Part 5 of the Regulatory Powers Act is applied to increase consistency across the Commonwealth regarding how infringement notices are applied.

#### **Item 53 – Section 146**

This item repeals section 146 of the Principal Regulations and substitutes a new section 146.

#### Section 146 – Application fees

This section sets out, for the purposes of subsection 189(2) of the OEI Act, the amounts of fees for dealing with certain specified applications under the Amendment Regulations. Section 45 of the Principal Regulations will be renumbered as section 146 in item 4 of the Amending Regulations.

Paragraph 189(1)(a) of the OEI Act provides that the Commonwealth, the Regulator, or the Registrar on behalf of the Commonwealth may charge a fee for dealing with an application made under the OEI Act or the applied work health and safety provisions. The reference to ‘the Act’ in paragraph 189(1)(a) includes the Amendment Regulations pursuant to the definition of ‘this Act’ in section 8 of the OEI Act.

The applicable fees are currently set out in Part 3 of the Principal Regulations. Section 45 of the Principal Regulations contains a schedule of fees for licensing matters. These fees apply to applications to extend, vary, transfer or surrender a licence and applications for a change in control of a licence holder, assessment undertaken by the Regulator, and WHS fees. The Amendment Regulations replaces the fees provision in the Principal Regulations to include the application fees for management plans, safety zones and protection zones.

The fees charged include:

- (a) \$10,000 for assessing an initial plan approval application (item 10).
- (b) \$10,000 for assessing a plan revision approval application (item 11).
- (c) \$10,000 for assessing a safety zone application (item 12).
- (d) \$10,000 for assessing a protection zone application (item 13).

#### **Item 54 – At the end of Part 10**

This item adds a new subsection 148 at the end of Part 10.

#### Section 148 – Fees for the Regulator to perform or exercise functions or powers

Paragraph 189(2) of the OEI Act provides that the Commonwealth, the Regulator or the Registrar on behalf of the Commonwealth may charge a fee for performing or exercising any other function or power under the OEI Act or applied work health and safety.

The amount of a fee referred to as an “assessment fee” is the total amount of the expenses incurred by the Regulator in performing or exercising that function or power (new subsection 148(2)). The assessment fees provide a scalable cost recovery mechanism that can increase for very complex plans, ensuring cost recovery is proportionate to effort.

The regulatory functions for which assessment fees will be charged include assessment of:

- initial plan approval application
- plan revision approval application
- design notification
- safety zone application
- protection zone application

An assessment fee is due when the Regulator issues an invoice for the fee to the person who requested the performance or exercise of the function or power; and payable in accordance with the requirements of the invoice (new subsection 148(3)). The Regulator may remit the whole or a part of an amount of an assessment fee if the Regulator considers that there are good reasons for doing so (new subsection 148(4)). Where an amount of an assessment fee is owed by a person under this section, the Minister, the Registrar or the Regulator may decline to perform the function or exercise the power to which the fee relates until the amount is paid (new subsection 148(5)).

#### **Item 55 – At the end of Part 13**

This item inserts new sections 161, 162 and 163.

## Section 161 – Licence holder must notify Regulator of certain events

New section 161 provides that a licence holder must notify the Regulator as soon as reasonably practicable after the licence holder becomes aware that any of the events listed in paragraphs 161(1)(a) – (f) have occurred. This is an important mechanism for the Regulator to be alerted, and if necessary, respond, to events that have or have the potential to result in a dangerous high-risk situation including damage to infrastructure, a contravention of the specified obligations under the EPBC Act, marine vessel collisions or contraventions of safety and protection zones.

The note to subsection 161(1) is applicable to subparagraph 161(1)(c) which regards to a collision between a marine vessel and any licence infrastructure and refers to clause 26 of Schedule 1 to the regulations for a modification that affects the meaning of **notifiable incident** in the WHS Act as applied by Part 1 of Chapter 6 of the OEI Act.

A notification under this section must be made in the manner and form that is approved by the Regulator and published on the Regulator’s website and must be accompanied by any other information or documents required by the form.

New subsection 161(4) provides that it is an offence, with the maximum penalty being 60 penalty units, if a licence holder ought reasonably to have known that an event mentioned in subsection 161(1) has occurred in relation to the licence and does not give the Regulator a notification under subsection 161(1) as soon as practicable after becoming aware that the event occurred.

The offence is necessary and proportionate to the contravention of section 161. Compliance with section 161 and timely notification of these events enables the Regulator to monitor the licence holder and any relevant third party’s compliance with legislation (including the OEI Act, obligations under the EPBC Act and WHS Act as relevant). Notification also enables the Regulator to react quickly to matters which require a regulatory response and can help identify the cause and prevent other incidents happening again.

## Section 162 – Licence holder must give report to the Regulator

If a licence holder gives the Regulator a notification of an event under new subsection 161(1), this section requires the licence holder, before the end of 48 hours after the notification was given, to give the Regulator a report of the event including further details of the event and details of the licence holder’s response to the event.

A report under this section must be given in the manner and form that is approved by the Regulator, published on the Regulator’s website, and must be accompanied by any other information or documents required by the form.

New subsection 162(3) provides that it is an offence of strict liability, with a maximum penalty of 50 penalty units, if a licence holder gives the Regulator a notification in accordance with new subsection 161(1) and does not give the Regulator a report under new subsection 162(1) before the end of 48 hours after giving the notification.

The offence is necessary and proportionate to the contravention of section 162. Compliance with section 162 and timely notification of giving a report to the Regulator within 48 hours enables the Regulator to monitor the licence holder and any relevant third party's compliance with legislation (including the OEI Act, EPBC Act and WHS Act as relevant). Notification also enables the Regulator to react quickly to matters which require a regulatory response and can help identify the cause and prevent other incidents happening again.

Strict liability is necessary and reasonable as requiring proof of fault would undermine deterrence of persons not assisting the Regulator, and the importance of the person complying with the direction by the Regulator. A person would still be able to rely on a defence of honest and reasonable mistake of fact if applicable.

### Section 163 – Regulator may direct licence holder to give further reports

This section provides that if a licence holder gives the Regulator a notification of an event under the new subsection 161(1) of the regulations, the Regulator may, by written notice, require the licence holder to submit one or more written reports of the event.

The notice given by the Regulator must describe the information to be included in a report or the matters to be addressed. The notice must also specify a day or time by which the report must be given to the Regulator and which allows the licence holder a reasonable time to prepare the report.

New subsection 163(4) provides that it is an offence of strict liability, with a maximum penalty of 50 penalty units, if a licence holder does not give the Regulator a written report of the event in accordance with a notice given by the Regulator to the licence holder under subsection 163(1) in relation to the event.

The offence is necessary and proportionate to the contravention of section 163. Compliance with section 163 and timely reporting in response to a notice given by the Regulator enables the Regulator to monitor the licence holder and any relevant third party's compliance with legislation (including the OEI Act, EPBC Act and WHS Act as relevant). Notification also enables the Regulator to react quickly to further matters which require a regulatory response and can help identify the cause and prevent other incidents happening again.

Strict liability is necessary and reasonable as requiring proof of fault would undermine deterrence of persons not assisting the Regulator, and the importance of the person complying with the direction by the Regulator. A person would still be able to rely on a defence of honest and reasonable mistake of fact if applicable.

## **Schedule 2 – Amendments relating to Work Health and Safety**

### ***Offshore Electricity Infrastructure Regulations 2022***

#### **Item 1 – At the end of the instrument**

This item adds new **Schedule 1 – ‘Modifications of the Work Health and Safety Regulations 2011’** – at the end of the Amendment Regulations. Pursuant to new section 141,

new Schedule 1 modifies the WHS Regulations as they apply for the purposes of Part 1 of Chapter 6 of the OEI Act. Schedule 1 does not otherwise affect the WHS Regulations.

### ***Work Health and Safety Regulations 2011***

#### **Item 1 – Regulation 5 (after the heading)**

This item inserts a new note after the heading of regulation 5 in the WHS Regulations. The note provides that a number of expressions included in the WHS Regulations are defined in the OEI Act, as it applies and is modified because of Part 1 of Chapter 6 of the OEI Act, including the following:

- (a) Commonwealth offshore area;
- (b) management plan;
- (c) regulated offshore activities;
- (d) regulator;
- (e) related onshore premises.

#### **Item 2 – Subregulation 5(1)**

This item inserts new definitions in subregulation 5(1) of the WHS Regulations. These include:

- (a) ***accepted DSMS*** is defined as a DSMS that is accepted by the Regulator under regulation 168C or 168D. The note in this definition provides that acceptance of a DSMS ends after 5 years if it is withdrawn by the Regulator or if the Regulator accepts a revised version of the DSMS pursuant to regulation 168K of the WHS Regulations.
- (b) ***ADAS*** is defined as the Australian Diver Accreditation Scheme administered by the Board of the Australian Diver Accreditation Scheme.
- (c) ***approved diving project plan*** for a diving project means a diving project plan for the project that is approved under regulation 169B of the WHS Regulations by the holder of the OEI licence the project is connected with. The note in this definition provides that the holder of the OEI licence may withdraw the approval as regulation 169D requires withdrawal in certain circumstances.

#### **Item 3 – Subregulation 5(1) (paragraph (b) of the definition of *competent person*)**

This item repeals paragraph (b) in the definition of ***competent person*** under subregulation 5(1) of the WHS Regulations. Paragraph (b) relates to general diving work. The Amendment Regulations modify the WHS Regulations to account for diving work relating to OEI activities which are more specialist and with higher levels of risk involved. Therefore, general diving work provisions are not required in the OEI context.

#### Item 4 – Subregulation 5(1)

This item inserts new definitions in subregulation 5(1) of the WHS Regulations. These include:

- (a) **covers** is defined as when an accepted DSMS **covers** a diving project directly involving one or more persons conducting businesses or undertakings if:
  - (i) one of those persons gave the DSMS to the Regulator for acceptance; and
  - (ii) each of those persons is committed to complying with the DSMS, and the conditions (if any) on its acceptance, as the sole DSMS relevant to the project.

Note: Only one accepted DSMS can cover a diving project at any time.

- (b) **crewed submersible craft** means a craft that is designed to maintain its occupant, or some or all of its occupants, at or near atmospheric pressure while submerged (whether or not it is self-propelled, and whether or not it is supplied with breathing mixture by **umbilical**), including a craft in the form of a suit.
- (c) **directly involved** with a diving project, diving operation, or diving work included in a diving project, that is connected with an OEI licence: without limiting the persons conducting businesses or undertakings who are (apart from this definition) directly involved with the project, **operation** or work, the holder of the OEI licence is **directly involved** with the project, operation or work.
- (d) **diver** means a worker who carries out diving work.
- (e) **diving** has the meaning given by regulation 167A.
- (f) **diving operation** means one or more dives conducted as part of regulated offshore activities connected with a single OEI licence.

Note: Regulation 167B explains when a diving operation begins and ends.

- (g) **diving project** means an activity consisting of one or more diving operations connected with a single OEI licence.
- (h) **diving supervisor** means a person appointed under regulation 172A as a diving supervisor to supervise diving included in a diving operation.
- (i) **diving work** means work involving diving.
- (j) **DSMS** means a diving safety management system (whether revised or not).

#### Item 5 – Subregulation 5(1)

This item repeals the following definitions in the WHS Regulations as they are no longer relevant following the amendments provided under the Amendment Regulations:

- (a) definition of *fitness criteria*;
- (b) definition of *general diving work*;
- (c) definition of *high risk diving work*;
- (d) definition of *incidental diving work*;
- (e) definition of *limited diving*;
- (f) definition of *limited scientific diving work*.

#### **Item 6 – Subregulation 5(1)**

This item inserts new definitions in subregulation 5(1) of the WHS Regulations. These include:

- (a) *OEI licence* means a licence under the OEI Act.
- (b) *OEI licence holder*, in relation to an OEI licence, means the holder, within the meaning of the OEI Act, of the OEI licence.
- (c) *personnel lifting equipment* includes any of the following:
  - (i) an air stage;
  - (ii) a wet bell;
  - (iii) a closed bell;
  - (iv) a guide wire system.

#### **Item 7 – Regulation 6B**

This item repeals regulation 6B. Regulation 6B prescribes certain courts of a State or Territory for the purpose of 273A of the WHS Act. Paragraph 239(c) of the OEI Act disapplies paragraph 273A(1)(d) of the WHS Act and therefore this definition is not required,

#### **Item 8 – Regulation 11A**

This item repeals and substitutes regulation 11A to clarify the extraterritorial application of the WHS Regulations into the Commonwealth offshore area.

##### Regulation 11A – Extraterritoriality

New subregulations 11A(1) provides that the WHS Regulations extend to acts, matters and things in the Commonwealth offshore area.

Regulations 59, 61, 64, 294, 295 and Chapter 5 extend to acts, matters and things outside Australia relating to plant or structures that are, or are reasonably expected to be, used as or at

a workplace in the Commonwealth offshore area where regulated offshore activities are, or are reasonably expected to be, carried out (new subregulation 11A(2)).

Subdivisions 1 and 2 of Division 2 of Part 7.1 extend to acts, matters and things outside Australia relating to substances, mixtures, articles and hazardous chemicals that are, or are reasonably expected to be, used at a workplace in the Commonwealth offshore area where regulated offshore activities are, or are reasonably expected to be, carried out (new subregulation 11A(3)).

Any provisions of these Regulations that are not mentioned in new subregulations 11A(2) and (3) extend to acts, matters and things outside Australia so far as is necessary for the operation under one of those subregulations of a provision mentioned in that subregulation (new subregulation 11A(4)).

New subregulation 11A(5) provides that the subregulations of this regulation do not limit one another.

### **Item 9 – Before Division 1 of Part 2.1.**

Item 11 inserts new Division 1A – Consultation before Division 1 of Part 2.1 of the WHS Regulations.

#### ***Division 1A – Consultation***

##### Regulation 15A – Consultation when preparing or revising management plan under the OEI Act

This regulation provides that the preparation of a management plan under the OEI Act, so far as it might affect the health or safety of workers, is prescribed as an activity for purposes of section 49 of the WHS Act.

Section 49 of the WHS Act provides for when consultation is required in relation to health and safety matters.

This consultation is of a different nature to that required under Subdivision D as it relates specifically to consultation with workers on matters of work health and safety for the purposes of Division 2 of Part 5 of the WHS Act. For clarity, this consultation is restricted to work health and safety matters, and the duty applies to licence holders and not all persons conducting a business or undertaking.

##### Regulation 15B – Consultation with unions where there are no workers to consult

This regulation provides that if consultation in accordance with Division 2 under Part 5 of the WHS Act is required under new regulation 15A, and there are no such workers at the time the consultation is required to be carried out, the licence holder must consult with each union that the licence holder considers will be reasonably likely to represent the industrial interests of the future workforce.

### **Item 10 – After paragraph 21(2)(b)**

This item inserts new paragraph 21(2)(c) which provides that, in approving a course of training for work health and safety representatives for subsection 72(1) of the WHS Act, the Regulator may have regard to any relevant matters, including for any approval (however described) of the training by a corresponding regulator, or by an authority of the Commonwealth that has functions similar to those functions of the Regulator that relate to work health and safety.

### **Item 11 – After paragraph 25(3)(b)**

This item inserts new paragraph 25(3)(c) which provides that, for the purpose of approving training for work health and safety entry permits, the Regulator may have regard to any relevant matters, including any approval (however described) of the training by a corresponding Regulator, or by an authority of the Commonwealth that has functions similar to those functions of the Regulator that relate to work health and safety.

### **Item 12 – Subparagraph 28(b)(i)**

This item repeals and substitutes subparagraph 28(b)(i) that provides that a notice of entry under section 119 of the WHS Act must also include a declaration that the union is entitled to represent the industrial interests of a worker who works at a workplace (in the Commonwealth offshore area) where there are carried out regulated offshore activities in relation to which the workplace entered is related onshore premises, and who is a member, or eligible to be a member, of that union.

The right of entry provisions, under section 237 of the OEI Act, permit entry to workplaces that are “related onshore premises”, and not to the actual offshore workplaces where relevant workers work. The OEI Act provides that WHS entry permits apply to the onshore premises because OEI will not normally be manned and relevant documents and systems relating to suspected contraventions will be accessible at onshore premises rather than at the location of the OEI. Further, there are significant logistical and safety risks associated with permit holders accessing remote and high-hazard OEI without notice.

Item 12 modifies subparagraph 28(b)(i) of the WHS Regulations to align with the OEI Act and reflect the fact that a worker does not technically carry out work at the workplace entered under a right of entry.

### **Item 13 – Paragraph 30(a)**

This item repeals and substitutes paragraph 30(a) that provides that a notice of entry under section 122 of the WHS Act must also include that the union is entitled to represent the industrial interests of a worker who works at a workplace (in the Commonwealth offshore area) where there are carried out regulated offshore activities in relation to which the workplace proposed to be entered is related onshore premises, and who is a member, or eligible to be a member, of that union.

The right of entry provisions, under section 237 of the OEI Act, permit entry to workplaces that are “related onshore premises”, and not to the actual offshore workplaces where relevant workers work. Item 13 modifies paragraph 30(a) of the WHS Regulations to reflect the fact that a worker does not technically carry out work at the workplace entered under a right of entry.

#### **Item 14 – Paragraphs 89(2)(b) and (c)**

This item repeals paragraphs 89(2)(b) and (c). This is to allow non-Commonwealth workers to apply for high-risk work licences which is necessary for the OEI context.

#### **Item 15 – Paragraph 142(1)(a)**

This item omits “, that is at least 6 metres in height” in paragraph 142(1)(a).

Paragraph 142(1)(a) has been modified to be appropriate for the OEI context. Currently, the measurements are not from the water level but rather the ground level. Demolition notices will apply to all structures or parts of structures that are loadbearing or otherwise related to physical integrity of the structure, regardless of height.

#### **Item 16 – Subregulation 142(5)**

This item repeals subregulation 142(5) which relates to the height reference in paragraph 142(1)(a) which has been omitted as above.

#### **Item 17 – Part 4.8**

This item repeals and substitutes Part 4.8 - Diving work.

While Part 4.8 of the WHS Regulations already governs diving work, these provisions are not considered to be appropriate for the OEI context. They are targeted more towards the risk profile of onshore (i.e. river and lake) and coastal water diving, as opposed to the higher risks associated with the deep-sea commercial diving that will take place for OEI projects. OEI diving work will be akin to the diving that takes place in offshore petroleum and gas projects, meaning that the diving provisions employed under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* will provide a better model for diving purposes. These provisions are set out in Chapter 4 of the *Offshore Petroleum and Greenhouse Gas Storage (Safety) Regulations 2009* (OPGGS Safety Regulations). This is in recognition of the unique and high-risk nature of offshore diving and that the same diving contractors will be operating across both industries. Implementing similar diving regulations for both industries increases safety for divers because it enables diving contractors to manage these similar operations under a consistent diving safety management system for both industries.

Part 4.8 of the WHS Regulations have therefore been replaced with regulations that are similar to Chapter 4 of the OPGGS Safety Regulations. Minor modifications have been made to tailor the provisions for the OEI context and to achieve harmonisation with the definitions, concepts and general regulatory approach taken in the wider WHS Regulations and OEI Regulations.

## ***Part 4.8 – Diving Work***

### ***Division 1 – Preliminary***

#### **Regulation 167A – Meaning of diving**

This regulation inserts a new meaning of diving. The regulation provides that for the purposes of the WHS Regulations, a person is diving if the person is in a chamber inside which the ambient pressure is equal to or higher than the hydrostatic pressure at a depth of 1 metre in seawater (whether or not the chamber is submerged in water or another liquid); or is submerged in water or another liquid and the person's lungs are subjected to a pressure greater than atmospheric pressure (whether or not the person is wearing a wetsuit or other protective clothing); or is in a crewed submersible craft that is submerged in water or another liquid (subregulation 167A(1)). For clarity diving also includes diving using a snorkel and diving without the use of any breathing apparatus (subregulation 167A(2)).

Subregulation 167A(3) provides that diving does not include diving using a snorkel for the purpose of conducting an environmental survey; or diving without the use of any breathing apparatus for that purpose.

#### **Regulation 167B – When a diving operation begins and ends**

This regulation provides for when a diving operation begins and ends. For the WHS Regulations a diving operation begins when the diver, or first diver, who takes part in the operation starts to prepare to dive (subregulation 167B(1)). A diving operation ends when the diver, or last diver, who takes part in the operation leaves the water or the chamber or environment in which the dive took place and has completed any necessary decompression procedures (subregulation 167B(2)).

For certainty a diving operation includes the time taken for therapeutic recompression if that is necessary (subregulation 167B(3)).

### ***Division 2 – Diving safety management systems***

#### **Regulation 168A – No diving without accepted DSMS**

This regulation establishes a penalty provision whereby a person conducting a business or undertaking at a workplace must not direct or allow diving work included in a diving project to be carried out at the workplace unless there is an accepted diving safety management system (DSMS) that covers the project.

A person who contravenes this regulation may be subject to the tier D monetary penalty. This penalty and amount is necessary and proportionate to the contravention of regulation 168A. Compliance with DSMS is vital to the health and safety of persons diving and the amounts reflect the dangers associated with diving. It is noted that section 12F of the WHS Act provides that strict liability applies to each physical element of each offence under the WHS Act, unless otherwise stated. The reference in section 12F of the WHS Act includes the WHS Regulations as amended by the Amendment Regulations. Strict liability is necessary and

reasonable as requiring proof of fault would undermine deterrence of persons not complying with the WHS regulations, and the importance of the person complying with DSMS. A person would still be able to rely on a defence of honest and reasonable mistake of fact if applicable.

### Regulation 168B – Content of DSMS

Subregulation 168B(1) provides that a DSMS must meet the minimum standards set out in guidelines made by the Regulator for this subregulation, as in force from time to time. A DSMS is required to include national standards, codes and procedures for diving that have been developed by bodies such as the Council of Standards for Australia and New Zealand, and the Australian Diver Accreditation Scheme. As these standards are updated regularly it is appropriate that the Regulator sets out the current standards in guidelines, which will be updated from time to time, to assist licence holders to understand their obligations and meet the requirements for a DSMS.

Subregulation 168B(2) details that a DSMS must provide for:

- (a) all activities connected with a diving project; and
- (b) the preparation of a diving project plan, in accordance with Division 3 of the Amendment Regulations, for a diving project (including consultation with workers in the preparation of the plan) and the revision of the plan as necessary; and
- (c) the continual and systematic identification of hazards related to a diving project; and
- (d) the continual and systematic assessment of:
  - (i) the likelihood of the occurrence, during normal or emergency situations, of injury or damage associated with those hazards; and
  - (ii) the likely nature of any injury or damage; and
- (e) the elimination of risks to workers involved with a diving project and associated work including:
  - (i) risks arising during evacuation, escape and rescue in case of emergency; and
  - (ii) risks to workers arising from plant for diving;
  - (iii) or the reduction of those risks to as low as reasonably practicable; and
- (f) the inspection and maintenance of, and testing programs for, equipment and hardware that is integral to the control of those risks; and
- (g) communications between persons involved with a diving project; and
- (h) the performance standards that apply to the DSMS; and

- (i) a program of continuous improvement.

A DSMS must also specify any standard or code of practice that is to be used in a diving project and require the diving to be carried out in accordance with those standards or codes (new subregulation 168B(3))

A DSMS must also contain any information that is reasonably necessary to demonstrate that the DSMS complies with these Regulations, and a system for the management of change (new subregulation 168B(4)).

#### Regulation 168C – Acceptance of new DSMS

This regulation provides that a person conducting a business or undertaking may give a DSMS to the regulator for acceptance.

Within 60 days after receiving the DSMS, the Regulator must accept or reject the DSMS. If the Regulator accepts the DSMS, the Regulator may place conditions on the acceptance (subregulation 168C(2)). It is noted that regulation 168E affects acceptance or rejection by the Regulator and a decision to reject a DSMS or place conditions on acceptance of a DSMS is a reviewable decision (see regulation 676).

As soon as practical after making a decision under subregulation 168C(2), the Regulator must notify the person of its decision (new subregulation 168C(3)).

#### Regulation 168D – Acceptance of revised DSMS

This regulation provides for the acceptance of a revised DSMS. If a person conducting a business or undertaking revises an accepted DSMS, the person may give the revised DSMS to the Regulator for acceptance. Noting that new regulations 168H and 168J require the person to revise the DSMS and give the revised DSMS to the Regulator in certain circumstances (new subregulation 168D(1)).

The Regulator must accept or reject the revised DSMS within 28 days after receiving it or another period agreed between the Regulator and the person. If the Regulator accepts the revised DSMS, the Regulator may place conditions on the acceptance. Noting that new regulation 168E affects acceptance or rejection by the Regulator and a decision to reject a DSMS or place conditions on acceptance of a DSMS is a reviewable decision (see regulation 676) (new subregulation 168D(2)).

As soon as practical after making a decision under subregulation 168D(2), the Regulator must notify the person of its decision (new subregulation 168D(3)).

#### Regulation 168E – Grounds for rejecting DSMS

This regulation provides for the grounds to reject a DSMS. The Regulator must reject a DSMS if the Regulator is not satisfied that the DSMS adequately complies with new regulation 168B, or that consultation required by regulation 170A was carried out in developing or revising the DSMS.

### Regulation 168F – Notice of reasons

This regulation provides that if the Regulator decides to reject a DSMS, the Regulator must set out, in writing, with the notice mentioned in new subregulation 168C(3) or 168D(3), the reasons for rejecting the DSMS.

If the Regulator decides to impose conditions on acceptance of a DSMS, the Regulator must set out, in writing, with the notice mentioned in new subregulation 168C(3) or 168D(3), the conditions and the reasons for imposing them (subregulation 168F(2)).

### Regulation 168G – Register of DSMSs

This regulation provides that the Regulator must keep a publicly accessible register of each DSMS it receives. The register must record as many of the following details as apply to the DSMS, the name of the person conducting a business or undertaking who gave the DSMS to the Regulator, the date of acceptance, any conditions on acceptance, the date of rejection, the date that acceptance ended (subregulation 168G(2)).

### Regulation 168H – Revision of DSMS because of developments or changes

This regulation provides that a DSMS must be revised in certain circumstances. A person conducting a business or undertaking who has an accepted DSMS must revise the DSMS and give the revised DSMS to the Regulator for acceptance if:

- (a) developments in scientific or technical knowledge, or in the assessment of hazards, relevant to diving projects make it appropriate to do so; or
- (b) as a result of changes to the guidelines mentioned in subregulation 168B(1), the DSMS does not meet the minimum standards set out in the changed guidelines; or
- (c) a significant change is proposed to a matter that new regulation 168B requires the DSMS to address. It is noted that under new regulation 168K, the regulator may withdraw the acceptance of the DSMS if the person does not give the Regulator a revised DSMS in circumstances required by this regulation.

### Regulation 168J – Notice to revise DSMS

This regulation provides for the Regulator to give a notice to revise an accepted DSMS and give the revised DSMS to the Regulator for acceptance. The revision notice must be in writing and must set out the matters to be revised, the time within which the revised DSMS must be given to the Regulator for acceptance, and the reasons why the revision is necessary (subregulation 168J(2)).

The person may make a submission in writing to the Regulator, within 21 days after receiving the revision notice or any longer period that the Regulator allows in writing, setting out the person's reasons for any of the following, why the revision is not necessary, why the revision should be in different terms from those proposed, why the time within which the revised DSMS must be given to the Regulator for acceptance should be extended (subregulation

168J(3)). If a person makes a submission under subregulation 168J(3), the Regulator must, within 28 days after receiving the submission, decide whether the Regulator accepts the reasons in the submission, and give the person notice in writing affirming, varying or withdrawing the revision notice, and if the Regulator decides not to accept the reasons or any part of them—set out in the notice the grounds for not accepting them (new subregulations 168J(4)).

Subregulation 168J(5) provides that a person must revise the DSMS, and give the Regulator the revised DSMS for acceptance, in accordance with the revision notice as originally given or as varied under subregulation 168J(4), unless the revision notice is withdrawn.

It is noted that under regulation 168K, the Regulator must withdraw the acceptance of the DSMS if the person does not give the revised DSMS to the Regulator.

#### Regulation 168K – End of acceptance of DSMS

This regulation provides that the acceptance of a DSMS by the Regulator ends 5 years after the acceptance, or if the Regulator withdraws the acceptance under this regulation, or if the Regulator accepts a revised version of the DSMS under regulation 168D. This provision recognises the important role of a DSMS in ensuring diving safety by providing they are revised at least every five years. This also aligns with the requirement for the 5-year revision for a management plan (see new section 56 above).

The Regulator may withdraw acceptance of a DSMS if the Regulator is satisfied that a person has failed to give the Regulator a revised version of the DSMS as required by regulation 168H (new subregulation 168K(2)). Noting that a decision to withdraw acceptance of a DSMS under this subregulation is a reviewable decision (see regulation 676).

Subregulation 168K(3) provides that the Regulator must withdraw acceptance of a DSMS if a person fails to revise the DSMS and give the revised DSMS to the Regulator as required by new subregulation 168J(5).

### ***Division 3 – Diving project plans***

#### Regulation 169A – No diving without diving plan approved by OEI licence holder

This regulation establishes a penalty provision whereby a person conducting a business or undertaking who is directly involved with a diving project must not direct or allow diving work included in the project to be carried out unless there is an approved diving project plan for the project.

A person who contravenes this regulation may be subject to the tier D monetary penalty applies. This penalty and amount is necessary and proportionate to the contravention of regulation 169A. Diving plans are vital to the health and safety of persons diving and the amounts reflect the dangers associated with diving.

It is noted that section 12F of the WHS Act provides that strict liability applies to each physical element of each offence under the WHS Act, unless otherwise stated. The reference

in section 12F of the WHS Act includes the WHS Regulations as amended by the Amendment Regulations. Strict liability is necessary and reasonable as requiring proof of fault would undermine deterrence of persons not complying with the WHS regulations, and the importance of the person complying with diving plans. A person would still be able to rely on a defence of honest and reasonable mistake of fact if applicable.

#### Regulation 169B – Approval of diving project plan by OEI licence holder

This regulation provides for the process of approval of a diving project plan by licence holders. A diving project plan is a detailed plan to manage a specific diving project. Responsibility for approving the diving project plan rests with the licence holder, even if it has been prepared by a diving contractor as the person conducting a business or undertaking, to ensure that activities set out in the diving project plan are carried out in accordance with the DSMS.

The Department considers it appropriate that the licence holder, as the entity in control of the project has a direct duty to ensure that the person conducting a business or undertaking is always capable of carrying out its duties under the OEI Act and regulations.

The holder of an OEI licence may approve a diving project plan (as originally made or as revised) for a diving project connected with the licence, if the holder is satisfied that the plan meets the requirements in new regulation 169C, and consultation required by new regulation 170A was carried out in developing or revising the plan.

The OEI licence holder must ensure that there is not more than one approved diving project plan for the diving project at any time (subregulation 169B(2)). On request by the Regulator, the OEI licence holder must give the Regulator a copy of a diving project plan approved by the OEI licence holder (subregulation 169B(3)).

If a licence holder does not give the Regulator a copy of the diving project plan on request, they may be subject to the tier H monetary penalty. Section 12F of the WHS Act provides that strict liability applies to each physical element of each offence under the Act, unless otherwise stated. This penalty and amounts are necessary and proportionate to the contravention of regulation 169B. Diving project plans are vital to the health and safety of persons diving and the amounts reflect the dangers associated with diving. It is important for the Regulator to have visibility of the diving project plan to ensure compliance and integrity within the scheme.

It is noted that section 12F of the WHS Act provides that strict liability applies to each physical element of each offence under the WHS Act, unless otherwise stated. The reference in section 12F of the WHS Act includes WHS Regulations as amended by the Amendment Regulations. Strict liability is necessary and reasonable as requiring proof of fault would undermine deterrence of persons not complying with the WHS regulations, and the importance of the person complying with diving project plan requests. A person would still be able to rely on a defence of honest and reasonable mistake of fact if applicable.

## Regulation 169C – Contents of diving project plan

This regulation provides the detail that must be set out in a diving project plan such as including a description of the work to be done, a description of the plant for diving to be used in the project and the procedures to be followed in operating the plant to minimise the risks to the health and safety of workers.

The diving project plan must describe each diving operation included in the diving project (new subregulation 169C(2)). The diving project plan must not specify as a diving operation a task that is too complex, or too big, to be supervised safely by one diving supervisor (new subregulation 169C(3)).

The diving project plan must provide for adequate communications between a person who is directly involved with the diving project and each relevant person conducting a business or undertaking, worker, vessel, or aircraft or onshore installation, offshore installation (new subregulation 169C(4)).

## Regulation 169D – Revision, or withdrawal of approval, of diving project plan

This regulation requires revision of an approved diving project plan for a diving project if a modification, or proposed modification, of the diving project significantly increases the overall risk, or a specific risk, of a diving operation included in the project, or the plan no longer meets the requirements of regulation 169C.

A note under paragraph 169D(1)(b) provides an example of when an approved diving project plan no longer meets the requirements of paragraph 169C(1)(j), which that the accepted DSMS that covers the project or the management plan for the OEI licence connected with the project has changed.

The OEI licence holder that has approved a diving project plan must withdraw the approval as soon as reasonably practicable after becoming aware that there has been a failure to revise the plan. The licence holder may be subject to the tier D monetary penalty if they do not comply with this regulation.

This penalty amount is necessary and proportionate to the contravention of regulation 169D. DPP's are vital to the health and safety of persons diving and the amounts reflect the dangers associated with diving. It is important for that the diving project plans are up to date or withdrawn when necessary, so for compliance and integrity within the scheme.

It is noted that section 12F of the WHS Act provides that strict liability applies to each physical element of each offence under the WHS Act, unless otherwise stated. The reference in section 12F of the WHS Act includes WHS Regulations as amended by the Amendment Regulations. Strict liability is necessary and reasonable as requiring proof of fault would undermine deterrence of persons not complying with the WHS regulations, and the importance of the person complying with diving project plan requests. A person would still be able to rely on a defence of honest and reasonable mistake of fact if applicable.

#### ***Division 4 – Involvement of divers and other workers***

##### **Regulation 170A – Involvement of divers and other workers in DSMS and diving project plan**

This regulation provides that in developing or revising a DSMS, a person conducting a business, or an undertaking must consult with divers and other workers who the person reasonably considers are likely to work on a diving project for which the DSMS may be appropriate.

In developing or revising a diving project plan for a diving project, a person conducting a business or undertaking must also consult with divers and other workers the person reasonably considers are likely to work on the project (subregulation 170A(2)). When giving a DSMS to the Regulator for acceptance, the person must set out in writing details of the consultation that took place, including any submissions or comments made during the consultation and any changes made to the DSMS as a result of the consultation (subregulation 170A(3)).

#### ***Division 5 – Safety responsibilities***

##### **Regulation 171A – General safety responsibilities relating to diving work**

This regulation provides that a person conducting a business or an undertaking at a workplace must manage risks to health and safety associated with diving work, in accordance with new Part 3.1. This relates to the person's primary duty of care under section 19 of the WHS Act.

Subregulation 171A(2) provides that a person conducting a business or undertaking who is directly involved with diving work included in a diving project must ensure that the work is carried out in a way that complies with the accepted DSMS (and any conditions) that covers the project and the approved diving project plan. A person who contravenes this regulation may be subject to the tier D monetary penalty.

This penalty and amount is necessary and proportionate to the contravention of regulation 171A as managing risks to health and safety associated with diving work is vital to the health and safety of persons diving and the amounts reflect the dangers associated with diving.

It is important that these responsibilities are taken seriously and as such, strict liability applies. It is noted that section 12F of the WHS Act provides that strict liability applies to each physical element of each offence under the WHS Act, unless otherwise stated. The reference in section 12F of the WHS Act includes WHS Regulations as amended by the Amendment Regulations. Strict liability is necessary and reasonable as requiring proof of fault would undermine deterrence of persons not complying with the WHS regulations. A person would still be able to rely on a defence of honest and reasonable mistake of fact if applicable.

## Regulation 171B – Safety in the diving area

This regulation provides that at each place of diving, before the beginning of a diving operation included in a diving project, a person conducting a business or an undertaking who is directly involved with the operation must ensure that all divers and other workers who will be engaged in the diving operation are aware, and that there is a copy available to them, of:

- (a) the instrument by which the diving supervisor for the operation was appointed under new regulation 172A;
- (b) the accepted DSMS that covers the diving project;
- (c) any conditions on the acceptance of the DSMS; and
- (d) the approved diving project plan.

A person who contravenes this regulation may be subject to the tier H monetary penalty.

Subregulation 171B(2) also provides that all divers must also be aware of the tasks and duties of each person involved with the dive, the diving equipment, breathing gases and procedures to be used in the dive and the dive time, bottom time and decompression profile for the dive. A person who contravenes this regulation may be subject to the tier H monetary penalty.

Subregulation 171B(3) provides that a diver or other worker engaged in a diving operation must comply with a direction under subregulation 172B(3) and an instruction under subregulation 172B(5). A person who contravenes this regulation may be subject to the tier G monetary penalty.

The above penalties and amounts are necessary and proportionate to the contravention of regulation 171B as managing risks to health and safety associated with diving work is vital to the health and safety of persons diving and the amounts reflect the dangers associated with diving. Having access to the above information will assist persons involved understand the safety requirements and parameters they are to operate under.

It is noted under each subregulation that section 12F of the WHS Act provides that strict liability applies to each physical element of each offence under the WHS Act, unless otherwise stated. The reference in section 12F of the WHS Act includes WHS Regulations as amended by the Amendment Regulations. Strict liability is necessary and reasonable as requiring proof of fault would undermine deterrence of persons not complying with the WHS regulations. A person would still be able to rely on a defence of honest and reasonable mistake of fact if applicable.

## Regulation 171C – Diving depths

This regulation requires a person conducting a business or an undertaking who is directly involved with a surface-oriented diving operation involving the use of air or mixed gas as a breathing medium to not direct or allow the operation to be carried out at a depth of more

than 50 metres. A person who contravenes this regulation may be subject to the tier D monetary penalty.

Subregulation 171C(2) also requires a person conducting a business or an undertaking who is directly involved with a diving operation that is carried out at a depth of more than 50 metres to ensure that the diving operation involves the use of a closed diving bell and a suitable mixed gas breathing medium or a crewed submersible craft. A person who contravenes this regulation may be subject to the tier D monetary penalty.

The above penalties and amounts are necessary and proportionate to the contravention of regulation 171C as managing risks to health and safety associated with diving work and maximum depth of 50 metres is vital to the health and safety of persons diving and the amounts reflect the dangers associated with diving.

It is noted under each subregulation that section 12F of the WHS Act provides that strict liability applies to each physical element of each offence under the WHS Act, unless otherwise stated. The reference in section 12F of the WHS Act includes WHS Regulations as amended by the Amendment Regulations. Strict liability is necessary and reasonable as requiring proof of fault would undermine deterrence of persons not complying with the WHS regulations. A person would still be able to rely on a defence of honest and reasonable mistake of fact if applicable.

### ***Division 6 – Diving supervisors***

#### **Regulation 172A – Appointment of diving supervisors**

This regulation requires a person conducting a business or an undertaking who is directly involved with a diving operation to ensure that one or more diving supervisors are appointed, in writing, to supervise all diving included in the operation. A person who contravenes this regulation may be subject to in the tier G monetary penalty.

Subregulation 172A(2) requires a person conducting a business or an undertaking who is directly involved with a diving operation to ensure that a person who is appointed as a diving supervisor for a diving operation is both qualified and competent. A person who contravenes this regulation may be subject to the tier G monetary penalty.

The above penalties and amounts are necessary and proportionate to the contravention of regulation 172A as managing risks to health and safety by having diving supervisors is vital to the health and safety of persons diving and the amounts reflect the dangers associated with diving.

It is noted under each subregulation that section 12F of the WHS Act provides that strict liability applies to each physical element of each offence under the WHS Act, unless otherwise stated. The reference in section 12F of the WHS Act includes WHS Regulations as amended by the Amendment Regulations. Strict liability is necessary and reasonable as requiring proof of fault would undermine deterrence of persons not complying with the WHS

regulations. A person would still be able to rely on a defence of honest and reasonable mistake of fact if applicable.

#### Regulation 172B – Duties of diving supervisors

This regulation sets out the duties of a diving supervisor. A diving supervisor must not fail to discharge a duty under subregulation 172B(1) as a person who contravenes this regulation may be subject to the tier G monetary penalty.

Subregulation 172B(3) allows a diving supervisor, when supervising a diving operation, to give reasonable directions to a worker taking part in the operation as necessary to enable the diving supervisor to comply with new subparagraph 172B(1)(a)(i).

Subregulation 172B(4) provides that a diving supervisor must not dive while on duty as diving supervisor. A person who contravenes this regulation may be subject to the tier G monetary penalty.

Subregulation 172B(5) requires a diving supervisor for a diving operation included in a diving project to tell each worker who takes part in the operation any instruction that is in the approve diving project plan for the diving project and applies to the worker. A person who contravenes this regulation to do so will result in the tier G monetary penalty.

The above penalties and amounts are necessary and proportionate to the contravention of regulation 172B as ensuring diving supervisors discharge their duties correctly is vital to the health and safety of persons diving and the amounts reflect the dangers associated with diving.

It is noted under each subregulation that section 12F of the WHS Act provides that strict liability applies to each physical element of each offence under the WHS Act, unless otherwise stated. The reference in section 12F of the WHS Act includes WHS Regulations as amended by the Amendment Regulations. Strict liability is necessary and reasonable as requiring proof of fault would undermine deterrence of persons not complying with the WHS regulations. A person would still be able to rely on a defence of honest and reasonable mistake of fact if applicable.

A penalty is included for body corporates despite a diving supervisor not being able to be a body corporate. This is so that a body corporate who commits an ancillary offence would be punishable as if the body corporate had committed the primary offence.

#### ***Division 7 – Start-up notices***

##### Regulation 173A – Start-up notice

This regulation provides that the holder of an OEI licence must give the Regulator a start-up notice for a diving project connected with the licence at least 28 days before the day when diving is to begin or on another day agreed between the Regulator and the OEI licence holder. This requirement is necessary to give the Regulator time to consider the safety of the

dive before it begins, ensure the dive activities align with the diving project plan, conduct an inspection if necessary, or to stop a dive if there are safety concerns.

A person who fails to comply with subregulation 173A(1) may be subject to the tier D monetary penalty.

Under subregulation 173A(2), a person conducting a business or undertaking is subject to a penalty if they direct or allow diving work included in a diving project to be carried out at a workplace where a start-up notice for the project has not been given to the regulation. A person who contravenes this regulation may be subject to the tier D monetary penalty.

The above penalty and amount is necessary and proportionate to the contravention of regulation 173A as ensuring diving supervisors discharge their duties correctly is vital to the health and safety of persons diving and the amounts reflect the dangers associated with diving.

It is noted under each subregulation that section 12F of the WHS Act provides that strict liability applies to each physical element of each offence under the WHS Act, unless otherwise stated. The reference in section 12F of the WHS Act includes WHS Regulations as amended by the Amendment Regulations. Strict liability is necessary and reasonable as requiring proof of fault would undermine deterrence of persons not complying with the WHS regulations. A person would still be able to rely on a defence of honest and reasonable mistake of fact if applicable.

Subregulation 173A(3) provides for the information a start-up notice for a diving project connected with an OEI licence must contain.

### ***Division 8 – Diving operations***

#### **Regulation 174A – Divers in diving operations**

This regulation provides that a person conducting a business or an undertaking who is directly involved with a diving operation, or a diving supervisor for a diving operation, must not direct or allow a worker to dive in the diving operation if the worker is not competent to carry out safely any activity that is reasonably likely to be necessary while the worker is taking part in the operation. A person who contravenes this regulation may be subject to the tier D monetary penalty.

Subregulation 174A(2) provides that a person conducting a business or an undertaking who is directly involved with a diving operation, or a diving supervisor for a diving operation, must not direct or allow a worker to dive in the diving operation if the worker does not have a current diving qualification under the Australian Diver Accreditation Scheme to carry out any activity that is reasonably likely to be necessary while the worker is taking part in the operation. A person who contravenes this regulation may be subject to the tier D monetary.

Subregulation 174A(3) provides that a person conducting a business or an undertaking who is directly involved with a diving operation, or a diving supervisor for a diving operation, must not direct or allow a worker to dive in the diving operation unless:

- (a) the worker has a valid medical certificate; and
- (b) the diving work to be done by the worker is consistent with the conditions (if any) to which the certificate is subject.

A person who contravenes this regulation may be subject to the tier D monetary penalty.

The above penalties and amounts are necessary and proportionate to the contravention of regulation 173B as ensuring persons diving have the appropriate competencies, qualifications and valid medical certificates, is vital to the health and safety of persons diving and the amounts reflect the dangers associated with diving.

It is noted under each subregulation that section 12F of the WHS Act provides that strict liability applies to each physical element of each offence under the WHS Act, unless otherwise stated. The reference in section 12F of the WHS Act includes WHS Regulations as amended by the Amendment Regulations. Strict liability is necessary and reasonable as requiring proof of fault would undermine deterrence of persons not complying with the WHS regulations. A person would still be able to rely on a defence of honest and reasonable mistake of fact if applicable.

Subregulations 174A(2) and (3) do not apply if the worker is diving in a crewed submersible craft or is diving to provide emergency medical care to an injured person in a chamber.

#### Regulation 174B – Medical certificates

This regulation provides that a diver's medical certificate is valid if, including if it is valid for the United Kingdom under any law of the United Kingdom (as in force from time to time) relating to the medical fitness of persons employed as divers:

- (a) it certifies that, at the time it was given, the diver was fit to dive in accordance with the fitness requirements in AS/NZS 2299 as in force at the time the medical practitioner who gave the certificate examined the diver; and
- (b) it is not more than 1 year old; and
- (c) the medical practitioner who gave it:
  - (i) is accredited by the South Pacific Underwater Medicine Society, the Health and Safety Executive of the United Kingdom or the Undersea and Hyperbaric Medical Society; or
  - (ii) has completed an appropriate course of training conducted by the Royal Australian Navy or the Royal Adelaide Hospital; or

- (iii) is a competent person to conduct medical examinations for occupational diving;  
and
- (d) before giving it, the medical practitioner examined the diver in accordance with the Schedule of Minimum Examination Requirements in AS/NZS 2299 as in force at the time of the examination; and
- (e) immediately after the examination, the medical practitioner entered the certificate in the diver's log book.

This provision incorporates standards and UK law as in place from time to time. This subdelegation is authorised by paragraph 276(3)(c) of the WHS Act, as applied by section 226 of the OEI Act under subsection 243(2) of the OEI Act.

Paragraph 276(3)(d) of the WHS Act allows regulations to apply, adopt or incorporate any matter contained in any document formulated, issued or published by a person or body whether with or without modification or as in force at a particular time or as in force or remade from time to time.

In allowing for the adoption of non-legislative instruments as in force or existing from time to time, consideration has been given to the fundamental principle of the Legislation Act, and of access to justice, that people are easily able to understand their rights and obligations at law. It is important that the fitness requirements use the latest industry standards and that divers are not required to use superseded standards because of the way they have been incorporated into the Principal Regulations.

## ***Division 9 – Records***

### **Regulation 175A – Keeping DSMS and diving project plan**

This regulation applies to a person conducting a business or undertaking who gives the Regulator a DSMS that the Regulator accepts or to a holder of an OEI licence who approves a diving project plan for a diving project. Subregulation 175A(2) requires that person, who gave the DSMS, to keep the DSMS until 7 years have passed since the end of the acceptance of the DSMS. A person who contravenes this regulation may be subject to the tier I monetary penalty.

Subregulation 175A(3) requires the person who approved the diving project plan for a diving project to keep the plan until 7 years have passed since the end of the project. A person who contravenes this regulation may be subject to the tier I monetary penalty.

Subregulation 175A(4) requires the person to, for the period for which the person must keep the DSMS or plan under new regulation 175A, ensure a copy is available, following a request, to any worker engaged to carry out the work to which the DSMS or plan relates. The person may be subject to the tier H monetary penalty if they contravene this regulation.

Subregulation 175A(5) requires the person to, for the period for which the person must keep the DSMS or plan under new regulation 175A, ensure a copy is available for inspection under

the WHS Act. The person may be subject to the tier I monetary penalty if they contravene this regulation.

The above penalties and amounts are necessary and proportionate to the contravention of regulation 175A as having the DSMS and diving project plan kept for 7 years ensures that the Regulator can enforce compliance and maintain integrity in the scheme. The amounts reflect the detriment to the scheme if records were not kept for this time and the Regulator was not able to check compliance and safety within projects.

It is noted under each subregulation that section 12F of the WHS Act provides that strict liability applies to each physical element of each offence under the WHS Act, unless otherwise stated. The reference in section 12F of the WHS Act includes WHS Regulations as amended by the Amendment Regulations. Strict liability is necessary and reasonable as requiring proof of fault would undermine deterrence of persons not complying with the WHS regulations. A person would still be able to rely on a defence of honest and reasonable mistake of fact if applicable.

The requirement for the DSMS to be kept for 7 years is for compliance and safety assurance reasons. It ensures records will be available to the Regulator upon request for review and auditing and to verify that safety standards and procedures have been followed over a substantial period of time.

A penalty is included for body corporates despite a diving supervisor not being able to be a body corporate. This is so that a body corporate who commits an ancillary offence would be punishable as if the body corporate had committed the primary offence.

#### Regulation 175B – Diving operations record

This regulation requires a diving supervisor to maintain a diving operations record. A diving operations record must be kept in a hard-covered form bound in such a way that its pages cannot easily be removed, or if it has multiple copies of each page, must be bound so that at least one copy of each page cannot easily be removed. The pages must also be serially numbered. A hard-covered and numbered logbook to input diving records during dives is standard practice, as opposed to electronic records, as it is considered to be harder to manipulate or remove records. Physical records can be directly inspected and verified during audits or investigations. They provide a tangible audit trail that can be cross-checked against operational practices.

The tier D monetary penalty may apply for failing to comply with subregulation 175B(1). The tier H monetary penalty may apply for failing to comply with subregulations 175B(2) and (3).

Subregulation 175B(4) requires a diving supervisor to make an entry in the diving operations record for each day when diving for the operation takes place, and must include the following information:

- (a) the date to which the entry relates;

- (b) the name and address of each person conducting a business or undertaking who appointed any diving supervisor for the operation;
- (c) the name of each diving supervisor who supervised the operation;
- (d) the location of the diving operation (including, if the diving was done from a vessel or installation, its name);
- (e) the name of each worker who took part in the operation (whether as a diver or as a member of a dive team);
- (f) the purpose of the diving operation;
- (g) for each diver—the breathing apparatus and breathing mixture used;
- (h) for each diver—the times at which the diver left the surface, reached the bottom, left the bottom and arrived at the surface again, and bottom time;
- (i) for each diver—the maximum depth reached;
- (j) for each diver—verification that the diver returned from each of the diver’s dives;
- (k) the decompression schedule followed including, for each diver, details of the depths and the duration at each depth during decompression;
- (l) details of any emergency or incident of special note that happened during the operation;
- (m) details of any decompression illness and any treatment given;
- (n) details of any significant defect or significant failure of plant for diving used in the operation;
- (o) details of any environmental factors relevant to the operation;
- (p) anything else that is likely to affect the health or safety of anybody who took part in the operation.

A person who contravenes this regulation may be subject to the tier H monetary penalty.

New subregulation 175B(5) requires a diving supervisor to sign in the diving operations record on either the original of each page of each entry if the record has multiple copies of each page; each page of each entry, or if there are 2 or more diving supervisors for the operation then the parts of the entry that relate to diving work that the diving supervisor supervised must be signed. A person who contravenes this regulation may be subject to the tier H monetary penalty.

New subregulation 175B(6) requires each diving supervisor for the operation to give the diving operations record to the OEI licence holder as soon as practicable after the end of a

diving operation connected with that OEI licence. A person who contravenes this regulation may be subject to the tier I monetary penalty.

New subregulation 175B(7) requires the OEI licence holder to keep the diving operations record for 7 years after receiving it. A person who contravenes this regulation may be subject to the tier I monetary penalty.

The above penalties and amounts are necessary and proportionate to the contravention of regulation 175B as having the diving operations record maintained with certain information, with diving supervisor signatures ensures that the Regulator can enforce compliance and maintain integrity in the scheme. The amounts reflect the detriment to the scheme if records were not kept for this time and the Regulator was not able to check compliance and safety within projects.

It is noted under each subregulation that section 12F of the WHS Act provides that strict liability applies to each physical element of each offence under the WHS Act, unless otherwise stated. The reference in section 12F of the WHS Act includes WHS Regulations as amended by the Amendment Regulations. Strict liability is necessary and reasonable as requiring proof of fault would undermine deterrence of persons not complying with the WHS regulations. A person would still be able to rely on a defence of honest and reasonable mistake of fact if applicable.

A penalty is included for body corporates under subregulation 175B(6) despite a diving supervisor not being able to be a body corporate. This is so that a body corporate who commits an ancillary offence would be punishable as if the body corporate had committed the primary offence.

A penalty is included for individuals under subregulation 175B(7) despite that a holder of an OEI licence must be a body corporate. This is so that an individual who commits an ancillary offence would be punishable as if the individual had committed the primary offence.

### Regulation 175C – Divers' log books

This regulation requires divers to maintain a log book and to make an entry, in ink, in that log book every time the diver dives, to sign the entry and have a diving supervisor for the diving operation countersigns the entry. The log book must be kept for at least 7 years after its last entry in case there is any need to subsequently refer to this information for medical and/or legal reasons in relation to activities on a particular dive.

New subregulation 175C(2) requires the log book to have hard covers, be bound, be serially numbered, show the diver's name, have a clear photograph of the diver's full face, and have a specimen of the diver's signature.

New subregulation 175C(3) requires certain information to be contained in an entry in the log book. A person who contravenes this regulation may be subject to the tier I monetary penalty applies for failing to comply with new subregulations 175C(1), (2) and (3).

The above penalty and amount is necessary and proportionate to the contravention of regulation 175C as having the diving operations record maintained with certain information, with diving supervisor signatures ensures that the Regulator can enforce compliance and maintain integrity in the scheme. The amounts reflect the detriment to the scheme if records were not kept for this time and the Regulator was not able to check compliance and safety within projects.

It is noted under each subregulation that section 12F of the WHS Act provides that strict liability applies to each physical element of each offence under the WHS Act, unless otherwise stated. The reference in section 12F of the WHS Act includes WHS Regulations as amended by the Amendment Regulations. Strict liability is necessary and reasonable as requiring proof of fault would undermine deterrence of persons not complying with the WHS regulations. A person would still be able to rely on a defence of honest and reasonable mistake of fact if applicable.

A penalty is included for body corporates despite a diver not being able to be a body corporate. This is so that a body corporate who commits an ancillary offence would be punishable as if the body corporate had committed the primary offence.

#### **Item 18 – Before regulation 228**

This item inserts new regulation 227A.

#### **Regulation 227A – Plant to which this Division applies**

This regulation provides that Division 2 of Part 5.2 of the WHS Regulations applies to plant that is:

- (a) a crane; or
- (b) a lift; or
- (c) a hoist; or
- (d) a work positioning system; or
- (e) a temporary work platform; or
- (f) a concrete placing boom.

#### **Item 19 – Subregulation 237(1)**

This item would repeal and substitute subregulation 237(1) to complement the changes made in item 24 above with an updated list of what plants this regulation applies to. This is:

- (a) a crane; or
- (b) a lift; or

- (c) a hoist; or
- (d) a work positioning system; or
- (e) a temporary work platform; or
- (f) a concrete placing boom.

### **Item 20 - At the end of Part 6.1**

This item adds new regulation 293A – Licence holder must identify principal contractor

#### Regulation 293A – Licence holder must identify principal contractor

New regulation 293A applies to an OEI licence holder if there are one or more construction projects in the Commonwealth offshore area for the purposes of the offshore electricity infrastructure project being carried out under the OEI licence.

The regulation provides that for each such construction project, the OEI licence holder must publish the listed information on the OEI licence holder’s website.

The note to this regulation references section 12F of the OEI Act, which applies strict liability to each physical element of this offence. A person who contravenes this regulation may be subject to the tier G monetary penalty.

The above penalty and amount is necessary and proportionate to the contravention of regulation 293A as identifying a principal contractor will enable efficient and reliable communication between the Regulator and the OEI licence holder, especially in cases of emergencies.

It is noted under each subregulation that section 12F of the WHS Act provides that strict liability applies to each physical element of each offence under the WHS Act, unless otherwise stated. The reference in section 12F of the WHS Act includes WHS Regulations as amended by the Amendment Regulations. Strict liability is necessary and reasonable as requiring proof of fault would undermine deterrence of persons not complying with the WHS regulations. A person would still be able to rely on a defence of honest and reasonable mistake of fact if applicable.

### **Item 21 – Regulation 308**

This item repeals regulation 308.

Regulation 308 provides that a principal contractor must ensure that there is clearly visible from outside the workplace, signage installed showing the principal contractor’s name, contact details and location of site office. This requirement may be impractical to implement in the offshore context. New regulation 293A is intended to achieve the same outcome by providing for virtual signage on the licence holders website. This will ensure that information about the principal contractor is available.

## **Item 22 – Paragraph 497(2)(c)**

This item repeals paragraph 497(2)(c) of the WHS Regulations.

Regulation 497 requires the Regulator to issue an asbestos removal licence if it is satisfied the requirements in subregulation 497(2) are met. Paragraph 497(2)(c) restricts this decision to applicants who are the Commonwealth, a public authority or a non - Commonwealth licensee; or the Regulator is satisfied that circumstances exist that justify the grant of the licence. Paragraph 497(2)(c) is repealed to allow this decision to be made in relation to a broader category of applicants, which is necessary for the OEI context.

## **Item 23 – Regulation 530 (before the note)**

This item inserts before the note of regulation 530 of the WHS Regulations the following:

“This Chapter does not apply to:

- (a) a facility that is an aircraft; or
- (b) a facility that is a vessel and is not offshore renewable energy infrastructure (within the meaning of the OEI Act) or offshore electricity transmission infrastructure (within the meaning of that Act).”

Chapter 9 of the WHS Regulations sets out provisions for the regulation of major hazard facilities which are facilities where hazardous chemicals are present or likely to be present. The new note at regulation 530 of the Amendment Regulations provides an exemption to an aircraft, a vessel that is not offshore renewable energy infrastructure, or offshore electricity transmission infrastructure. The object of the OEI Act is to regulate offshore electricity infrastructure, while aircraft and vessels are regulated under other laws

## **Item 24 – Subregulation 676(1) (subheading before table item 8, column headed “Regulation under which reviewable decision is made”)**

This item omits the subheading terms “**Accreditation of assessors**” under column heading “Regulation under which reviewable decision is made” before table item 8 in subregulation 676(1) of the WHS Regulations and substitutes it with a new subheading “**DSMS**”.

This reflect amendments above relating to including the DSMS in the WHS Regulations.

## **Item 25 – Subregulation 676(1) (table items 8 to 16)**

This item repeals table items 8 to 16 in subregulation 676(1) of the WHS Regulations and substitutes it with the following, to update references due to the amendments made in the Amendment Regulations:

8	168C—Rejection of DSMS	Person conducting a business or undertaking who gave the DSMS to the Regulator
9	168C—Placing conditions on acceptance of DSMS	Person conducting a business or undertaking who gave the DSMS to the Regulator
10	168D—Rejection of revised DSMS	Person conducting a business or undertaking who gave the revised DSMS to the Regulator
11	168D—Placing conditions on acceptance of revised DSMS	Person conducting a business or undertaking who gave the revised DSMS to the Regulator
12	168K—Withdrawal of acceptance of a DSMS for failure to give the Regulator a revised version of the DSMS as required by regulation 168H	Person conducting a business or undertaking who gave the DSMS to the Regulator

## Item 26 – After regulation 699

This item inserts new regulation 699A after regulation 699 of the WHS Regulations.

### Regulation 699A – Incident notification—prescribed events that are dangerous incidents

This regulation prescribes events specific to offshore diving that are dangerous incidents for the purposes of subsection 37(1) of the WHS Act. These are:

- (a) an event that incapacitates a worker or other person for work for at least 3 days;
- (b) any of the following events relating to diving work:
  - (i) a decompression illness;
  - (ii) a pulmonary barotrauma;
  - (iii) a case of omitted decompression;
  - (iv) an event for which a standby diver is deployed for an emergency, except for the purposes of training, exercises or drills;
  - (v) a failure of life support equipment or personnel lifting equipment;
- (c) an event that a reasonable person would consider needs immediate investigation for its effects on work health and safety.

This will align the incident notifications with the specificities required by the OEI scheme.

## **Item 27 – Regulations 700 and 702**

This item repeals regulations 700 (identity cards) and 702 (Confidentiality of information—authorisation relating to administration or enforcement of other Acts) of the WHS Regulations.

This is because paragraph 238(b) of the OEI Act disapplies Part 9 of the WHS Act, and paragraph 239(b) of the OEI Act disapplies section 271 of the WHS Act.

## **Item 28 – At the end of Part 11.3**

This item inserts new regulation 703 – Approved codes of practice

### Regulation 703 – Approved codes of practice

This regulation provides that all codes of practice that are, from time to time, approved under section 274 of the WHS Act (disregarding the modifications made by the OEI Act and regulations made under that Act) are prescribed for the purposes of subsection 274(1) of the WHS Act. Codes of practice are practical guides to achieving the standards of health and safety required under the WHS Act and Regulations. As the codes of practice are updated from time to time, it is important for safety outcomes that the most up to date versions of the codes are used.

It is noted that section 240 of the OEI Act provides for a modification of section 274 of the WHS Act.

## **Item 29 – Chapter 12**

This item repeals Chapter 12 in the WHS Regulations and substitutes it with a new Chapter 12 – ‘**Transitional provisions**’.

### ***Chapter 12 – Transitional provisions***

Chapter 12 of the WHS Regulations provides for matters of a transitional nature that were necessary to address when the instrument was enacted in 2011. Since the OEI industry is still emerging in Australia, the transitional provisions set out in Chapter 12 of the WHS Regulations are not applicable. However, some transitional provisions are necessary while the legislative framework for offshore infrastructure projects is still being developed. As such, the current Chapter 12 is replaced by a new Chapter 12, that delays commencement of Parts 5.2 and 5.3 of the WHS Regulations.

Part 5.3 of the WHS Regulations requires some plant design and items of plant to be registered and sets out a process to apply for registration. Working with plant items such as cranes and lifts can cause death or serious injury. The purpose of registering an item of plant is to ensure that it is inspected by a competent person and is safe to operate. Part 5.2 of the WHS Regulations sets out the duties relating to registered plant and plant designs.

Sufficient time is required to establish a registration scheme, such as setting up the administrative arrangements required to implement the scheme. Further analysis also needs to be undertaken to ensure these requirements are implemented in a streamlined way to avoid duplication with management plan and design notification requirements, and any overlapping regimes such as maritime laws.

Accordingly, there will be a four-year delay to the requirement for certain plant design and items of plant to be registered. However, applications can be submitted a year prior to allow the Regulator sufficient time to deal with applications ahead of duties applying.

#### Regulation 719 – Commencement day

This regulation provides that, for the purposes of this Part, **commencement day** means the day that item 1 of Schedule 2 to the *Offshore Electricity Infrastructure Amendment Regulations 2024* commences.

It also provides that **registration duty day** means the day 4 years after the commencement.

#### Regulation 720 – Transitional provision – additional duties relating to registered plant and plant designs

This regulation provides that a duty in Part 5.2 applies on and after the registration duty day.

#### Regulation 721 – Transitional provision – duty to register plant designs and items of plant

This regulation provides a duty to register a design under Division 1 of Part 5.3. It applies on and after the registration duty day.

#### Regulation 722 – Transitional provisions – registration of plant designs and items of plant

This regulation provides that Divisions 3, 4, 5 and 6 of Part 5.3 apply on and after the day that is 3 years after the commencement day.

#### **Item 30 – Clause 1 of Schedule 2 (table item 1.1, column headed “Fee”)**

This item omits “\$5,500” from table item 1.1 of clause 1 of Schedule 2 of the WHS Regulations and substitutes it with “\$5,500 (capped)”.

#### **Item 31 – Clause 1 of Schedule 2 (table item 1.1, column headed “When fee is to be paid”)**

This item omits “On application for approval” and substitute with “On invoice”. This is an administrative amendment that would complement the other amendments made to the WHS Regulations.

#### **Item 32 – Clause 1 of Schedule 2 (table item 2.1, column headed “Fee”)**

This item omits “\$550” from table item 2.1 of clause 1 of Schedule 2 of the WHS Regulations and substitutes it with “\$550 (capped)”.

**Item 33 – Clause 1 of Schedule 2 (table item 2.1, column headed “When fee is to be paid”)**

This item omits “On application for approval” and substitute with “On invoice”. This is an administrative amendment that would complement the other amendments made to the WHS Regulations.

**Item 34 – Clause 1 of Schedule 2 (table item 2.1A, column headed “Fee”)**

This item omits “\$65” from table item 2.1A of clause 1 of Schedule 2 of the WHS Regulations and substitutes it with “\$200 (fixed)”.

**Item 35 – Clause 1 of Schedule 2 (table item 2.1B, column headed “Fee”)**

This item omits “\$30” from table item 2.1B of clause 1 of Schedule 2 of the WHS Regulations and substitutes it with “\$50 (fixed)”.

**Item 36 – Clause 1 of Schedule 2 (table item 2.1C, column headed “Fee”)**

This item omits “\$30” from table item 2.1C of clause 1 of Schedule 2 of the WHS Regulations and substitutes it with “\$100 (fixed)”.

**Item 37 – Clause 1 of Schedule 2 (table items 2.2 to 2.4)**

This item repeals items 2.2 to 2.4 of clause 1 of Schedule 2 and substitutes it with the following:

2.2	Regulation 168C	Giving a DSMS to the Regulator for acceptance	\$30,000 (capped)	On invoice
2.3	Regulation 168D	Giving a revised DSMS to the Regulator for acceptance	\$15,000	On invoice

**Item 38 – Clause 1 of Schedule 2 (table item 2.5, column headed “Fee”)**

This item omits “\$30” from table item 2.5 of clause 1 of Schedule 2 of the WHS Regulations and substitutes it with “\$100 (fixed)”.

**Item 39 – Clause 1 of Schedule 2 (table item 2.6, column headed “Fee”)**

This item omits “no fee” from table item 2.6 of clause 1 of Schedule 2 of the WHS Regulations and substitutes it with “\$5,500 (capped)”.

**Item 40 – Clause 1 of Schedule 2 (table item 2.6, column headed “When fee is to be paid”)**

This item omits “On application for licence” and substitute with “On invoice”. This is an administrative amendment that would complement the other amendments made to the WHS Regulations.

**Item 41 – Clause 1 of Schedule 2 (table item 2.7, column headed “Fee”)**

This item omits “no fee” from table item 2.7 of clause 1 of Schedule 2 of the WHS Regulations and substitutes it with “\$50 (fixed)”.

**Item 42 – Clause 1 of Schedule 2 (table item 2.8, column headed “Fee”)**

This item omits “no fee” from table item 2.8 of clause 1 of Schedule 2 of the WHS Regulations and substitutes it with “\$50 (fixed)”.

**Item 43 – Clause 1 of Schedule 2 (at the end of the table)**

This item repeals items 2.9 to 2.10 of clause 1 of Schedule 2 and substitutes it with the following:

2.9	Regulation 578	Application for major hazard facility licence	\$55,000 (capped)	On invoice
2.10	Regulation 596	Application for renewal of major hazard facility licence	\$55,000 (capped)	On invoice

**Item 44 – At the end of Schedule 2**

This item would insert new clause 2 to the end of Schedule 2 of the WHS Regulations.

Clause 2 – Capped fees

New clause 2 provides that this clause applies in relation to a fee described as “(capped)” in an item of Table 2.1.

Subclause 2(2) provides that the amount of the fee is the lesser of:

- (a) the amount specified in the item; and
- (b) the total amount of the expenses incurred by the Regulator in performing or exercising the function or power, or dealing with the application, mentioned in the item.

Subclause 2(3) provides that the fee is due and payable when the Regulator issues an invoice for the fee to the person who requested the performance or exercise of the function or power or made the application and must be paid in accordance with the invoice.

The Regulator may decline to perform the function or exercise the power to which the fee related until the amount is paid.

#### **Item 45 – Schedule 5**

This item repeals Schedule 5 of the WHS Regulations.

Schedule 5 of the WHS Regulations provides for the registration of plant and plant designs and exception to this, in relation to regulations 243 and 246. The new regulations 227A and subregulation 237(1) include the modified lists of plant that replace Schedule 5 for the purposes of registration under Chapter 5.

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

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

### *Offshore Electricity Infrastructure Amendment Regulations 2024*

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

#### **Overview of the Disallowable Legislative Instrument**

The *Offshore Electricity Infrastructure Amendment Regulations 2024* (Amendment Regulations) amend the *Offshore Electricity Infrastructure Regulations 2022* (Principal Regulations) for the purposes of the licensing scheme under section 29 of the *Offshore Electricity Infrastructure Act 2021* (OEI Act).

These amendments give effect to elements of the offshore electricity infrastructure (OEI) framework, including management plans, design notifications, financial securities, work health and safety, safety and protection zones, and record keeping. These matters are crucial to fully operationalise the OEI framework and provide regulatory certainty for offshore renewable energy industry.

#### **Human rights implications**

The Amendment Regulations engage the following rights:

- the right to a fair trial and equality before the courts under Article 14(1) of the International Covenant on Civil and Political Rights (the ICCPR);
- the right to privacy and reputation under Article 17 of the ICCPR;
- the right to enjoy and benefit from culture under Article 15(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The Australian Government recognises that climate change can impact upon the enjoyment of human rights. The Amendment Regulations implements a licensing scheme to support the OEI Act and framework to increase renewable energy infrastructure in pursuit of achieving Australia's greenhouse gas emissions reduction targets.

#### Right to a fair trial and equality before the courts

Article 14(1) of the ICCPR provides the right to a fair hearing and equality before the courts. The right applies to criminal and civil proceedings and in cases before both courts and tribunals and provides that, in the determination of any criminal charge against a person, or of their rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law (Article 14(5)). Additionally, in a criminal charge against a person they shall be provided with the presumption of innocence (Article 14(2)) and minimum guarantees (Article 14(3)).

#### *Offences of strict liability*

Article 14(2) of the ICCPR provides for the right to the presumption of innocence – that everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. The right to presumption of innocence is also a fundamental common law principle.

Laws which remove the burden of proof from a plaintiff are commonly known as ‘strict liability offences’. Strict liability offences remove the fault or intent element that would otherwise attach to a physical element of an offence. Offences of strict liability do not require the plaintiff to prove a person’s intention to do (or not to do) a particular act and as such engage an individual’s right to the presumption of innocence. For strict liability offences, the mere commission of an act is sufficient for a person to be charged. Strict liability offences are only appropriate in certain circumstance and are permissible in circumstances where the offences are non-arbitrary, or if the offences are non-arbitrary, the offences must be aimed at a legitimate objective and be reasonable, necessary, and proportionate to achieving that objective.

As per *A Guide to Framing Commonwealth Offences, Infringement Notices Enforcement Powers* (the Guide), strict liability offences should only be applied in certain circumstances such as where:

- the penalty does not include imprisonment;
- the pecuniary penalty does not exceed 60 penalty units for an individual;
- the operation of the offences are necessary to ensure the integrity of a regulatory scheme;
- specific and clear criteria apply;
- the operation of the offences are necessary to protect general revenue; and/or
- the operation of the offences minimising resource and cost requirements (although this justification is not enough in and of itself).

The Amendment Regulations include various new offences of strict liability which aim to increase the Regulation’s effectiveness, address non-compliance with, and ensure the integrity of, the Regulations. The offences of strict liability are contained in new subsections 46(1), 54(1), 56(4), 61(1), 76(3), 78(5), 143(1), 162(3) and 163(4) incorporated by Schedule 1 to the Amendment Regulations.

New subsection 46(1) establishes an offence of strict liability in circumstances where a licence holder has a management plan for a licence and carries out activities in a way that is contrary to the management plan. This offence of strict liability is appropriate to enhance the effectiveness of the licensing scheme and uphold the integrity of the management plan. The maximum amount of 50 penalty units for this offence coupled with the explicit obligations on the licence holder regarding a management plan, as set out in the Amendment Regulations, ensure the application of strict liability is reasonable and appropriate.

New subsection 54(1) establishes an offence of strict liability in circumstances where a licence holder is directed under new subsection 53(1) to revise a management plan and does not comply with the direction within the specified timeframe. This offence of strict liability is essential to ensure that a management plan remains contemporary and aligns with the activities and operations of an OEI project. This ensures that the Regulator has oversight over any changes to a project and ensure principles of work health and safety, infrastructure integrity, and environmental management are upheld. The maximum amount of 40 penalty units for this offence coupled with the Regulator’s power to direct the licence holder to revise their management plan under new section 53 ensure that the application of strict liability is reasonable and appropriate.

New subsection 56(4) establishes an offence of strict liability in circumstances where a licence holder does not prepare a revised management plan, and makes a plan revision approval application for the Regulator’s approval, prior to the periodic revision day for the licence. This

offence of strict liability is appropriate as requiring proof of fault would undermine deterrence of persons not assisting the Regulator, and the importance of the Regulator having the summary of the management plan outweighs the detriment. The maximum amount of 40 penalty units for this offence coupled with the licence holder's obligations set out in the Regulations ensure that the application of strict liability is reasonable and appropriate.

New subsection 61(1) establishes an offence of strict liability in circumstances where a circumstance under subsection 60(2)<sup>3</sup> applies, the circumstance results, or is likely to result, in the licence holder failing to comply with the management plan, and the licence holder fails to prepare a revised management plan and make a plan revision approval application for the Regulator's approval. This offence of strict liability is appropriate as requiring proof of fault would undermine deterrence of persons not assisting the Regulator, and the importance of the management plan remaining contemporary outweighs the detriment. The maximum amount of 40 penalty units for this offence coupled with the licence holder's obligations set out in the Regulations ensure that the application of strict liability is reasonable and appropriate.

New subsection 76(3) establishes an offence of strict liability in circumstances where a licence holder is required to provide the Regulator a summary of a management plan under new subsections 76(1) or 76(2) and the licence holder does not do so within 30 days after the approval of the initial plan or plan revision approval application. This offence of strict liability is appropriate as requiring proof of fault would undermine deterrence of persons not assisting the Regulator, and the importance of the Regulator having the summary of the management plan outweighs the detriment. The maximum amount of 50 penalty units for this offence coupled with the licence holder's obligations set out in the Regulations ensure that the application of strict liability is reasonable and appropriate.

New subsection 78(5) establishes an offence of strict liability in circumstances where the Regulator gives a licence holder a direction to revise the summary of a management plan and the licence holder does not comply with that direction within the specified timeframe. This offence of strict liability is appropriate as requiring proof of fault would undermine deterrence of persons not assisting the Regulator, and the importance of the Regulator having the revised summary of the management plan outweighs the detriment. The maximum amount of 60 penalty units coupled with the Regulator's power to direct the licence holder to revise the management plan summary ensure that the application of strict liability is reasonable and appropriate.

New subsection 143(1) establishes an offence of strict liability in circumstances where a person fails to keep accounts, records, and other documents in accordance with new section 142. The provision of accounts, records, and other documents is essential to offshore operations and to ensure that the Regulator is able to maintain compliance with a project's management plan and the Regulations as a whole. The maximum amount of 40 penalty units coupled with the licence holder's obligations set out in the Regulations ensure that the application of strict liability is reasonable and appropriate.

New subsection 162(3) establishes an offence of strict liability in circumstances where a licence holder notifies the Regulator of an event under new subsection 161(1) and does not provide a written report of the notified event within 48 hours of notification. This offence of strict liability is appropriate to enhance the effectiveness of the Regulations; particularly in relation activities

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<sup>3</sup> New subsection 60(2) sets out the circumstances in which a licence holder must prepare a revised management plan and make a plan revision approval application for the Regulator to approve the revised management plan as the management plan for the licence. Some of these circumstances include that the list of relevant structures, equipment and property included in the plan are significantly incorrect or the licence holder identifies a new or significantly increased hazard, impact or risk.

carried out under the Regulations. The maximum amount of 60 penalty units for this offence coupled with the licence holder's obligations set out in the Regulations ensure that the application of strict liability is reasonable and appropriate.

New subsection 163(4) establishes an offence of strict liability in circumstances where the Regulator directs a licence holder to give a further report of an event after the licence holder notifies the Regulator of that event under new subsection 161(1), and the licence holder does not comply with that direction. This offence of strict liability is appropriate to enhance the effectiveness of the Regulations, including enabling the Regulator to monitor the licence holder and any relevant third party's compliance with legislation (such as the OEI Act, the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) and the *Work Health and Safety Act 2011* (WHS Act) as relevant). The maximum amount of 50 penalty units for this offence coupled with the Regulator's power to direct the licence holder to provide a further report ensure that the application of strict liability is reasonable and appropriate.

Certain offence provisions under the *Work Health and Safety Regulations 2011* (WHS Regulations), as incorporated by Schedule 2 of the Amendment Regulations, note that section 12F of the WHS Act provides that strict liability applies to each physical element of each offence under the WHS Act, unless otherwise stated. Each offence included in the WHS Regulations would, therefore, be a strict liability offence. Strict liability is necessary and reasonable in these circumstances as requiring proof of fault would undermine deterrence of persons not complying with the WHS Regulations. A person would still be able to rely on a defence of honest and reasonable mistake of fact if applicable.

In addition to the above explanation, the remote and complex nature of offshore operations, and multiple worksite arrangements, makes it difficult to practically prove intent of people who commit these offences. Specifying strict liability to offence provisions is necessary to ensure the integrity and efficacy of both the Principal Regulations and the WHS Regulations to achieve its objective of greater compliance with the regulatory regime. This is consistent with the principles outlined in the Guide, which include that the punishment of offences not involving fault may be appropriate in circumstances where it is likely to significantly enhance the effectiveness of the enforcement regime in deterring certain conduct.

#### *Continuing offences and contraventions*

A person is guilty of a separate offence for each day of non-compliance where an act or thing must be done within a specified timeframe or before a particular point in time. The failure to comply to each timeline will its own offence. A continuing offence should be conveyed clearly, and the penalty associated with the offence, expressed as a daily rate to reflect that a person may be liable for multiple contraventions. Such offences are used to create a strong incentive for compliance with a continuing obligation to comply with each step or stage after the initial contravention.

Schedule 1 to the Amendment Regulations incorporates six new continuing contravention provisions into the Principal Regulations, which are in new sections 46, 56, 61, 76 and 143. These provisions will operate where a person subject to a civil penalty will commit a separate contravention of that provision for each day that the contravention continues.

As these provisions clearly communicate that they are continuing offences linked to initial contraventions of respective civil penalties and would be implemented for the purposes of ensuring compliance within the regulatory scheme, the provisions are reasonable, appropriate and do not engage the rights under Article 14 of the ICCPR.

### *Civil penalties*

Civil penalty provisions may engage criminal process rights under Articles 14 and 15 of the ICCPR, regardless of the distinction between criminal and civil penalties in domestic law. When a provision imposes a civil penalty, an assessment is required as to whether it amounts to a criminal penalty for the purposes of the ICCPR, so that an assessment can be made as to whether the provision is consistent with the requirements of the ICCPR. Determining whether penalties could be considered criminal under international human rights law requires consideration of the classification of the penalty provisions under Australian domestic law, the nature and purpose of the penalties, and the severity of the penalties.

The Amendment Regulations expressly classify certain penalties as civil penalties. These provisions create solely pecuniary penalties in the form of a debt payable to the Commonwealth. The purpose of these penalties are to promote and ensure integrity of the Amendment Regulations and to ensure compliance and enforcement. The civil penalty provisions do not impose criminal liability, and a finding by a court that they have been contravened would not lead to the creation of a criminal record. The civil penalties would only apply to persons using the OEI scheme, rather than to the general public. These factors all suggest that the civil penalties imposed by the Amendment Regulations are civil rather than criminal in nature. As such, they would not engage criminal process rights provided for by Articles 14 and 15 of the ICCPR.

The Amended Regulations incorporate twenty-five new civil penalty provisions into the Principal Regulations where a person has contravened certain requirements. The new civil penalty provisions are in new subsections 54(2) and 143(2).

New section 144 provides that all civil penalty provisions in the Amended Regulations are enforceable under Part 4 of the *Regulatory Powers (Standard Provisions) Act 2014* (RP Act). Part 4 of the RP Act provides for the various terms and conditions that apply to civil penalty provisions; including the manner in which a civil penalty is dealt with by the courts. Accordingly, the civil penalty provisions in the Amendment Regulations do not limit the right to a fair hearing contained in Article 14 of the ICCPR.

Considering the matters discussed above, the civil penalties in the Amendment Regulations are necessary and reasonable as they balance the integrity of the Regulations, the need for compliance and enforcement with right under the ICCPR.

### *Infringement notices*

Infringement notice provisions supplement offence and civil penalty provisions by providing an alternative to prosecution for an offence or litigation of a civil matter. A person to whom the notice is issued, will be provided an option to pay the fine or elect to have the offence heard by a court. An infringement notice will set out the particulars of an alleged contravention of an offence or civil penalty provisions and are usually issued for minor offences that are regulatory in nature. It is appropriate for infringement notice scheme to be implemented in circumstances where a high volume of contraventions of a relatively minor offence is expected, and whether the penalty should be imposed immediately to be effective. Subsection 104 of the RP Act also posits similar requirements pertaining to infringement notices.

Section 145 of the Amended Regulations provides that the certain civil penalty provisions contained in the Principal Regulations, are subject to an infringement notice under Part 5 of the RP Act; being subsections 54(1) and (2), 56(4), 61(1), 76(3), 78(5), 143(1) and (2), 162(3),

162(3), 163(4). An infringement notice issued under this Part is a notice of a pecuniary penalty imposed on a person which sets out the particulars of an alleged contravention of a law.

The addition of an infringement notice provision is a necessary and proportionate mechanism to ensure the efficient enforcement of the relevant provisions. Given the significant resources involved in court proceedings, the option for an infringement notice to be issued allows for greater enforcement of the regulations in circumstances where civil penalties are incurred however, court proceedings cannot be justified. The addition of infringement notices is consistent with the objective of the Amendment Regulations to enhance the compliance and enforcement of the Regulations.

As the person may elect to have the matter heard by a court rather than pay the penalty, the right to a fair hearing provided for by Article 14(1) of the ICCPR is not limited by the Amendment Regulations.

### *Summary*

The Bill is compatible with the right to a fair hearing provided for by Article 14 of the ICCPR because, to the extent that it engages those rights, it does not unduly limit them.

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

Article 17 of the ICCPR prohibits arbitrary or unlawful interference with an individual's privacy, family, home, or correspondence, as well as attacks on their honour or reputation. The right to privacy can be limited to achieve a legitimate objective where the limitations are lawful and not arbitrary. For an interference with the right to privacy to be permissible, the interference must be authorised by law, be for a reason consistent with the ICCPR, and be reasonable in the circumstances. The UNHRC has interpreted the requirement of 'reasonableness' to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.

The UNHRC has not defined 'privacy', but it is generally understood to comprise of a freedom from unwanted and unreasonable intrusions into activities that society recognises as falling within the sphere of individual autonomy. The collection and sharing of information (public or otherwise) may be considered to engage and offend the right to privacy.

### *Personal information of the licence holder*

New section 76 requires a licence holder to provide a summary of their project's management plan to the OEI Regulator. As per new section 77, the summary must include the licence holder's contact information (i.e. telephone number and email address). The summary may be published on the Regulator's website in accordance with the existing section 115A of the OEI Act.

The licence holder's contact information is required in the summary to enable stakeholders to contact the licence holder about their project and activities. There may be stakeholders affected by certain activities that should be consulted by the licence holder. The publication of the summary is required to support transparency about matters that are in the public interest.

Finally, the OEI Act still requires compliance with the *Privacy Act 1988* (the Privacy Act). Accordingly, publication of personal information would be subject to the Regulator confirming with the conditions set out in the Privacy Act. While it is acknowledged that this would authorise the Regulator to publish personal information within the meaning of the Privacy Act, most persons to whom these provisions would apply would be bodies corporate, for whom, personal information does not exist (and the Privacy Act does not apply).

To the extent the Regulator obtains and publishes personal information, it would be done so in accordance with the conditions set out in the *Privacy Act* and for the reasonable and legitimate objectives of the Amendment Regulations. Participation in the offshore electricity market is voluntary and therefore, any publication of personal information will be in relation to persons who have agreed to interact with the offshore electricity market. Accordingly, the Amendment Regulations are compatible with the right to privacy and reputation provided for by Article 17 of the ICCPR.

#### Right to enjoy and benefit from culture (Article 15 of the ICESCR)

Article 15(1)(a) of the ICESCR protects the right of all persons to take part in cultural life. The United Nations Committee on Economic, Social and Cultural Rights (the Committee) (General Comment 21, 2009) has stated that culture encompasses ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions.

The Committee has stated that cultural rights may be exercised by a person as an individual, in association with others, or within a community or group. The Committee has also stated that countries should guarantee that the exercise of the right to take part in cultural life takes due account of the values of cultural life, which may be strongly communal, or which can only be expressed and enjoyed as a community by Indigenous peoples. Indigenous persons' cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected. Countries must take measures to recognise and protect the rights of Indigenous persons to own, develop, control, and use their communal lands, territories, and resources. Indigenous persons have the right to act collectively to ensure respect for their right to maintain, control, protect and develop their cultural heritage, traditional knowledge, and traditional cultural expressions.

New section 64 requires a licence holder to consult with a range of parties in relation to their licence activities, including Aboriginal or Torres Strait Islander communities or groups that are reasonably considered to hold Native Title rights and interests (within the meaning of the *Native Title Act 1993*). These consultation obligations have been included in the Amendment Regulations to require licence holders to make reasonable efforts to identify and consult with Native Title holders whose rights and interests may be affected by licence activities.

The Amendment Regulations positively engage the right to enjoy and benefit from culture in the ICESCR by establishing the above obligation. This obligation facilitates this right by facilitating Aboriginal and Torres Strait Islander communities to maintain elements of autonomy and control over Native Title lands, which in turn promotes and enhances the enjoyment and benefit of related culture attached to these lands.

#### **Conclusion**

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