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18 October 2023

Mr Clayton Barr, Chair  
Committee on Environment and Planning  
Legislative Assembly  
Parliament of New South Wales

**BY EMAIL: [environmentplanning@parliament.nsw.gov.au](mailto:environmentplanning@parliament.nsw.gov.au)**

To the Committee on Environment and Planning

**Supplementary questions: Inquiry into Minerals Legislation Amendment (Offshore Drilling and Associated Infrastructure Prohibition) Bill 2023 (Bill)**

We refer to our advice to Surfers for Climate (SFC) of 29 August 2023 (**Advice**), SFC's and Hannah Marshall's statements to the Committee during the hearing on 9 October 2023 (**Hearing**), and the Committee's letter of 11 October 2023 containing four further questions directed to SFC.

We have been instructed to provide answers to those four questions on behalf of SFC, which are addressed below.

1. **Is it your understanding that State based Legislation that acts to “alter, impair or detract” from decisions of the Commonwealth, as per s109 of the Constitution would put the State into conflict with the Commonwealth and thus instigate a Constitutional dilemma?**
  - 1.1 State legislation which alters, impairs or detracts from Commonwealth legislation has been found to be ‘directly’ inconsistent with the Commonwealth legislation, creating an inconsistency for the purposes of s 109. This concept of direct inconsistency has been examined in, for example, *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 266 CLR 428; [2019] HCA 2 at [31]-[32] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ); *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508; [2011] HCA 33 at [39] and [41] (French CJ, Gummow, Heydon, Crennan, Kiefel (as her Honour then was) and Bell JJ); *Dickson v The Queen* (2010) 241 CLR 491; [2010] HCA 30 at [13]-[15]; *Victoria v The Commonwealth* (1937) 58 CLR 618; [1937] HCA 82 at 630 (Dixon J).
  - 1.2 In circumstances where State legislation is inconsistent with Commonwealth legislation, the State legislation will be automatically invalid to the extent of the inconsistency. An inconsistency will not create a Constitutional ‘dilemma’ per se; it merely means that that the relevant provisions of the State legislation will be of no effect to the extent of the inconsistency.

2. **Do you interpret this proposed Bill to be intended to do exactly that — alter, impair or detract — from an impending decision for the Commonwealth?**

2.1 We understand that this question goes to the ultimate issue of legal risk associated with the Bill. In short, our view is that there is no:

- (a) Constitutional risk; nor
- (b) related risk of compensation claim,

associated with the Bill. Legal risk should not be an impediment to its passage.

2.2 We are asked whether the Bill would alter, impair or detract from an ‘impending decision’ of the Commonwealth. We assume that the Committee means hypothetical future legislation. We respond as follows.

- (a) We rely on our Advice by way of explanation that the Bill carries no present inconsistency with Commonwealth legislation, particularly paragraphs 4.6 – 4.8 (inclusive). This analysis answers Professor Twomey’s point about whether the Bill would reflect an attempt to impede the operation of Commonwealth law.<sup>1</sup> It is already within the State’s power to decline approval for these activities.<sup>2</sup> Professors Twomey and Crommelin’s statements otherwise seem to agree that there is no present inconsistency.<sup>3</sup>
- (b) We are not aware of any relevant impending Commonwealth decision that might create inconsistency with the Bill. Absent any detail of an ‘impending decision’ which may produce inconsistency, the risk is at most hypothetical. In any case, at worst a future Commonwealth decision might render the Bill invalid, but only to the extent of the inconsistency. In our view this would not form a reasonable basis to abandon the Bill or narrow its operation.
- (c) Professors Twomey and Crommelin addressed a hypothetical scenario concerning the Bill’s proposed insertion of section 103A into the *Petroleum (Offshore) Act 1982* (NSW) (**State Petroleum Act**).<sup>4</sup> They considered a scenario where the Commonwealth might in

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<sup>1</sup> See T25.

<sup>2</sup> For example, a pipeline licence of the kind referred to in the Bill’s proposed section 103A of the *Petroleum (Offshore) Act 1982* (**State Petroleum Act**) may already be refused, pursuant to section 66 of the State Petroleum Act.

<sup>3</sup> See, eg, at T20, “I don’t know that there’s any Commonwealth legislation at the moment that specifically conflicts” (Twomey); T21, “But nor can one say, ‘This is unconstitutional. You can’t do it.’ There’s nothing firm of that nature either” (Twomey); T24, “I can confirm, and it is certainly my view, that the current Commonwealth legislation—both the *Offshore Petroleum and Greenhouse Gas Storage Act* and the *Offshore Minerals Act*—do not purport to operate outside offshore areas. In other words, they do not apply their provisions to the coastal waters of New South Wales. So at the moment there’s not a problem” (Crommelin); T25, “Before you get anywhere, you’ve actually got to have something that is happening offshore that is approved by Commonwealth legislation before you even get to the point of look at some kind of inconsistency” (Twomey).

<sup>4</sup> At T23 – T24.

future rely on an exception in the *Coastal Waters (State Title) Act 1980* (Cth)<sup>5</sup> to authorise the construction and use of pipelines in coastal waters for the transport across the seabed of petroleum. This scenario does not add risk to the Bill. The likely analysis in that scenario would be that no State licence is required; the relevant authority would be granted by the Commonwealth. As such there would be no inconsistency — section 103A of the *State Petroleum Act* simply would not apply.

- (d) Finally, in light of the above, we cannot conceive of any basis on which a legitimate claim for compensation might arise if in future the Bill's operation is narrowed as a result of an inconsistent Commonwealth decision. Ultimately that analysis would depend on the detail of the decision. However, it would be extraordinary if a future decision were given retrospective application in such a way that a business might have an arguable claim that it suffered damage as a result of the provisions in the Bill. We are aware of no analogous precedent of this nature. Further, to our knowledge PEP-11 is the only permit or licence which would be impacted by the Bill.<sup>6</sup> This also speaks to the low practical risk of any challenge.

2.3 We understand that the Committee may be concerned by the definition of 'relevant development' in proposed s 10.17 of the *Environmental Planning and Assessment Act 1979* (NSW). It remains our view that a circularity or inconsistency does not arise on a proper construction of the provision. However, if the Committee considers this definition to be problematic in a s 109 sense, we would endorse the amendments to that section which have been proposed by the Environmental Defenders Office, in their submission to the Committee dated 8 September 2023.<sup>7</sup>

3. **As per your submission at 2.3(c), does the nature of this Bill in NSW (being contemplated by way of this Inquiry) directly contradict the point that you make here? Wouldn't the current Bill as proposed put the State and the Commonwealth into direct conflict of principles and rules, unless of course the Commonwealth adopted similar frameworks?**

3.1 As noted in our Advice, the Offshore Constitutional Settlement provides:

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<sup>5</sup> Section 4(2)(c).

<sup>6</sup> See NSW government licence details (at <https://minview.geoscience.nsw.gov.au/#/?lon=145.0953&lat=-32.59402&z=5.94&bm=bm1&l=ge612:y:100,qp5:n:100,qp2:n:100,re1:n:100,qp8:y:100,qp81:y:100,pt6:y:100,pt5:y:100,pt4:y:100,pt3:y:100,pt2:y:100,pt1:y:100,gc1:n:100,cl1:n:100,dr23:n:100,dr22:n:100,dr21:n:100,dr20:n:100,dr19:y:100>) and Commonwealth licence and permit map (at <https://public.neats.nopta.gov.au/Map>).

<sup>7</sup> These amendments have also been endorsed by Professors Twomey and Crommelin: see, eg, at T20, "I read the EDO's suggestion. I think that's a sensible suggestion" (Twomey); T22, "As long as the amendment did not purport to take the operation of this bill into the offshore area of the State, then I think there's high chance of constitutional validity in coastal waters and onshore [sic]" (Crommelin); T25, "However, if the references to the offshore area were excluded as discussed earlier, then that would no longer be a problem" (Twomey).

*The Commonwealth and the States should try to maintain, as far as practicable, common principles, rules and practices in regulating and controlling offshore mining beyond the baseline of Australia's territorial sea.*

(Emphasis added.)

- 3.2 Nothing in this creates a positive obligation on the State to ensure that its legislation is in complete accordance with Commonwealth legislation. Further, unlike s 109 of the Constitution, the Settlement does not evince an intention for Commonwealth to prevail above State legislation. Had the writers of the Settlement intended to impose a positive obligation on the States, that would have been explicitly included in the wording of the Settlement.
- 3.3 Furthermore, that the States should try to maintain common principles, rules and practices, as far as practicable, with the Commonwealth should *not* be prohibitive of a State forging a new path, especially one with such laudable aims as the Bill. If passed, the Bill would be precedent setting. It is possible, in fact, that other States would pass similar legislation and eventually the Commonwealth.
- 3.4 In any event, the NSW State government has already adopted policies (as far back as 2020), which indicate that it gives only limited support new offshore coal and petroleum exploration and mining<sup>8</sup> and gas exploration and production.<sup>9</sup>
4. **What direct impact do you foresee for the NSW Minister, within the Joint Authority as per the Offshore Constitutional Settlement in your submission at points 2.1 through to 3.2, if the proposed Bill in NSW is enacted, given that the NSW Minister's position for future (and current) proposals with regard to petroleum exploration and extraction under the Bill would be to say "no" to any and all applications? Does this fundamentally extinguish the purpose of the Joint Authority in instances of petroleum exploration or production applications?**
- 4.1 As discussed in our Advice, the Bill purports to legislate only in respect of the NSW coastal waters, pursuant to the powers of the State conferred in the terms of the Offshore Constitutional Settlement and by the *Coastal Waters (State Powers) Act 1980* (Cth).<sup>10</sup> However, as noted by Professor Crommelin in his evidence to the Committee,<sup>11</sup> the Joint Authority is a construct of the

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<sup>8</sup> Offshore Exploration and Mining – Policy (February 2022): [https://www.resourcesregulator.nsw.gov.au/sites/default/files/2022-10/policy-offshore-exploration-and-mining\\_0.pdf](https://www.resourcesregulator.nsw.gov.au/sites/default/files/2022-10/policy-offshore-exploration-and-mining_0.pdf). See also Strategic Statement of Coal Exploration and Mining in NSW (2020): <https://www.resourcesregulator.nsw.gov.au/sites/default/files/2022-11/strategic-statement-on-coal-exploration-and-mining-in-nsw.pdf>.

<sup>9</sup> Future of Gas Statement (2021): <https://www.nsw.gov.au/sites/default/files/2021-07/Future%20of%20Gas%20Statement.pdf>.

<sup>10</sup> See s 5.

<sup>11</sup> T24.

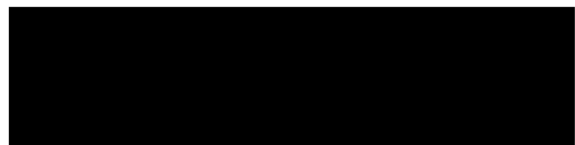
relevant Commonwealth legislation<sup>12</sup> and operates only with respect to the offshore area; the Joint Authority has no role in the coastal waters of the State.

- 4.2 If the Minister, in his or her discretion as part of the Joint Authority, says “no” to *all* applications in instances of petroleum or production applications in connection with the offshore area, then that is the Minister’s prerogative and is not governed or informed by the operations of the Bill. The Bill states that the Minister must not grant licenses and/or permits under the provisions of the *Petroleum (Offshore) Act 1982* (NSW) and the *Offshore Minerals Act 1999* (NSW) that deal with applications relating to *coastal waters* — it does not purport to govern the Minister’s discretion with respect to the offshore area. To the extent that the Minister takes any ‘standing’ negative position on offshore activity governed by the Joint Authority, that would be more likely informed by the State’s pre-existing policy position.<sup>13</sup> It would not be a consequence of the Bill.
- 4.3 The purpose of the Joint Authority therefore is not, and cannot, be extinguished by the operation of the Bill. Nor does it create an obligation on the Minister to perform their function in the Joint Authority in any particular manner. The Bill’s operation is confined to State legislation operating in coastal waters.
- 4.4 Regardless, it unlikely that the Minister will be required to agree or disagree with an application in the offshore area of NSW in the future. Currently, there is one permit pending application in the offshore area of NSW: PEP-11. Of previous licenses which have been granted in the NSW offshore area, there was some seismic testing done in the Clarence-Moreton Basin, which application was granted in 1969, that was done primarily onshore with a small area offshore.<sup>14</sup> These have been the only two licenses granted in respect of the offshore area of which we are aware.
- 4.5 In light of the above, the simple answer to question 4 is no, the Bill will not affect the operation of the Joint Authority.

Yours sincerely



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**Alice Osborne**  
Lawyer

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<sup>12</sup> See *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), s 5; *Offshore Minerals Act 1994* (Cth), s 3.

<sup>13</sup> Offshore Exploration and Mining – Policy (February 2022):  
[https://www.resourcesregulator.nsw.gov.au/sites/default/files/2022-10/policy-offshore-exploration-and-mining\\_0.pdf](https://www.resourcesregulator.nsw.gov.au/sites/default/files/2022-10/policy-offshore-exploration-and-mining_0.pdf).

<sup>14</sup> Yamba-Evans Head marine seismic survey no. 1, Clarence-Moreton Basin:  
<https://search.geoscience.nsw.gov.au/report/R00021511>.