Submission No 46

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

Organisation: Environmental Defenders Office

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Environmental Defenders Office

Submission to the inquiry into the Minerals Legislation Amendment (Offshore Drilling and Associated Infrastructure Prohibition) Bill 2023

8 September 2023

About EDO

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

Environmental Defenders Office is a legal centre dedicated to protecting the environment.

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Acknowledgment of Country

Environmental Defenders Office recognises the Traditional Owners and Custodians of the land, seas and rivers of Australia. We pay our respects to Aboriginal and Torres Strait Islander Elders past, present and emerging, and aspire to learn from traditional knowledges and customs so that, together, we can protect our environment and cultural heritage through law.

Submitted to:

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Background

On 29 June 2023, the Minerals Legislation Amendment (Offshore Drilling and Associated Infrastructure Prohibition) Bill 2023 (**MLA Bill**) was referred for inquiry to the Legislative Assembly Committee on Environment and Planning (**Committee**). The Committee is required to table a report setting out their findings by 21 November 2023. The MLA Bill proposes several amendments to the *Petroleum (Offshore) Act 1982* (NSW) (**PO Act**)*, Offshore Minerals Act 1999* (NSW) (**OM Act**) and *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) (collectively, **the Acts**) relating to, amongst other things, offshore mineral and petroleum exploration and recovery. The MLA Bill purports to prohibit the exploration and mining of petroleum and minerals in coastal waters off NSW.[1]

We welcome the opportunity to provide comments on the MLA Bill. We commend the proposed amendment of the Acts to prohibit the offshore exploration and recovery of minerals and petroleum in NSW coastal waters. However, we consider that the legislative framework proposed by the MLA Bill should be expanded to prohibit development related to Carbon Capture and Storage (**CCS**) in NSW coastal waters, that the drafting of the MLA Bill raises potential constitutionality issues in relation to its purported application to Commonwealth waters, and that the MLA Bill falls short with respect to updating and modernising relevant penalty provisions. Accordingly, we offer the follow comments and recommendations for amendment.

EDO's submission on the MLA Bill is couched in the context of its Roadmap for Climate Reform (**Roadmap**). We advocate for law reform that is science-aligned, prudent and ambitious enough to meet the scale of the climate crisis.

[1] Legislative Assembly Committee on Environment and Planning, *Media Release: Drilling into the details of the proposed offshore drilling ban* (website, 31 July 2023), https://www.parliament.nsw.gov.au/ladocs/other/18332/Media%20release%20-%20Inquiry%20launch%20and%20call%20for%20submissions.pdf

Summary of Recommendations

Recommendation 1: The EDO supports the MLA Bill. However, in order for New South Wales to ensure that global warming is limited to 1.5 degrees, then all new fossil fuel use and production should be prohibited and all existing fossil fuel development should be phased out as soon as possible.

Recommendation 2: The MLA Bill be amended to prohibit CCS activities in NSW coastal waters.

Recommendation 3: Proposed s 10.17 of the EP&A Act be amended as follows:

a. the phrase "whether occurring in the coastal waters of the State or the offshore area of the State" be removed from the definition of "relevant development" in s 10.17(2) of the EP&A Act; and

b. the phrase "in the coastal waters of the State or the offshore area of the State" be added to the end of the proposed wording in each of ss 10.17(b)(i)-(iii) of the EP&A Act.

Recommendation 4: The MLA Bill should increase the penalty provisions in the PO Act and OM Act to appropriately reflect the seriousness of the offence being punished, which must be at least in line with inflation since each penalty provision was introduced.

Recommendation 5: The MLA Bill should introduce a tiered penalty unit system in the PO Act and OM Act, which mirrors the penalty unit system in the EP&A Act. Alternatively, a penalty unit system should be introduced in the OM Act, to replace the outdated existing specific financial penalty provisions in the OM Act.

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I. All fossil fuel use and production should be phased out to ensure a safe climate, and the MLA Bill should be expanded to cover CCS in NSW coastal waters

A. The urgency of the climate crisis requires the phasing out of all fossil fuel use and production

We commend the MLA Bill for prohibiting offshore petroleum and minerals activities. However, the EDO considers that broader legislative reforms are required in New South Wales to prohibit all new fossil fuel use and development, and phase out all existing fossil fuel development, to ensure a safe climate.[2]

We remind the Parliament of New South Wales that it is a component of the Earth System.[3] It is an institution of the anthroposphere with the ability to affect future outcomes.[4] The decisions the Parliament makes today will affect the level of risk that the environment and people of New South Wales face in the future.

It is a moral imperative that decision-makers apply the law in ways that will protect, restore and enhance the quality of the environment, and will ensure the safety and survival of the people and ecosystems affected by those decisions. Indeed, this is the very obligation imposed on the New South Wales Environmental Protection Authority by s 6 of the *Protection of the Environment Administration Act 1991* (NSW). Consideration of the MLA Bill must proceed from an initial acknowledgement that the continued approval of new fossil fuel developments is no less than a matter of life and death for the ecosystems and people of New South Wales.[5] The MLA Bill should therefore be commended for proposing to prohibit offshore petroleum and mineral activities. However, the Parliament of New South Wales should recognise that in order to effectively address the devastating impacts of climate change in New South Wales, much more significant reforms are required. Those reforms should stop at nothing less than the total prohibition of all new fossil fuel development in the State (whether onshore or offshore) and the phasing out of existing fossil fuel developments.

As courts in Australia have already concluded, in considering the potential impacts of climate change upon future generations in Australia:

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[2] See i.e., Environmental Defenders Office, 'Climate-ready planning laws for NSW: Rocky Hill and beyond' (March 2019) <http://www.edo.org.au/wp-content/uploads/2019/11/EDO-CC-FINAL-full-report-double-spreads.pdf>.

[3] Steffen, W., K. Richardson, J. Rockström, H.J. Schellnhuber, O.P. Dube, S. Dutreuil, T.M. Lenton and J. Lubchenco (2020) The emergence and evolution of Earth System Science. *Nature Reviews: Earth and Environment* 1:54-63.

[4] *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6)* [2022] QLC 21 [595]-[596] ("The Earth System is defined as the suite of interlinked physical, chemical, biological and human processes that cycle (transport and transform) materials and energy in complex, dynamic ways within the system. … Using the Earth System, the Court is part of the anthroposphere as an institution within a decision making framework that can determine whether or not an activity that will emit GHGs can proceed.").

[5] See, e.g. Vargas Zeppetello, L.R., Raftery, A.E. & Battisti, D.S. Probabilistic projections of increased heat stress driven by climate change. *Commun Earth Environ* 3, 183 (2022). https://doi.org/10.1038/s43247-022-00524-4.

> *It is difficult to characterise in a single phrase the devastation that the plausible evidence presented in this proceeding [about the impacts of climate change] forecasts for the Children. As Australian adults know their country, Australia will be lost and the World as we know it gone as well. The physical environment will be harsher, far more extreme and devastatingly brutal when angry. As for the human experience – quality of life, opportunities to partake in nature's treasures, the capacity to grow and prosper – all will be greatly diminished. Lives will be cut short. Trauma will be far more common and good health harder to hold and maintain. None of this will be the fault of nature itself. It will largely be inflicted by the inaction of this generation of adults, in what might fairly be described as the greatest inter-generational injustice ever inflicted by one generation of humans upon the next*.[6]

In *Sharma v Minister for the Environment* [2021] FCA 560 (***Sharma***), the Court relevantly made the following findings (which were not disturbed on appeal in *Minister for the Environment v Sharma* [2022] FCFCA 35):

a. If the global average surface temperature increases beyond 2°C, there is a risk, moving from very small (at about 2°C) to very substantial (at about 3°C), that Earth's natural systems will propel global surface temperatures into an irreversible 4°C trajectory, resulting in global average surface temperature reaching about 4°C above the pre-industrial level by about 2100.[7] That is, given the gravity of our current circumstances and the potentially catastrophic outcomes, the scale at which emissions reductions (or increases) are material is much lower.

b. The risk of harm from climatic hazards brought about by increased global average surface temperatures is on a continuum in which both the degree of risk and magnitude of the potential harm will increase exponentially if the Earth moves beyond a global average surface temperature of 2°C, towards 3°C and then to 4°C above the pre-industrial level.[8]

c. Exceeding the carbon budget for 2°C or even 1.5°C will lead to severe, irreversible and potentially cascading climate change harm.[9]

In *Bushfire Survivors for Climate Action v Environment Protection Authority* [2021] NSWLEC 92, in which the Court ordered the NSW EPA to develop environmental quality objectives, guidelines and policies to ensure environment protection from climate change, the court referred approvingly to evidence that:

a. the State's emissions trajectory was incompatible with holding global warming to 1.5°C;[10]

b. the State was outside its population share of the 1.5°C carbon budget;[11] and

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[6] *Sharma v Minister for Environment* [2021] FCA 560 [293], finding not overturned on appeal.
[7] Ibid [74].
[8] Ibid [75].
[9] Ibid [88].
[10] *Bushfire Survivors for Climate Action v Environment Protection Authority* [2021] NSWLEC 92 [87].
[11] Ibid [88].

c. the State was a major contributor to the production gap, being the discrepancy between planned fossil fuel production and global production levels consistent with limiting warming to 1.5°C.[12]

In addition:

a. The United Nations Secretary-General has warned that "[i]nvesting in new fossil fuel infrastructure is moral and economic madness".[13]

b. The IPCC has recently made clear that emissions from existing fossil fuel infrastructure will push the world beyond 1.5°C of warming, and that "[g]lobal warming is more likely than not to reach 1.5°C between 2021 and 2040 even under the very low greenhouse gas (**GHG**) emission scenarios",[14] and "[p]athways consistent with 1.5°C and 2°C carbon budgets imply rapid, deep, and in most cases immediate GHG emission reductions in all sectors (high confidence).[15]

c. The International Energy Agency has concluded that the scientifically credible pathway to limiting warming to 1.5°C – the goal of the Paris Agreement – requires that no new gas and oil fields be approved for development after 2021.[16]

The urgency of the climate crisis now dictates that governments move beyond a "polluter pays" philosophy that completely ignores the magnitude of harm caused by the continued production of fossil fuels. The only approach to carbon pollution from fossil fuel development (whether onshore or offshore) that is consistent with science is to move rapidly to prohibit all new fossil fuel use and production and phase out all existing fossil fuel development in New South Wales. To pretend, or allow otherwise, is contrary to scientific consensus, and the moral obligation owed by this generation to future generations.

RECOMMENDATION: The EDO supports the MLA Bill. However, in order for New South Wales to ensure that global warming is limited to 1.5 degrees, then further significant legislative reform is required such that all new fossil fuel development is prohibited and all existing fossil fuel development is phased out as soon as possible.

B. The MLA Bill should be expanded to cover CCS in NSW coastal waters

The MLA Bill, as presently drafted, does not apply to CCS in NSW coastal waters. CCS is commonly associated with offshore petroleum development. These two types of offshore development are now often proposed together given that the petroleum industry considers that CCS provides a potential solution to mitigate the significant GHG emissions resulting from petroleum production

[12] *Bushfire Survivors for Climate Action v Environment Protection Authority* [2021] NSWLEC 92 [89].
[13] UN Secretary-General Antonio Guterres, 'Secretary-General Warns of Climate Emergency, Calling Intergovernmental Panel's Report 'a File of Shame', While Saying Leaders 'Are Lying', Fuelling Flames (Media Release, 4 April 2022) <https://press.un.org/en/2022/sgsm21228.doc.htm>
[14] Hoesung Lee et al., Synthesis Report of the IPCC Sixth Assessment Report (AR6) (2023) 56 (Figure 3.5) < https://report.ipcc.ch/ar6syr/pdf/IPCC_AR6_SYR_LongerReport.pdf>.
[15] Ibid.
[16] International Energy Agency, *Net Zero by 2050: A Roadmap for the Global Energy Sector – Summary for Policymakers* (May 2021) 11 <https://iea.blob.core.windows.net/assets/7ebafc81-74ed-412b-9c60-5cc32c8396e4/NetZeroby2050-ARoadmapfortheGlobalEnergySector-SummaryforPolicyMakers_CORR.pdf>.

and processing. In theory, CCS involves the process of capturing of carbon dioxide (**CO_2**) emissions from fossil fuel production and combustion, and the storage of this CO_2 in underground geological formations.[17] However, CCS is a false solution to the climate crisis given that globally there are no CCS developments that are operating at the scale required to materially contribute to reducing global GHG emissions, and that the "promise" of CCS is often used by the petroleum industry to advocate for the expansion of the existing offshore petroleum industry in Australia.

The EDO is of the view that the omission of CCS development from the MLA Bill is a missed opportunity for NSW to prohibit an environmentally harmful industry that is related to offshore petroleum and mineral exploration and recovery. The EDO **recommends** that the MLA Bill should be expanded to cover CCS development in NSW coastal waters for the following reasons.

First, CCS comes with its own environmental concerns, many of which are similar to the environmental impacts associated with offshore petroleum and minerals exploration and recovery – for example:

a. At the initial stages, CCS development utilises seismic testing surveys to explore for suitable sub-sea geological formations to store CO_2. Established CCS developments also use seismic testing to monitor whether injected CO_2 is properly stored and not leaking.[18] Seismic exploration is a geophysical method that detects reflected or refracted seismic waves from subsurface media using artificial sources.[19] Seismic exploration poses a significant threat to marine life.[20] Seismic exploration has been proven to damage the hearing of whales and keep them away from key feeding and breeding grounds.[21] Seismic exploration also impacts other marine organisms, including zooplankton.[22] For instance, a 2017 study found that a loud blast, softer that the sound of a seismic air gun, killed nearly two-thirds of the zooplankton in three-quarters of a mile on either side.[23] The Second Reading Speech for the MLA Bill itself details the devastating impact that seismic testing has on marine life, including "killing plankton over one kilometre away; stressing, harming and displacing nearby fish and other sea life; and having links to mass strandings of turtles, dolphins and whales".[24] However, seismic testing and exploration in connection with CCS in NSW coastal waters is not currently prohibited by the MLA Bill.

b. CCS infrastructure is equally as damaging to the marine environment as the infrastructure required for offshore petroleum and mineral exploration and production. The Second Reading Speech for the MLA Bill refers to the threat to the marine environment posed by

[17] International Energy Agency, *Net Zero by 2050: A Roadmap for the Global Energy Sector* (October 2021) 206 < https://iea.blob.core.windows.net/assets/deebef5d-0c34-4539-9d0c-10b13d840027/NetZeroby2050-ARoadmapfortheGlobalEnergySector_CORR.pdf>.
[18] Youngjae Shin et al, '4D Seismic Monitoring with Diffraction-Angle-Filtering for Carbon Capture and Storage (CCS) (2022) 11(57) *Journal of Marine Science and Engineering* 1, 1.
[19] Ibid 2.
[20] Jonathan Gordon et al, 'A Review of the Effects of Seismic Surveys on Marine Mammals' (2003) 37(4) *Marine Technology Society Journal* 16, 16.
[21] Ibid 16.
[22] Robert McCauley et al, 'Widely used marine seismic survey air gun operations negatively impact zooplankton' (2017) *Nature ecology & evolution* 1, 1.
[23] Ibid.
[24] New South Wales, *Parliamentary Debates,* Legislative Assembly, 22 June 2023, 2 (Rory Amon, Member for Pittwater).

exploration and mining activities, including by reference to the 1999 oil spill in Sydney Harbour.[25] It goes on to refer to the types of infrastructure that would be banned by the MLA Bill, including "the construction of drilling platforms, pipelines and other infrastructure, which physically damage or destroy critical marine habitats such as coral reefs, seagrass and benthic ecosystems" and "disturb the sea floor and disrupt sensitive habitats".[26] In addition, it notes that accidental spills of petroleum during exploration and drilling "pose a significant risk to marine ecosystems, contaminating water and sediments and affecting entire food chains".[27] Similarly, the implementation of CCS development requires "a massive buildout of pipelines and associated infrastructure".[28] It follows that the impacts on marine ecosystems posed by the installation of CCS infrastructure in offshore locations are likely to be equally as damaging as the impacts on marine ecosystems posed by offshore petroleum and minerals infrastructure. In addition, the transport of captured CO_2 presents significant risks associated with pipeline failure which increase with the distance of travel required.[29]

c. The CCS process, whether it involves pre- or post-combustion capture of CO_2, requires significant energy use, and therefore may increase GHG emissions in NSW unless the energy required to power CCS operations is renewably sourced.[30] Post-combustion capture of CO_2 associated with energy production presents particular difficulties with efficiency and contaminants.[31] This, coupled with the significant potential for CCS developments to leak CO_2, means that, rather that providing a solution to the problem of climate change, there is a risk that CCS developments could in fact cause a net increase in global GHG emissions.

d. CCS systems are also water-intensive because water is needed during the cooling process at the power-plant level and as part of the carbon capture process.[32] Consequently, broad

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[25] New South Wales, *Parliamentary Debates,* Legislative Assembly, 22 June 2023, 2 (Rory Amon, Member for Pittwater).
[26] Ibid 2-3.
[27] Ibid 3.
[28] Center for International Environmental Law, 'Carbon Capture and Storage (CCS); Frequently Asked Questions' (Blog Post).
[29] A. Brown et al, 'IMPACTS: Framework for Risk Assessment of CO2 Transport and Storage Infrastructure' (2017) 114 Energy Procedia 6501, 6503. See also, Dr. S Jansto, Risks and Potential Impacts from Carbon Steel Pipelines in Louisiana Transporting and Processing Variable Produced Gases such as Carbon Dioxide (CO2), Hydrogen (H2), Methane (CH4) (Oct. 9, 2022).
[30] Leigh Collins, 'The amount of energy required by direct air carbon capture proves it is an exercise in futility', Recharge (online, 14 September 2021) (2021, < https://www.rechargenews.com/energy-transition/the-amount-of-energy-requiredby-direct-air-carbon-capture-proves-it-is-an-exercise-in-futility/2-1-1067588>; see also IPCC, 'Climate Change 2022: Mitigation of Climate Change, Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change' (2022) IPCC, 642.
[31] Ibid. See also Roger Sathre et al., 'The role of Life Cycle Assessment in identifying and reducing environmental impacts of CCS' (April 2011).
[32] Lorenzo Rosa et al., 'The Water Footprint of Carbon Capture and Storage Technologies' (2021) Renewable and Sustainable Energy Reviews 3; see also IPCC, *Climate Change 2022: Mitigation of Climate Change, Contribution of WorkingGroup III to the Sixth Assessment Report of the Intergovernmental Panel on ClimateChange* (2022) 642, 643 ("CCS requires considerable increases in some resources and chemicals, most notably water. Power plants with CCS could shut down periodically due to water scarcity. In several cases, water withdrawals for CCS are 25–200% higher than plants without CCS (Rosa et al. 2020b; Yang et al. 2020) due to energy penalty and cooling duty. The increase is slightly lower for non-absorption technologies.

adoption of CCS "could strongly affect local and global water resources" where they compete with municipal and industrial uses, irrigated agriculture, and agro-ecosystems.[33]

e. Injection and storage of CO_2 in subsea reservoirs create risks of reservoir failure and potential for contamination.[34]

Second, the potential for GHG leaks associated with CCS activities is significant. In addition to the obvious climate change impacts of CO_2 leaks, studies have found that the leakage of CO_2 emissions can impact the marine environment.[35] One of the main impacts of CO_2 leakage in offshore CCS facilities is the acidification of seawater.[36] A decrease of pH associated with the increase of CO_2 can "produce chemical changes in the sediment-seawater interface, leading to biogeochemical alteration in marine ecosystems".[37] Rapid environmental changes associated with a decreased PH caused by CO_2 leakage can reduce the capacity of marine organisms to adapt to ecosystem stressors,[38] and have been found to cause high mortality in certain marine organisms.[39]

On the basis of the above, the EDO **recommends** that the MLA Bill be amended to prohibit CCS activities in NSW coastal waters.

RECOMMENDATION: The MLA Bill be amended to prohibit CCS activities in NSW coastal waters.

In regions prone to water scarcity such as the Southwestern USA or Southeast Asia, this may limit deployment and result in power plant shutdowns during the summer months (Liu et al. 2019b; Wang et al. 2019c).").

[33] Lorenzo Rosa et al. (n 32) 15, 17.

[34] See., e.g. The Royal Society, Locked Away: Geological Carbon Storage Policy Briefing (2022) 12, ("The overlying geological strata should be effectively impermeable to CO2 to prevent it rising through the subsurface and either flowing into potable aquifers or returning to the surface."); see also Minh Hà Dương and David W Keith, 'Carbon storage: The economic efficiency of storing CO2 in leaky reservoirs' (2003) 5 Clean Technologies and Environmental Policy 181, 182.

[35] MD Basallote et al, 'Lethal Effects on Different Marine Organisms, Associated with Sediment-Seawater Acidification Deriving from CO2 Leakage' (2012) 19(7) Environmental Science and Pollution Research 2550, 2550; M Conradi et al, 'Lethal and sublethal responses in the clam *Scrobicularia plana* exposed to different CO_2-acidic sediments' (2016) 151 *Environmental Research* 642, 642.

[36] Youngjae Shin et al, '4D Seismic Monitoring with Diffraction-Angle-Filtering for Carbon Capture and Storage (CCS)' (2022) 11(57) *Journal of Marine Science and Engineering* 1, 2.

[37] MD Basallote et al, 'Lethal Effects on Different Marine Organisms, Associated with Sediment-Seawater Acidification Deriving from CO_2 Leakage' (2012) 19(7) Environmental Science and Pollution Research 2550, 2551.

[38] M Dolores Basallote et al, 'CO_2 leakage simulation: effects of the pH decrease on fertilisation and larval development of *Paracentrotus lividus* and sediment metals toxicity' (2018) 34(1) *Chemistry and Ecology* 1, 15.

[39] MD Basallote et al, 'Lethal Effects on Different Marine Organisms, Associated with Sediment-Seawater Acidification Deriving from CO2 Leakage' (2012) 19(7) Environmental Science and Pollution Research 2550, 2550.

II. The MLA Bill is not the complete answer to prohibiting petroleum development off the coast of NSW and clarity on potential Constitutional issues is needed

A. The MLA Bill is not the complete answer to prohibiting petroleum activities off the coast of NSW - including within PEP 11

The MLA Bill should be commended for prohibiting petroleum and mineral exploration and recovery in NSW coastal waters, and for prohibiting development in NSW that would support the offshore petroleum industry in Federal Waters off the NSW Coast. However, the MLA Bill is not the complete answer to prohibiting petroleum activities in the offshore area of NSW. In particular, the MLA Bill cannot directly prohibit, or render nugatory by prohibiting ancillary development, all offshore petroleum or mineral activities in Federal Waters off the coast of NSW, including within Petroleum Exploration Permit 11 (**PEP 11**).

Proposed s 10.17(1)(b) of the EP&A Act purports to prohibit any development in NSW for the purposes of the matters set out in s 10.17(b)(i)-(iii) of the EP&A Act, each of which are ancillary to petroleum exploration and recovery. The EDO's view is that the provision attempts to prohibit any development in NSW that would support offshore petroleum activities in Federal waters – for example, by preventing the transportation (via pipeline) of petroleum obtained from petroleum recovery in Federal waters to NSW coastal waters or the NSW mainland.

However, the EDO notes that some petroleum activities in Federal waters do not require any ancillary development to proceed. This includes seismic testing and exploration drilling, which do not require any connection to the mainland through NSW coastal waters. Indeed, even petroleum production and processing could theoretically occur entirely at sea within PEP 11, without any need for any ancillary development within NSW coastal waters or on the mainland (see, for example, Shell's Prelude Floating LNG Processing Platform, which is the largest floating object ever built, currently installed in Federal Waters off the coast of Western Australia). It follows that the intimation in the Second Reading Speech that the MLA Bill will prohibit seismic blasting from being conducted under PEP-11 is misplaced.[40] The dangers of PEP 11, including as a result of seismic blasting, will remain – regardless of whether or not the MLA Bill is passed. As noted in the Second Reading Speech for the MLA Bill, the seismic blasting under PEP 11, "as close as a few kilometres off the coast of New South Wales" will "have a devastating effect on marine life, including killing plankton over one kilometre away; stressing, harming and displacing nearby fish and other sea life; and having links to mass strandings of turtles, dolphins and whales".[41] These dangers are unaffected by the MLA Bill, in both the exploration stage, and in some instances, the production stage of PEP 11. Any suggestion to the contrary is an overstatement.

For the avoidance of doubt, the MLA Bill cannot directly prohibit offshore gas exploration and recovery in Federal waters by virtue of s 109 of the Australian Constitution, as discussed below.

[40] New South Wales, *Parliamentary Debates,* Legislative Assembly, 22 June 2023, 2 (Rory Amon, Member for Pittwater).
[41] Ibid.

B. Potential constitutionality issues can and should be clarified

As noted above, the EDO supports the intention of the MLA Bill to prohibit petroleum and mineral exploration and recovery in NSW coastal waters, and to prohibit development in NSW that would support the offshore petroleum industry in Federal waters off the NSW Coast. However, the EDO is concerned that parts of the MLA Bill, as presently drafted, are ambiguous and uncertain, and could give rise to potential constitutionality issues, which could detract from the overall intent of the MLA Bill.

To eliminate this uncertainty, and for the reasons that follow, the EDO **recommends** that:

a. the phrase "whether occurring in the coastal waters of the State or the offshore area of the State" be removed from the definition of "relevant development" in s 10.17(2) of the EP&A Act; and

b. the phrase "in the coastal waters of the State or the offshore area of the State" be added to the end of the proposed wording in each of ss 10.17(b)(i)-(iii) of the EP&A Act.

The uncertainty in the MLA Bill arises from an ambiguity in the geographical application of proposed s 10.17(1)(a) of the EP&A Act vis-a-vis the geographical application of the definition of "relevant development" in proposed s 10.17(2). Proposed s 10.17(1)(a) of the EP&A Act prohibits "relevant development in the coastal waters of the State". However, "relevant development" is defined in s 10.17(2) of the EP&A Act by reference to petroleum and mineral exploration or recovery occurring in either the coastal waters of New South Wales or in Federal waters (emphasis added):

> *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).*

In the MLA Bill, the "offshore area of the State" is a reference to Federal waters off the coast of NSW, and is defined in s 10.17(2):

> *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.*

Therefore, if the text of proposed section 10.17(1)(a) is read in line with the definition of "relevant development" in section 10.17(2), a potentially incongruous interpretation occurs whereby section 10.17(1)(a) purports to prohibit petroleum and mineral activities in the "*coastal waters of NSW*" whether those activities are occurring in the "*coastal waters of NSW*" or in the "*offshore area of NSW*" (Federal Waters). In the EDO's view, this drafting is ambiguous and could potentially cause confusion.

For example, in its current form, it may be open to construe s 10.17(1)(a) as prohibiting the exploration and recovery of petroleum and minerals in Federal waters, otherwise referred to as

the "offshore area of the State" in the MLA Bill. This construction would give rise to an inconsistency between proposed s 10.17(1)(a) of the EP&A Act and certain provisions in the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) (**OPGGS Act**) and *Offshore Minerals Act 1994* (Cth). By way of example, a petroleum exploration permit granted pursuant to s 98(1) of the OPGGS Act authorises the permit holder to, inter alia, explore for and recover petroleum in the permit area, in accordance with the conditions (if any) to which the permit is subject. Similarly, s 46(1) of the *Offshore Minerals Act 1994* (Cth) authorises the licence holder to, inter alia, explore for and take samples of minerals in the licence area. This potential inconsistency between the MLA Bill and Federal laws could raise potential constitutionality issues in relation to s 109 of the Australian Constitution, meaning that the relevant provisions of the MLA Bill could be disapplied (including by way of s 83 of the OPGGS Act).

The EDO is concerned that this drafting ambiguity could detract from the laudable overall intention of the MLA Bill. Fortunately, this ambiguity can be easily cured without sacrificing any of the original intent of the MLA Bill, by adopting the proposed amendments recommended below. The EDO recommends that these amendments be adopted in order give the community, industry and decision-makers greater clarity as to intended operation of the MLA Bill, and to avoid any distracting ancillary discussions surrounding the MLA Bill in regard to potential conflict between NSW and Federal laws.

The EDO **recommends** that Schedule 3 of the MLA Bill be amended so that it is clear that the intention of proposed s 10.17(1)(a) is to prohibit offshore mineral and petroleum exploration and recovery in NSW coastal waters only (and not Federal waters).

We consider that this could be achieved by removing the reference to the "offshore area of the State" from the definition of "relevant development" in s 10.17(2) of the EP&A Act. We are of the view that it is not necessary to include the phrase "offshore area of the State" in the definition of "relevant development" to achieve the objective of the MLA Bill, which is, amongst other things, to prohibit the exploration and recovery of petroleum and minerals in the coastal waters of NSW.[42]

The EDO recognises that the proposed amendment to the definition of "relevant development" would also affect the operation of proposed s 10.17(b) of the EP&A Act. The EDO considers that the prohibition in s 10.17(1)(b) should continue to apply to development within the State for the ancillary purposes listed in s 10.17(1)(b)(i)-(iii), which are carried out to support "relevant development," whether occurring in the coastal waters of NSW or within the offshore area of NSW (Federal waters). Therefore, in order to preserve the intention of s 10.17(1)(b), the EDO recommends that a reference to "the offshore area of the State" be inserted into each of sub paragraphs (i)-(iii) in s.10.17(1)(b).

In summary, to resolve the potential ambiguity in the MLA Bill, and to more clearly articulate the intention of proposed s 10.17 of the EP&A Act, the EDO **recommends** that:

a. the phrase "whether occurring in the coastal waters of the State or the offshore area of the State" be removed from the definition of "relevant development" in s 10.17(2) of the EP&A Act; and

[42] New South Wales, *Parliamentary Debates,* Legislative Assembly, 22 June 2023, 2 (Rory Amon, Member for Pittwater).

b. the phrase "in the coastal waters of the State or the offshore area of the State" be added to the end of the proposed wording in each of ss 10.17(b)(i)-(iii) of the EP&A Act.

Further, to ensure certainty and consistency between the operation of the MLA Bill (if enacted) and Federal Laws, the EDO also supports amendment to the OPGGS Act to prohibit petroleum and mineral activities in the offshore area of New South Wales (Federal waters), including within PEP 11 (as has previously been proposed within the Federal Parliament).

RECOMMENDATION: For clarity, proposed s 10.17 of the EP&A Act be amended as follows:

a. the phrase "whether occurring in the coastal waters of the State or the offshore area of the State" be removed from the definition of "relevant development" in s 10.17(2) of the EP&A Act; and

b. the phrase "in the coastal waters of the State or the offshore area of the State" be added to the end of the proposed wording in each of ss 10.17(b)(i)-(iii) of the EP&A Act.

III. Penalty provisions must reflect the serious consequences of offences and should be modernised

A. Penalties related to the exploration and recovery of petroleum and minerals are inadequate

The MLA Bill proposes the introduction of a new penalty for breach of proposed s 10.17 of the EP&A Act. The proposed penalty is a maximum penalty – Tier 1 monetary penalty, being: (a) for corporations, $5 million (and for a continuing offence, a further $50,000 for each day the offence continues; or (b) for individuals, $1 million (and for a continuing offence, a further $10,000 for each day the offence continues.

The EDO commends the proposed introduction of a Tier 1 monetary penalty for contravention of s 10.17 of the EP&A Act. This penalty is commensurate with the gravity of the environmental impacts of offshore petroleum and mineral exploration and recovery.

The MLA Bill does not propose any new penalties in the PO Act or OM Act.

Set out below are the existing penalties in the PO Act and OM Act with respect to exploration and recovery of petroleum and minerals, and the associated construction, maintenance and operation of infrastructure.

Table 1

Section	Violation	Penalty
OM Act		
38	Exploration for and recovery of minerals in coastal waters that is not authorised by a licence/special purpose consent granted under the OM Act.	$30,000

Section	Violation	Penalty
44	Interference with other activities in licence area to a greater extent than is necessary for the reasonable exercise of the person's rights under the licence or consent, or the performance of the person's duties under the licence/consent.	$10,000
123	Failing to take reasonable steps while carrying out activities in the licence area to, amongst other things: (a) ensure that the activities are carried out at a standard that is accepted as reasonable and proper in the mining industry; and (b) maintain in good repair all structures/equipment in the licence area.	$20,000
PO Act		
20(1)	Exploration for petroleum that is not under and in accordance with a permit, or otherwise permitted by the PO Act.	500 penalty units or imprisonment for 5 years, or both
35(3)	Non-compliance with a direction given by the Minister under s 35(2) requiring the permittee to furnish certain particulars in writing relating to the discovery of petroleum in a permit area.	100 penalty units
36(2)	Non-compliance with a direction given by the Minister under s 36(1) requiring the permittee to do certain things specified in an instrument in relation to the discovery of petroleum in a permit area.	100 penalty units
39(3)	Non-compliance with a direction given by the Minister under s 39I(2) requiring the lessee to furnish certain particulars in writing relating to the discovery of petroleum in a lease area.	100 penalty units
39J(2)	Non-compliance with a direction given by the Minister under s 39J(1) requiring the lessee to do certain things specified in an instrument in relation to the discovery of petroleum in a lease area.	100 penalty units
40	Recovery of petroleum that is not under and in accordance with a licence, or otherwise permitted by Division 3 of the PO Act.	500 penalty units or imprisonment for 5 years, or both
61	Construction (or alteration/reconstruction) or operation of a pipeline/water line/pumping station/tank station/valve station except under and in accordance with a pipeline licence	500 penalty units or imprisonment for 5 years, or both
73(2)	Non-compliance with a direction given by the Minister under s 73(1) requiring the pipeline licensee to make changes in the	500 penalty units or imprisonment for 5 years, or both

Section	Violation	Penalty
	design/construction/route/position of a pipeline/water line/pumping station/tank station/valve station	
98	Failure to maintain all structures, equipment and other property in the operations area in good condition and repair	100 penalty units

The above penalties are grossly inadequate. They are disproportionate to the environmental impacts caused by the continued production of fossil fuels that they are meant to disincentivise.

Not only are the existing penalties inconsequential, but they differ across the Acts for similar violations. For example, under s 38 of the OM Act, the penalty for exploring for and recovering minerals without appropriate authorisation is $30,000, whereas under s 20(1) of the PO Act, the penalty for exploring for petroleum without appropriate authorisation is 500 penalty units (which equates to $55,000),[43] or 5 years imprisonment, or both.

There should not be these kinds of inconsistencies in penalties associated with what is essentially the same unlawful conduct across the Acts. Penalties should be fixed according to the gravity of impact.

RECOMMENDATION: The MLA Bill should increase the penalty provisions in the PO Act and OM Act set out in table 1 above to appropriately reflect the seriousness of the offence being punished, which must be at least in line with inflation since each penalty provision was introduced.

B. A uniform tiered penalty unit approach in the Acts should be adopted

Each of the Acts utilise vastly different penalty mechanisms. As outlined above, the EDO is of the view that these mechanisms should be streamlined. This will allow the penalties in the Acts to be easily updated, ensuring the legislation to which the scheme applies remains effective and current while minimising the work required.

A preferable structure for penalty provisions is a tiered system – as is the case in the EP&A Act. This system imposes different penalties on corporations as opposed to individuals, and clearly articulates when each penalty applies. For example, a tier 1 penalty applies only if the prosecution establishes (to the criminal standard of proof): (a) that the offence was committed intentionally; and (b) that the offence (i) caused or was likely to cause significant harm to the environment, or (ii) caused the death or serious injury or illness to a person.

At the very least, a penalty unit system should be introduced in the OM Act – to ensure that the approach within the OM Act and PO Act is uniform.

RECOMMENDATION: The MLA Bill should introduce a tiered penalty unit system in the PO Act and OM Act, which mirrors the penalty unit system in the EP&A Act. Alternatively, a penalty unit system should be introduced in the OM Act, to replace the outdated existing specific financial penalty provisions in the OM Act.

[43] *Crimes (Sentencing Procedure) Act 1999* (NSW), s 17.