



**Biodiversity
Council**

Submission to the Inquiry into Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment (Safety and Other Measures) Bill 2024

7 March 2024

About the Biodiversity Council

The Biodiversity Council is an independent expert group founded by 11 Australian universities to promote evidence-based solutions to Australia's biodiversity crisis. Our mission is to be a trusted expert voice communicating accurate information on all aspects of biodiversity to the Australian people, businesses and governments to ensure biodiversity and Country prosper.

Overview

The Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment (Safety and Other Measures) Bill 2024 (the Bill) proposes amendments to the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (OPGGs Act). This submission deals only with Part 2 of Schedule 2 of the Bill, entitled 'Approval under Environment Protection and Biodiversity Conservation Act 1999' ('EPBC Deeming Part').

The Biodiversity Council submits that the EPBC Deeming Part should be omitted from the bill for several reasons. First, the policy behind the Part is wrong in principle because it would override, indefinitely, an important environmental protection in the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). Second, the Part is inconsistent with the Government's wider environment policy, as set out in its *Nature Positive Plan*.¹ Finally, the Part takes an objectionable approach to legislation, because it buries a *de facto* 'carving out' of the Offshore Petroleum and Greenhouse Gas Storage regime from the EPBC Act under an obtusely-worded deeming provision in another Act. We deal with these points below, after describing the legislative context.

Legislative Context

The EPBC Act protects various 'matters of national environmental significance', including the Commonwealth marine area. It also includes a regime under which a proponent can, following environmental impact assessment (EIA), obtain an approval from the Environment Minister to undertake a development, notwithstanding likely impacts on what is protected.

There are a small number of exemptions from the need to seek the Environment Minister's approval for a development. One of these applies where the minister has, following an appropriate assessment, accredited a Commonwealth, State or Territory approval regime, essentially on the basis that the accredited regime delivers equivalent outcomes to the approval regime in the EPBC Act. In 2014, then Environment Minister Hunt accredited the regime administered by NOPSEMA under the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* ('OPGGs environmental management regime').

One limitation of this accreditation mechanism is that it only applies to the regime as assessed at the time. If the accredited regime is amended, a fresh accreditation is required.

The Government is reviewing the offshore environmental management regime. As part of that review it has published a consultation paper, *Clarifying consultation requirements for offshore*

¹ <https://www.dcceew.gov.au/sites/default/files/documents/nature-positive-plan.pdf>.

*petroleum and greenhouse gas storage regulatory approvals.*² Beyond that, it is too early to know what the review might conclude, although the review terms of reference state that:

The 3 year review will recommend improvements to the environmental management regime to make sure it:

- is fit for purpose in a decarbonising economy
- reflects best practice for offshore environmental management
- is consistent with reforms to the national environmental legislation that the Department of Climate Change, Energy, the Environment and Water under the government's Nature Positive Plan is developing
- is consistent with Australia's international obligations for emissions and sustainable development. (<https://www.industry.gov.au/mining-oil-and-gas/oil-and-gas/offshore-oil-and-gas/offshore-petroleum-and-greenhouse-gas-storage-environmental-management-review>)

The stated intent of the EPBC Deeming Part is to remove the need for a fresh accreditation from the Environment Minister, on the ground that:

... it may be necessary to revise the environmental assessment and approval processes under the OPGGS Act or prescribed regulations from time to time to clarify, strengthen, or improve those processes. If such changes are made, there is a risk that the requirements of the OPGGS Act or prescribed regulations will no longer be consistent with the processes set out in the endorsed Program. (Explanatory Memorandum, para 307).

To achieve this, the government proposes to include a provision in the Bill to the effect that any action approved under the offshore petroleum regime, including the offshore environmental management regime, 'as in force from time to time' (ie including any changes made following the current and any subsequent reviews) is taken to be within the scope of the original accreditation. In other words, there is no need for a fresh accreditation and the OPGGS environmental management regime is taken to be accredited, no matter what changes this or future governments might make, for the indefinite future.

Submission One: Wrong in Principle

If enacted, the EPBC Deeming Part would permanently override an important protection for both biodiversity and the environment more generally. The EPBC Act allows the Environment Minister to 'switch off' the requirement for environmental approvals by endorsing another environmental approval regime, but only after the regime concerned is assessed and the minister is satisfied, in effect, that it will deliver environmental outcomes equivalent to that provided by the EPBC Act. The effect of the EPBC Deeming Part, by implication, is to declare that the Environment Minister is satisfied, *in advance and without assessment*, that any environmental approval regime put in place under the OPGGS Act, whether pursuant to the current review or in future, delivers protection equivalent to that provided by the EPBC Act, provided it is within the scope of the original accreditation. This is obviously a complete fiction and is in effect a blank cheque, one that would

² <https://consult.industry.gov.au/offshore-petroleum-consultation-requirements>.

enable a Resources Minister, current or future, to water down protections enacted by Parliament, if so minded.

Submission Two: Inconsistency with Wider Government Policy

The EPBC Deeming Part is inconsistent with the Government's wider environment policy, as set out in its *Nature Positive Plan*. This Plan in turn responds to the Samuel Review of the EPBC Act³, a key finding of which was that Australians have lost trust in the ability of the EPBC Act to deliver good outcomes for the environment and for business. The establishment of a proposed independent regulatory and oversight body, Environment Protection Australia (EPA), is a key response to that finding.

While the Government has yet to introduce legislation to give effect to the Nature Positive Plan, the Plan states the Government's intention to have accreditation provisions in its new Nature Positive laws, including requirements that accredited arrangements meet new National Environmental Standards, and that compliance with accreditation be subject to ongoing independent oversight by the EPA (page 18). Exempting the OPGGS environment management regime from current accreditation requirements is inconsistent, not only with the existing EPBC Act but with government policy for the future accreditation, which emphasises not only compliance with Standards set by the Environment Minister, but ongoing oversight from within the environment portfolio.

Moreover, the EPBC Deeming Part is so wide as to amount to a complete 'carve out' of offshore petroleum activities from the EPBC Act. In relation to another 'carve out', which applies to Regional Forest Agreements (RFAs), Government policy is to extend the new National Environmental Standards to RFA forests and to strengthen environmental protection (page 18). In other words, the government's policy direction in relation to 'carve outs' is to strengthen the role of the Environment Minister, not exclude it.

Submission Three: Objectionable Approach to Legislation

Finally, the Part is objectionable in its legislative form, not only because it deems a discretionary power to be exercised in advance, but because it buries a *de facto* 'carving out' of the OPGGS environmental management regime from the EPBC Act, in an obtusely-worded provision that is located outside the EPBC Act, which will make the law difficult to find.

Amendments that fundamentally impact the operation of national environmental law should be borne out through reforming that legislation. In this case, if the government seeks to implement forms of industry 'carve outs' from environmental laws, or reduce oversight of accredited arrangements, they should be transparent as to their policy intent to enable full and informed debate.

Recommendation

Omit Part 2 of Schedule 2 from the Bill.

³ <https://epbcactreview.environment.gov.au>