

**Submission
No 39**

**MINERALS LEGISLATION AMENDMENT (OFFSHORE DRILLING AND
ASSOCIATED INFRASTRUCTURE PROHIBITION) BILL 2023**

Organisation: Surfers for Climate

Date Received: 31 August 2023



Attention: The Legislative Assembly Committee on Environment and Planning

RE: The inquiry into the Minerals Legislation Amendment (Offshore Drilling and Associated Infrastructure Prohibition) Bill 2023.

Thank you for providing the opportunity for Surfers for Climate to provide its submission to this inquiry which so many in the community are invested in. It's a big community with 85% of all Australians living within 50kms of the coast.

Surfers for Climate is an Australian charity dedicated to helping the surfing community turn the tide on climate change. Surfers for Climate is a community of thousands surfers, many in New South Wales, and ocean lovers across Australia coming together to take off on the 'party wave of climate action' and become part of the solution to reduce emissions.

Surfers for Climate successfully delivers high-impact climate educational experiences across Australia, builds deep relationships with a diverse set of Australians, and focuses on building bipartisan support for sensible policies by working with politicians on all sides of politics.

Our members love our coastal environment, and many live by the beach. The physical and natural resources from the oceans and beaches are critical to our wellbeing and the local coastal economies which many of us rely on. Any disruption to them, whether temporary or permanent, has significant impacts for us and the communities in which we live and work.

For the future of our coastlines, livelihoods and climate we strongly support this bill. Please find our submission below.

Sincerely,



Josh Kirkman
CEO Surfers For Climate

SUBMISSION FROM SURFERS FOR CLIMATE

In response to the terms of reference (a) any constitutional issues or unintended consequences raised by the bill, and whether any amendments may address those.

Marque Lawyers Pty Ltd conducted a legal review of the Minerals Legislation Amendment (Offshore Drilling and Associated Infrastructure Prohibition) Bill 2023 on behalf of Surfers for Climate. They concluded that the bill **does not** raise any Constitutional issues. They found the bill to be consistent with the existing regime between the States and the Commonwealth, which allocates jurisdiction of the coastal waters to the States and offshore area to the Commonwealth. The proposed amendments in the bill purport to legislate only regarding the coastal waters, which are within the State jurisdiction.

Please find their advice in more detail, in the file attached to this submission.

In response to the terms of reference (b) whether there are other ways to achieve the intended outcomes of the proposed bill including through the New South Wales Government offshore exploration and mining policy.

Legislation is required, rather than any other option as it is the strongest form of action. Using regulations, regulators or new policies (which can be changed with incoming or outgoing governments) does not provide the long-term policy certainty that the community expects and is calling for.

The Minerals Legislation Amendment (Offshore Drilling and Associated Infrastructure Prohibition) Bill 2023 offers the best safeguard for protecting the NSW coastline, marine life, climate and coastal communities from risky offshore oil and gas exploration, production and associated infrastructure.

In response to the terms of reference (d) environmental impacts of offshore drilling.

Carbon and methane emissions

We do not support any new offshore oil and gas projects because of their well-known impacts on climate change and the environment..

The consensus of the global scientific community is clear. We must reduce emissions this decade if we are to avoid more severe climate impacts. Scientists say that we are reaching irreversible tipping points with warming oceans, droughts and ice caps melting. These impacts and many others threaten our economy, our ocean and our way of life. Exploring for more oil and gas today will only lock in more harmful emissions for many decades to come at a time when we must reduce, not increase our carbon emissions.

New offshore oil and gas projects are in conflict with the NSW Labor State Government's objective to deliver a 50% cut in emissions by 2030 and achieve net zero by 2050^[1].

More carbon emissions from new oil or gas projects will only fuel climate impacts. Our coastal communities need leadership to reduce carbon emissions, to mitigate the cost of climate impacts^[2] on coastal communities, and ensure we can ride waves in a thriving ocean for generations to come.

Natural gas is composed of 70-90% methane, a potent greenhouse gas and major contributor to global warming.^[3] Methane has a much shorter atmospheric lifetime than CO₂ (around 12 years compared with centuries for CO₂), but it is a much more potent greenhouse gas, absorbing much more energy while it exists in the atmosphere.^[4] Methane represents about 18% of global emissions and is estimated to have contributed to around 30% of the rise in global temperatures since the Industrial Revolution^[5]. Australia recently joined the Global Methane Pledge^[6], which aims to reduce global methane emissions by at least 30% below 2020 levels by 2030. NSW cannot be adding more methane to the economy when we have to find ways to reduce it in the next 8 years.

In terms of gas supplies, NSW does not need any new offshore wells opened. Gas consumption continues to decline in NSW, so there is no business case for new gas. Gas usage in NSW has fallen and this is partly due to less gas being consumed for power generation since the first half of the 2010s^[13]. As more renewable energy comes online and as home electrification grows it will free up gas supply.

In addition, any new gas projects approved today will be many years away in terms of production, and therefore cannot contribute to the energy transition we are currently managing. It will not help with the rising cost of energy bills that NSW residents are currently facing. Australia does not have a gas supply problem per se - we have an export problem. Around three quarters^[7] of our Australian gas is exported, when some of the gas (should we experience a short fall) could be sent to the domestic market.

Marine Impacts

Seismic surveying, required in the exploration phase of any new offshore oil and gas projects, has incredibly harmful impacts on the marine environment and industries that rely on it, such as tourism and commercial fishing. The airgun blasts can reach more than 250 decibels^[8] and can be heard for miles. Seismic surveying can cause hearing loss amongst marine wildlife, and disturb essential behaviours such as feeding, breeding, communications between individual whales and dolphins. Seismic surveying can also negatively impact zooplankton, often killing them en masse. These species underpin the health and productivity of marine ecosystems and form the basis of marine food chains.

Any offshore oil and gas project poses unacceptable and significant environmental risks. These include: the potential for oil spills, pollution in coastal areas, the disposal of enormous volumes of toxic waste drilling fluid, and the physical impacts on marine life, including endangered species.

The laying of seabed pipelines also alters local seabed habitats by adding hard substratum, which in turn may support sessile epifauna and/or attract motile benthic organisms^[9] Ulfnes et al. (2013)^[10] estimated a 50 metre wide corridor of impact for pipeline installations, including

dislocation of existing hard substrata.

Detected ecological changes attributed to current practices have typically been found within 200–300 metre of the well-head^[11], but can occasionally extend to 1–2 kilometres for sensitive species^[12].

^[1] [NSW Labor Announces Net Zero Legislation](#)

^[2] [Global warming to cost Australia up to \\$423 billion over 40 years](#)

^[3] Yale Program on Climate Change Communication [Should it be called 'natural gas' or 'methane'](#) 1 December 2020

^[4] International Energy Agency (IEA) [Methane Tracker 2021 Methane and climate change](#)

^[5] IEA [Global methane tracker 2023. Understanding methane emissions](#)

^[6] Australian minister for climate change and energy Chris Bowen [Australia joins global methane pledge](#) 23 October 2022

^[7] [Energy Trade](#)

^[8] [What is Seismic Blasting](#)

^[9] [\(Lebrato and Jones 2009\)](#)

^[10] [Ulfesnes et al. \(2013\)](#)

^[11] [Currie and Isaacs 2005; Gates and Jones 2012](#)

^[12] [Paine et al., 2014](#)

^[13] [Gas's Role In The Transition](#)

In response to the terms of reference (e) any other related matters.

Surfers for Climate released a public survey to collect data about the public sentiment regarding the bill. At the time of writing this submission the survey received 1,010 responses, with 70% of respondents living in NSW, and 46% in a coastal NSW location.

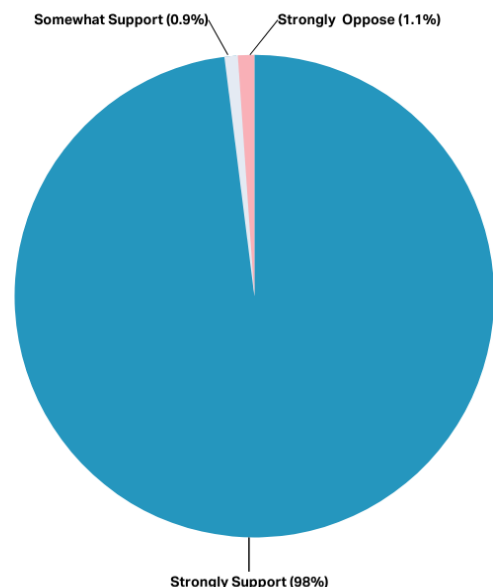
A summary of the survey results is below, further data from the public survey is available at the request of the committee.

Support for the bill

Overall 98.9% of the public support the bill, with 98% indicating that they “strongly support” the legislation to ban all new offshore oil and gas, and associated infrastructure in NSW waters.

Support for the bill to ban all new offshore oil and gas projects, and associated infrastructure in NSW waters: Overall

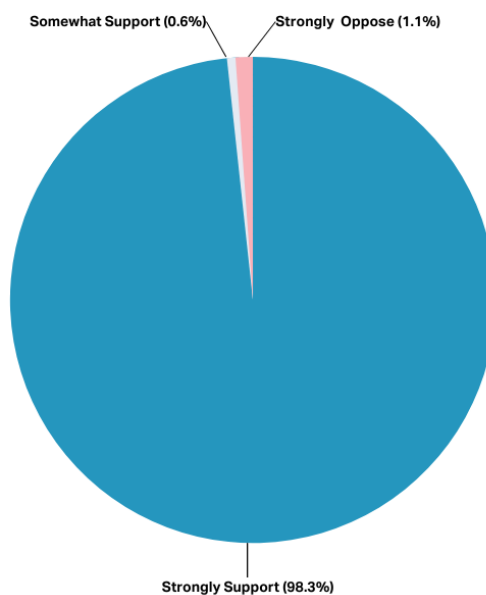
- Strongly Support (98%)
- Somewhat Support (0.9%)
- Somewhat Oppose (0%)
- Strongly Oppose (1.1%)



Amongst NSW respondents, 98.9% of NSW residents support the bill, with 98.3% of those indicating that they “strongly support” the bill. Similarly, amongst NSW residents living in a coastal community, total support for the bill is 98.9%, with 98.3% of those indicating they strongly support the bill.

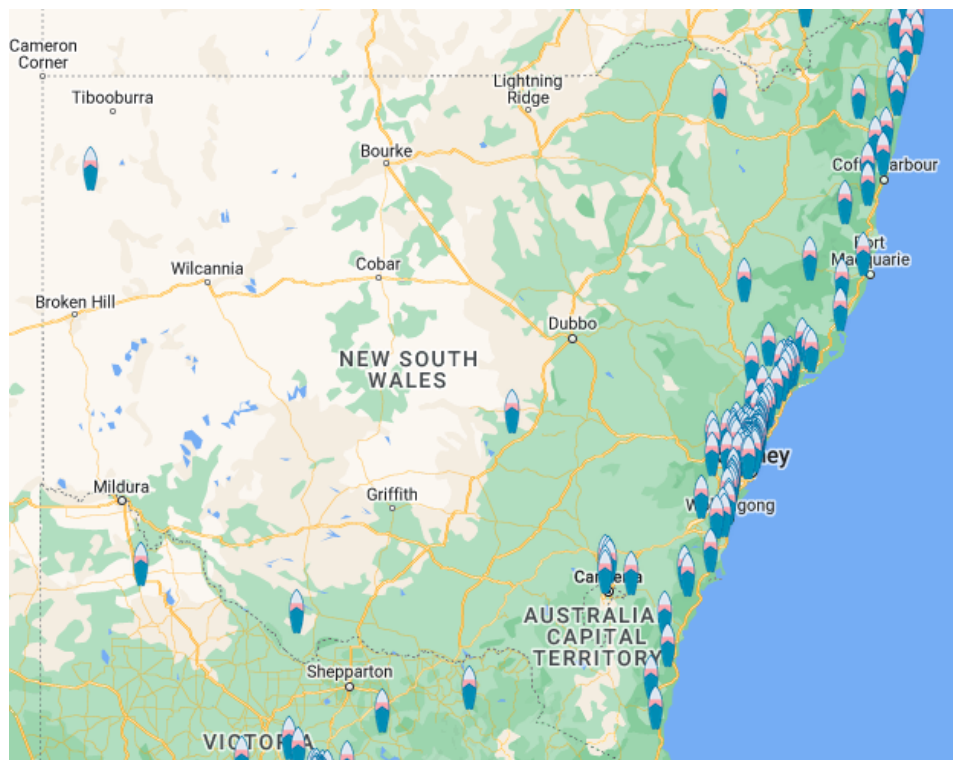
Support for the bill to ban all new offshore oil and gas projects, and associated infrastructure in NSW waters: NSW Residents

- Strongly Support (98.3%)
- Somewhat Support (0.6%)
- Somewhat Oppose (0%)
- Strongly Oppose (1.1%)



Public support by location in NSW

The map to the right depicts the location of respondents, and clearly demonstrates that support for this bill extends the entire length of the NSW coastline.

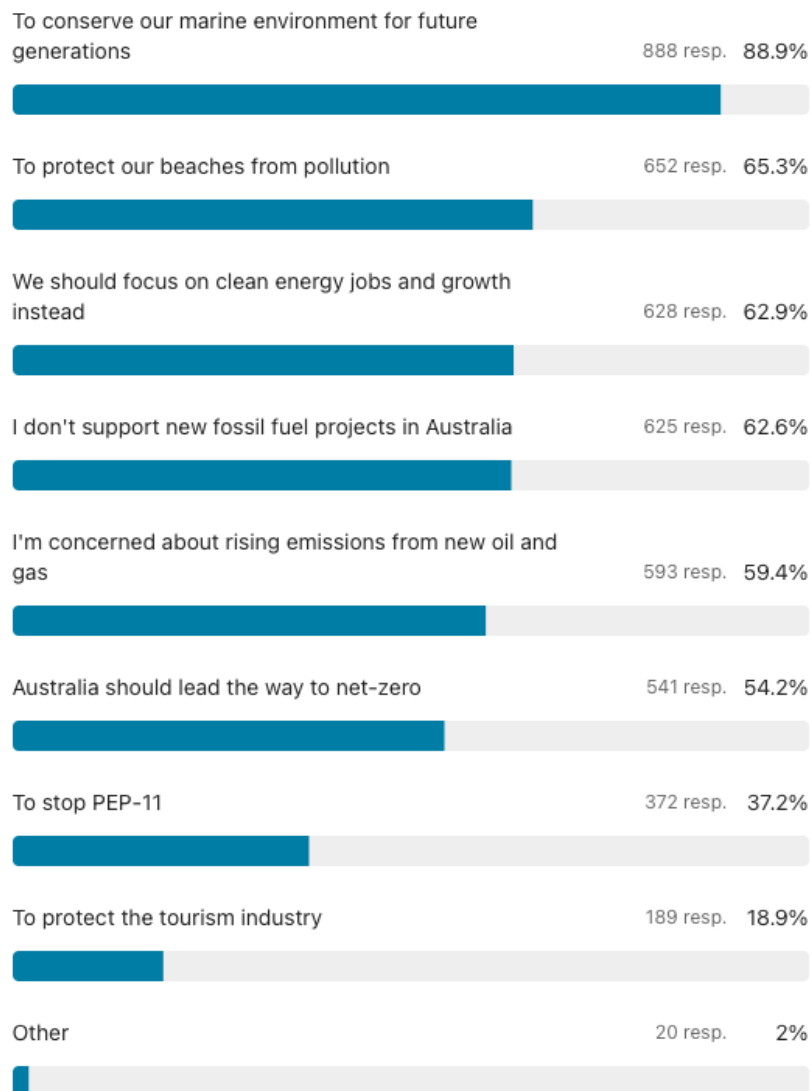


Reasons for supporting the bill

For people who indicated support for the bill, we asked respondents for their top three reasons for supporting the bill. The results were:

1. To conserve our marine environment for future generations
2. To protect our beaches from pollution
3. We should focus on clean energy jobs and growth instead

What became very clear is that support for banning offshore oil and gas is not just centred around PEP-11. The public do not want any future oil or gas projects, or associated infrastructure in NSW Waters.



In their 'own words'

We asked those supportive of the bill to tell us why they were supportive of ending offshore oil and gas in their own words, and the results showed a similar pattern of reasons for support, including:

1. It's the right thing to do.
2. They want to ensure marine environments are protected from the harmful environmental impacts of offshore oil and gas.
3. They want their kids and grandkids to be able to enjoy the coast and ocean.
4. They want to see renewable energy projects, not fossil fuel projects.
5. They understand that opening up new oil and gas projects does not match with the Government's emissions reduction targets.
6. They are concerned about the detrimental impacts of offshore oil and gas could have on the health, livelihood and well being of coastal communities in NSW.

Below is a sample of quotes from the 1,010 respondents:

- "Australia and the globe are already seeing the impacts of climate change. The future is clean and renewable, we need to embrace it and transform our economy."
- "I support this bill as I am concerned about rising emissions, and the resulting impacts on our communities and the environment. I'd like to see the government support families who are doing it tough to reap the benefits of a new energy system instead (e.g. incentives to increase rooftop solar intake)."
- "We need robust bills/legislation in place (hopefully like this one) to ensure that those in power are not perpetually given the green light (or, easily bypassed 'loopholes') to continue destroying this beautiful country and its oceans."
- "Offshore oil and gas infrastructure has a demonstrated track record of environmental damage. I support legislation to ban any and all new offshore oil and gas because it's a straightforward way to protect our environment."
- "It's the right thing to do!"
- "Because I want my son and his friends to be able to enjoy the world's beauty as I have."
- "A ban on new offshore oil and gas in NSW is the right path, not just for environmental reasons but also for economic well-being. Dependence on fossil fuels can drive up the cost of living. Transitioning to cleaner energy is a smart move for a more affordable future."
- "We don't need it - we need to focus on rolling out clean and cheap renewable energy and if we ruin our oceans from pollution and rising sea temperatures that's bad for marine life, which is bad for tourism and other businesses along the coast."
- "Australia needs to get on the right side of history before it's too late. It's time to end our reliance on fossil fuels instead and instead invest in clean energy alternatives."
- "The IEA is clear on the science. No greenfield oil, gas and coal projects if we are to meet net zero (net zero is enshrined by law in Australia)."

- “This isn’t just an ocean protection thing, it’s a people protection thing. This bill is a no brainer.”
- ”Unnecessary to continue offshore oil and gas. Time to embrace the energy transition, which is an enormous task, and requires leadership and market signals.”
- “Having recently returned from surfing in California, I couldn't believe how disgusting the exploration and drilling has made the sand and water quality across the whole Californian coast.”
- “I think Australia has the most beautiful beaches in the world by far. I’ve been spending a lot of time in America where they have offshore oil and gas, it’s not pretty.”
- “We need to shift towards an all-electric future for the next generation. Those that don’t support this ban, will have to explain the consequences for their actions to their children and grandchildren.”
- “Making policies and decisions that will have a positive impact on climate, environment, and the earth's future is important!”
- “When it comes to the government’s role in all this, new offshore oil and gas go directly against the NSW Labor state objective to deliver a 50% cut in emissions by 2030 compared to 2005 and net zero by 2050.”
- “We already know that this is not necessary, there are alternative forms of fuel and energy. The government has promised to take steps towards a renewable future and allowing offshore oil and gas would only contradict this.”
- “We can't risk our environment for the sake of a multinational company that pays very little or no tax.”
- “The potential risk affects many, and the profits affect so few.”
- “Our oceans are precious. The diversity of life they support should not be endangered”
- “Coastal communities rely on the beaches and ocean for our livelihood. Our future is in tourism and aquaculture - not oil and gas.”
- “It is crucial for the health and livelihood of everyone who resides in the coastal regions. This population is growing exponentially.”
- “There is technology available to make the transition we need to meet our 2050 climate targets. By leading by example, we will also have the upper hand of innovation.”
- “It is the positive change and direction we should all be supporting.”
- “This isn’t just an ocean protection thing, it’s a people protection thing. This bill is a no-brainer.”
- “Our voices need to be heard. It is time to come together and put an end to this. We must protect our nature for our future generations.”

- “As we need to transition away from our reliance on the fossil fuel industry as one of our key economic drivers in the Country.”
- “Let's keep as much oil and gas in the ground. We should be working toward new renewable options. Marine life has already suffered a lot from plastics, oil spills, and warming temperatures. We don't need to add more harm to the ocean.”
- “Why risk it? Surely there are more viable, less risky ways to secure energy.”
- “I think it is a necessary step forward toward creating the type of future I want to live through and would be proud to be a part of.”
- “The time for offshore oil and gas exploration is over. The science is clear: we must transition to a clean energy future now to avoid catastrophic economic, social, environmental and cultural consequences.”
- “The flora and fauna in these coastal areas are extremely fragile. The chances are way too high that these areas will be permanently damaged from offshore oil and gas.”
- “It's a no brainer - nature must come first.”
- “Mining or any resource presents an environmental risk, offshore mining of oil and gas resources presents significant risk to the integrity and health of the environment and the ecology. It makes no sense to put the environment at unnecessary risk from mining a resource that has no future.”
- “Australia needs to become a global leader in renewable energy, and not rely on finite supplies of oil and gas.”
- The risks associated with offshore drilling, including oil spills and pollution, can harm coral reefs and coastal areas, leading to negative impacts on tourism and local economies.“
- “I am part of the senior population and I strongly believe we need to do so much more in order to provide for future generations.
- “We need a more forward thinking approach which starts now not in 30 years after more oil rigs have added to our climate problems.”
- “Because I bloody love the ocean and I want my kids to share the same experience as me, grow up by the sea and make sure it's still clean!”
- “As a sailor, I see the changes to the ocean from damaged reef systems to reduced fish quantities. I see pollution in the ocean waters. We need to protect our waters for the future and this is a step forward.”

Our reference HM/14378

Phone

Email

29 August 2023

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

To the Committee on Environment and Planning

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

1. Introduction

- 1.1 We act for Surfers for Climate (**SFC**).¹ SFC is an Australian charity dedicated to turning the tide on climate change. One of their goals is to fight to prevent new coastal and offshore fossil fuel developments.
- 1.2 We have been instructed to provide advice to SFC for the purpose of a submission to the Inquiry (**Inquiry**) into Minerals Legislation Amendment (Offshore Drilling and Associated Infrastructure Prohibition) Bill 2023 (**Bill**).
- 1.3 The purpose of the Bill is to prevent offshore mining and exploration in NSW coastal waters. It achieves this by amending three pieces of NSW legislation: the *Petroleum (Offshore) Act 1982* (NSW) (**State Petroleum Act**); the *Offshore Minerals Act 1999* (NSW) (**State Minerals Act**); and the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**).
- 1.4 The Bill proposes to insert:
 - (a) section 103A in the State Petroleum Act, which would provide that the Minister must not grant:
 - (i) certain permits or licenses with respect to the exploration and recovery of petroleum in the coastal waters of the State; nor
 - (ii) a pipeline license for construction of a pipeline wholly or partly within the coastal waters of the State;

¹ <https://surfersforclimate.org.au/>.

- (b) section 444A in the State Minerals Act, which would provide that the Minister must not grant a mineral license under that Act except for the purposes of the recovery of sand for beach nourishment; and
- (c) section 10.17 in the EPA Act, which would provide that a person must not carry out:
 - (i) relevant development in coastal waters of the State; nor
 - (ii) development in the States for the purposes of supporting such a relevant development,

(collectively, **Proposed Amendments**).

1.5 This submission addresses item (a) in the Inquiry terms of reference, being whether the Bill raises any constitutional issues. For the reasons set out in more detail in this submission, the Bill does not raise a constitutional issue and is consistent with the existing agreement between the States and the Commonwealth about the allocation of powers and jurisdiction in the territorial sea.

- (a) There is an existing regime which divides the waters in Australia’s territorial sea between the State (referred to as the coastal waters) and the Commonwealth (referred to as the offshore area), and which provides for the power of each to legislate in their respective zone (**Offshore Constitutional Settlement**).
- (b) The Proposed Amendments are consistent with the powers conferred on the States by the Offshore Constitutional Settlement.
- (c) The Proposed Amendments do not infringe on the rights of the Commonwealth to confer licenses and permits pursuant to the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) (**Commonwealth Petroleum Act**) and the *Offshore Minerals Act 1994* (Cth) (**Commonwealth Minerals Act**) because they deal only with the coastal waters of the State.

2. **There is an existing legal regime allocating jurisdiction and powers between the States and the Commonwealth**

2.1 The Offshore Constitutional Settlement is a regime which allocates responsibility of the territorial sea between the States and the Commonwealth. The territorial sea currently extends 12 nautical miles from the territorial sea baseline, approximately the coastline of Australia.

2.2 Although the Commonwealth has sovereignty over the territorial sea, as a result of the Settlement the States have responsibility for the coastal waters of the State (see s 5 of the *Coastal Waters (State Powers) Act 1980* (Cth) (**State Powers Act**)). “Coastal waters” are the first three nautical miles of the territorial sea extending from the baseline.

2.3 The remainder of the territorial sea, to the outer limits of the continental shelf, is known as the “offshore area”. The Settlement also provides that:

- (a) Commonwealth offshore mining and exploration legislation is limited to the offshore area which is outside the State coastal waters;²
- (b) the States should share in the administration of Commonwealth offshore mining legislation; and
- (c) 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.

2.4 A further result of the Settlement was the establishment of the Joint Authorities, which exist for each State offshore area. The Joint Authority is constituted by the responsible State Minister and the responsible Commonwealth Minister. The Joint Authority has decision-making power with respect to permits and licenses under the Commonwealth Petroleum Act and the Commonwealth Minerals Act. Where the State Minister and the Commonwealth Minister disagree about a decision, the decision of the Commonwealth Minister prevails.

2.5 The Settlement was a deliberate and considered decision to allocate jurisdiction between the States and the Commonwealth following a decision of the High Court in *New South Wales v Commonwealth* [1975] HCA 58 (also known as the Seas and Submerged Lands case). The High Court found that the Commonwealth has sovereignty over waters to the edge of the territorial sea, including the seabed beneath these waters. However, the States and the Commonwealth agreed that this jurisdiction should be split between them, as set out above.

3. **The Proposed Amendments are consistent with State powers and jurisdiction**

3.1 The Proposed Amendments purport to affect the State's power to legislate only with respect to the State's coastal waters. This is consistent with the States Powers Act.

Proposed Amendment in Schedule 1

3.2 Schedule 1 of the Bill would insert s 103A into the State Petroleum Act (see **Annexure A**). Again, this section restricts only the State's ability to grant permits or licenses with respect to the coastal waters of the State. It therefore does not, and cannot, infringe upon the Commonwealth's powers and jurisdiction in the Commonwealth–State offshore area.

3.3 Despite the fact that s 103A(1)(c) prohibits the granting of a pipeline license for construction *wholly or partly* within the coastal waters of the State, this only prohibits the granting of the license under Division 4 of the State Petroleum Act. It does not affect the ability of the Joint Authority to grant a license under the Commonwealth Petroleum Act.

² See Commonwealth Petroleum Act, s 5 and Commonwealth Minerals Act, s 3.

Proposed Amendment in Schedule 2

- 3.4 Schedule 2 of the Bill would insert s 444A into the State Minerals Act (see **Annexure B**). As above, this amendment would not infringe upon the Commonwealth’s powers and jurisdiction in the Commonwealth–State offshore area.
- 3.5 The State Minerals Act provides for the grant of exploration licenses, retention licenses, mining licenses and works licenses. Each of these licenses are granted only with respect to State coastal waters.³

Proposed Amendment in Schedule 3

- 3.6 The amendments in Schedules 1 and 2 of the Bill are dependent on the enactment of the amendment in Schedule 3 of the Bill. Schedule 3 would insert s 10.17 into the EPA Act (see **Annexure C**), prohibiting ‘relevant development’ in the coastal waters of the States and ‘development’ in the State. Under the proposed section, ‘relevant development’ means sea bed petroleum or mineral exploration or recovery,⁴ whether occurring in the coastal waters or the offshore area. For the purposes of the EPA Act,⁵ ‘development’ is any of the following: the use of land; the subdivision of land; the erection of a building; the carrying out of a work; the demolition of a building or work; any other act, matter or thing that may be controlled by an environmental planning instrument. ‘Development’ clearly refers to infrastructure that may support mineral or petroleum mining activities.
- 3.7 This Proposed Amendment does not purport to restrict petroleum or mineral mining in the offshore area of the State. It therefore does not infringe on the Commonwealth’s powers and jurisdiction in the Commonwealth–State offshore area.
- 3.8 It can be seen from this Proposed Amendment that it regulates only the State’s coastal waters, as it is tied only to ‘relevant development *within the coastal waters of the State*’ (emphasis added). Furthermore, it constrains only ‘development *within the State*’ (emphasis added), even where the relevant development may occur in the coastal waters or the offshore area of the State. The purpose of this amendment is clearly to ensure that no petroleum or mineral mining can occur within the coastal waters, and nor can any further infrastructure be built within the State to support any kind of petroleum or mineral mining in the coastal waters or the offshore area. This will be further discussed below at [4.7].

4. No infringement on Commonwealth powers or legislation

- 4.1 Section 109 of the Constitution deals with inconsistency between State and Commonwealth laws. It finds that when a law of a State is inconsistent with a law of the Commonwealth, the Commonwealth law shall prevail, and the State law shall, to the extent of the inconsistency, be

³ See State Minerals Act, ss 45, 132, 192 and 267.

⁴ Except for the recovery of sand for the purposes of beach nourishment.

⁵ Section 1.5.

invalid. If the Proposed Amendments were found to be inconsistent with the Commonwealth legislation, they would be considered invalid to the extent of the inconsistency.

- 4.2 As set out above, the Proposed Amendments concern only the State's coastal waters, in which the State specifically has the power to legislate. There can therefore be no Constitutional inconsistency.
- 4.3 There is separate Commonwealth legislation which covers the Commonwealth–State offshore area (the Commonwealth Petroleum Act and the Commonwealth Minerals Act) over which the Joint Authority exercises its authority. The Commonwealth Petroleum Act relevantly sets up a system for regulating, in the *offshore area*, the exploration and recovery of petroleum, and construction and operation of infrastructure facilities and pipelines, and provides for the grant of permits.⁶ The Commonwealth Minerals Act provides a legal framework which establishes a license system for the exploration and mining of minerals in the Commonwealth–State offshore area.
- 4.4 The High Court has distinguished between 'direct' inconsistency and 'indirect' (or 'covering the field') inconsistency.⁷ A direct inconsistency will arise where a State law would alter, impair or detract from the operation of a Commonwealth law. An indirect, or covering the field, inconsistency will arise if it appears from the terms, nature or subject matter of the Commonwealth law that it was intended as a complete statement of the law governing a particular area, and the State law tries to regulate or apply to the same area.⁸
- 4.5 To deal first with an indirect inconsistency, it is clear and unequivocal that the Commonwealth law is not intended to cover the field. This can be seen in explicit provisions in the Commonwealth legislation concerning the Offshore Constitutional Settlement — see s 5 of the Commonwealth Petroleum Act and s 3 of the Commonwealth Minerals Act, which codify and describe the Offshore Constitutional Settlement.
- 4.6 Further, there is no direct inconsistency. The Proposed Amendments specifically deal only with the coastal waters. As set out in the State Powers Act and the Offshore Constitutional Settlement, the States have legislative power with respect to coastal waters. Any decisions made by the responsible State Minister as part of the Joint Authority with respect to the Commonwealth legislation cannot be affected by the Proposed Amendments.
- 4.7 Finally, as foreshadowed above at [3.8], the operation of proposed s 10.17 in Schedule 3 of the Bill may create a practical impediment to the Commonwealth in seeking to regulate or grant permits in the offshore area. Under s 10.17(1)(b), persons would be prohibited from carrying out 'developments' with respect to 'relevant development'. Although s 10.17(1)(a) specifically states that only relevant developments in coastal waters of the States are prohibited, sub-s (b) does

⁶ Commonwealth Petroleum Act, s 4.

⁷ See, eg, *Dickson v The Queen* (2010) 241 CLR 491 at [13]–[14]; *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 85 ALJR 945 at [39]–[41].

⁸ See *Victoria v Commonwealth* (1937) 58 CLR 618 at 630.

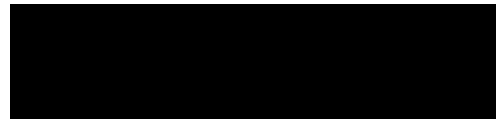
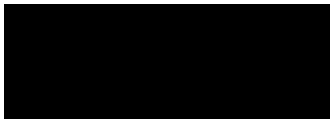
not contain that limitation. It refers to any relevant development, which may be in the coastal waters or the offshore area. This could therefore prevent the construction or maintenance of infrastructure supporting petroleum and mineral exploration and recovery which has been permitted under the Commonwealth legislation. This does not itself create an inconsistency with Commonwealth legislation; with or without this amendment, it is possible that the State may not approve projects relating to petroleum or mineral recovery in the offshore area, insofar as they require licences or approvals for activity in the coastal waters of the State or in the State itself.

4.8 There is no positive legal obligation, under Commonwealth or State legislation, on States to approve or support infrastructure projects relating to petroleum or mineral recovery in the offshore area, or to support licensees under the Commonwealth legislation. Nor does the Offshore Constitutional Settlement impose such an obligation. In fact, given the powers of the States outlined in the State Powers Act, to impose such an obligation and to dictate what developments the State must approve, would encroach on State powers specifically granted by the Commonwealth legislation.

5. **Conclusion**

5.1 The Inquiry should be satisfied that the Bill and the Proposed Amendments do not raise any constitutional issues, and no amendment is required on this basis. The Proposed Amendments legislate only with respect to the coastal waters of the State, an area in which the State is specifically empowered to legislate. There is no inconsistency between the Proposed Amendments and the laws of the Commonwealth.

Yours sincerely



Annexure A

444A Minister must not grant further mineral licenses, except sand for beach nourishment

- (1) The Minister must not, after the commencement of the *Environmental Planning and Assessment Act 1979*, section 10.17, grant a license under this Act.
- (2) Subsection (1) does not apply in relation to a license for or in relation to the recovery of sand for the purpose of beach nourishment.

Annexure B

103A Minister must not grant certain permits or licenses

- (1) The Minister must not, after the commencement of the *Environmental Planning and Assessment Act 1979*, section 10.17, grant—
 - (a) a permit under Division 2 for exploration in the coastal waters of the State, or
 - (b) a license under Division 3 for the recovery of petroleum from the coastal waters of the State, or
 - (c) a pipeline license under Division 4 for the construction, wholly or partly within the coastal waters of the States, of a pipeline to be used in connection with the recovery of petroleum.
- (2) In this section—

coastal waters of the State has the same meaning as in the *Interpretation Act 1987*, section 58.

Annexure C

10.17 Development for certain sea bed petroleum and mineral exploration and recovery prohibited

- (1) Despite any provision of this or another law, a person must not carry out—
- (a) relevant development in the coastal waters of the State, or
 - (b) development within the State for the purposes of—
 - (i) maintenance, repair, provisioning or fuelling of vessels, aircraft or equipment used for the relevant development, or
 - (ii) handling, refining or processing petroleum or minerals obtained from relevant development, or
 - (iii) unloading or transportation, including by pipeline, of petroleum or minerals obtained from relevant development.

Maximum penalty—Tier 1 monetary penalty.

- (2) In this section—

coastal waters of the State has the same meaning as in the *Interpretation Act 1987*, section 58.

Mineral has the same meaning as in the *Offshore Minerals Act 1999*.

Offshore area of the State means the offshore area of New South Wales within the meaning of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* of the Commonwealth, section 8.

Petroleum has the same meaning as in the *Petroleum (Offshore) Act 1982*.

Relevant development means the following, whether occurring in the coastal waters of the State or the offshore area of the State—

- (a) sea bed petroleum exploration or recovery,
- (b) sea bed mineral exploration or recovery, except for the recovery of sand for the purpose of beach nourishment permitted under the *Offshore Minerals Act 1999*, section 444A(2).

Vessel has the same meaning as in the *Petroleum (Offshore) Act 1982*.