

Environmental management regulation for offshore renewables

Document No: A1087958

Date: 13/05/2024

Explanatory Note

An Exposure Draft of the Offshore Electricity Infrastructure Amendment Regulations 2024 (draft OEI Regulations) was released for public consultation by the Department of Climate Change, Energy, the Environment and Water (DCCEEW) on 12 April 2024.

The Offshore Infrastructure Regulator (OIR) has prepared this document to provide preliminary information to stakeholders on the interface between the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) and the part of the *Offshore Electricity Infrastructure Act 2021* (OEI Act) framework that applies to oversight of environmental management.

Persons using this draft document should be aware that it is based on the current Exposure Draft of the OEI Regulations which may be subject to change. For this reason, references to specific regulation numbers have not been included in the document. However, references to specific provisions under the OEI Act are included throughout as this legislation is currently in force.

This document is intended to provide early-stage information on the interface between the EPBC Act and OEI Act frameworks in relation to environmental management and protection. This document complements other draft preliminary information that provides early-stage information to stakeholders on content and level of detail for management plans.

As this draft document is based on the Exposure Draft OEI Regulations only, it should not be relied upon for the preparation of a final management plan to be submitted to the OIR once regulations are in force.

Contents

1. Background	3
2. Purpose	3
3. Scope	3
4. Disclaimer	3
5. Relevant legislation	3
6. A coordinated environmental performance framework for offshore renewable energy activities	4
7. EPBC Act requirements: Referrals, assessments and decisions	6
8. OEI Act requirements: Licences and management plans	6
9. The interface between the EPBC Act and OEI Act frameworks	6
10. What is an EPBC Act obligation?	7
10.1. Describing EPBC Act obligations and measures	10
11. Compliance monitoring	10

DRAFT

1. Background

The Offshore Infrastructure Regulator (OIR) is provided with functions and powers under the *Offshore Electricity Infrastructure Act 2021* (OEI Act)¹. The OIR is responsible for regulating work health and safety, environmental management, and *infrastructure integrity*² of *offshore infrastructure activities*³ in the *Commonwealth offshore area*⁴.

2. Purpose

The purpose of this document is to provide an explanation of the interface between frameworks for environmental protection and management under the *Environmental Protection and Biodiversity Conservation Act 1999* (EPBC Act) and regulation of activities under the *Offshore Electricity Infrastructure Act 2021* (OEI Act) for offshore renewable energy projects. It also outlines some items that licence holders may wish to consider when preparing regulatory documentation.

Licence holders should be aware that the OEI Act and EPBC Act operate independently of one another except where explicit links are provided for in legislation, as discussed further below.

Licence holders should also note that approval under one Act does not constitute or guarantee approval under the other and that the requirements of each legislative framework should be considered and complied with on a case-by-case basis.

3. Scope

The purpose of this document is to provide information to stakeholders on the interface between the EPBC Act and the part of the OEI Act framework that applies to oversight of environmental management obligations.

4. Disclaimer

This document is not a legal instrument and does not override or amend the requirements of the OEI Act or Offshore Electricity Infrastructure Regulations 2022 (OEI Regulations) in any way. It is provided to inform stakeholders and does not limit the discretion of the OIR to take any action it considers appropriate under relevant legislation. It reflects the current position of the OIR, which may change from time to time. All changes will be notified publicly.

5. Relevant legislation

The following Commonwealth legislation gives direction to the OIR and provides the legal framework relevant to the preparation of a management plan:

¹ See section 177 of the OEI Act

² See section 8 of the OEI Act

³ Ibid

⁴ Ibid

- *Offshore Electricity Infrastructure Act 2021* (OEI Act)
- Offshore Electricity Infrastructure Regulations 2022 (OEI Regulations)
- *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act)
- Environment Protection and Biodiversity Conservation Regulations 2000 (EPBC Regulations)

This document does not cover legislative requirements beyond the scope of the OEI Act framework and related legislation listed above. The reader should be aware of and comply with all other Commonwealth, State and Territory legislative requirements that may apply to their activities.

6. A coordinated environmental performance framework for offshore renewable energy activities

In relation to environmental management, the OEI Act⁵ and the exposure draft of the OEI Regulations create a direct legislative link with the EPBC Act.

This link is established by the requirement for OEI Act management plans to address how the licence holder is to comply with any obligations under the EPBC Act or associated regulations in relation to the activities to be carried out under an OEI licence.

This framework allows the Offshore Infrastructure Regulator (OIR) to monitor the licence holder's performance implementing the measures set out in an OEI management plan to address environmental protection and management obligations. These obligations, which will be discussed further below, include conditions attached to project approvals and other relevant obligations imposed under the EPBC Act.

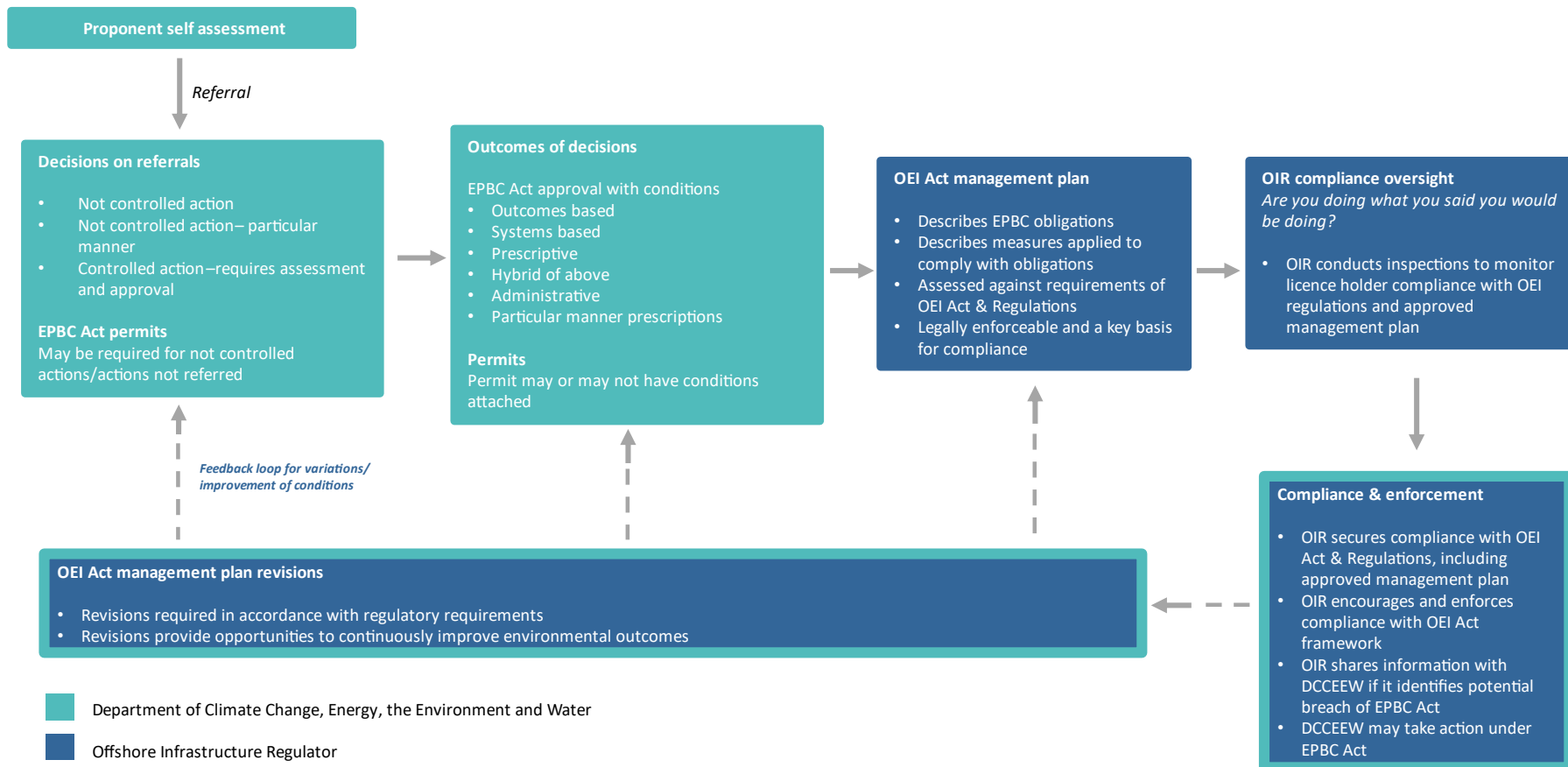
Where the OIR becomes aware of a potential non-compliance with an OEI Act management plan that may also represent a non-compliance with EPBC Act obligations, the OIR will share this information with the Department of Climate Change, Energy, the Environment and Water (DCCEEW) as the regulator of the EPBC Act. The agencies will then work together to establish an appropriate course of action with respect to encouraging and enforcing compliance with requirements.

The interface arrangement between the EPBC Act and OEI Act supports regulatory oversight by the Australian government through leveraging the on the ground presence and proactive compliance monitoring of the OIR to promote and enforce requirements of the law.

The key framework elements are set out in the scheme below. These form the basis for the structure of the rest of this document.

⁵ See section 115(1)(c) of the OEI Act

A coordinated environmental management compliance monitoring framework for offshore renewables activities



7. EPBC Act requirements: Referrals, assessments and decisions

Offshore infrastructure projects⁶ are subject to approval requirements under Australian environmental legislation, including the EPBC Act administered by DCCEEW.

Following self-assessment to understand the nature and scale of potential impacts associated with a proposed offshore infrastructure project, proponents decide whether or not to refer their 'action' under the EPBC Act.

Activities that do not need to be referred under the EPBC Act because they are not likely to have a significant impact on a matter protected under the EPBC Act can proceed subject to any other applicable laws and approvals. Activities that are referred and determined not to be controlled actions may also proceed subject to other relevant laws and approvals, and where relevant, a particular manner specified in the EPBC Act decision.

Proponents should be aware that even if an activity is not referred or determined not to be a controlled action, there may still be requirements to gain permits and comply with other obligations under the EPBC Act and associated regulations.

Referred activities determined to be controlled actions may proceed if approved by the Commonwealth Environment Minister or delegate, provided they comply their EPBC approval conditions and with all other laws including the OEI Act. The EPBC Act provides for conditions to be attached to approval decisions.

To find out more, the DCCEEW website provides guidance in relation to the [referral and environmental assessment processes](#).

8. OEI Act requirements: Licences and management plans

If the proposed offshore infrastructure project involves construction, installation, commissioning, operation, maintenance or decommissioning of **offshore renewable energy infrastructure**⁷ (OREI) or **offshore electricity transmission infrastructure**⁸ (OETI), a licence under the OEI Act and a management plan approved by the OIR is also required before the activity can commence.

Further information on these requirements is available in the OIR's [Authorisations for offshore infrastructure activities](#) guideline.

9. The interface between the EPBC Act and OEI Act frameworks

The Exposure Draft of the OEI Regulations provides further detail on the requirements of section 115(1)(c) of the OEI Act and sets out how a management plan creates a link between the EPBC Act and OEI Act frameworks.

⁶ See section 8 of the OEI Act

⁷ See section 10 of the OEI Act

⁸ See section 11 of the OEI Act

Specifically, an OEI Act management plan must describe any obligations under the EPBC Act and associated regulations (hereafter EPBC Act obligations) that a licence holder has in relation to activities to be carried out under the licence.

The draft OEI Regulations also require that a management plan describes the measures that will be implemented to comply with the obligations. These measures will need to be described in such a way that their performance in meeting obligations is evident to both the users of the management plan and the OIR so that compliance is able to be monitored and verified.

Further information regarding the development of a management plans can be found in our preliminary information on preparing a management plan.

10. What is an EPBC Act obligation?

The term ‘obligation’ is not defined in the OEI Act, or the EPBC Act, but its ordinary meaning is ‘a binding requirement as to action; duty’⁹. The Exposure Draft OEI Regulations also offer guidance on what an EPBC Act obligation is for the purpose of an OEI Act management plan. In particular, the draft OEI Regulations indicate that an EPBC Act obligation includes any obligation under conditions attached to an approval or conditions of a permit issued under the EPBC Act.

EPBC Act approval conditions

It is common practice for conditions to be attached to approvals of controlled actions under Part 9 of the EPBC Act. Examples of these can be found by searching the [EPBC Act public portal](#).

An EPBC Act obligation to be addressed in an OEI Act management plan will most commonly entail the obligation to comply with conditions attached to an approval under Part 9 of the EPBC Act. As all commercial-scale offshore wind farm projects will likely be subject to formal assessment and approval under the EPBC Act, the obligation to comply with conditions of approval under Part 9 of the EPBC Act is relevant to OEI Act management plans for those projects.

Particular manner prescriptions

A decision on some actions referred under the EPBC Act will be that they are not a controlled action for the purposes of a particular provision of Part 3 of the EPBC Act if the action is taken in a particular manner. Where a not controlled action – particular manner decision is made, there is an obligation on the licence holder not to take the action in a way that is inconsistent with that manner.

The particular manner obligations should be included in the OEI Act management plan where relevant to licence activities.

EPBC Act permit conditions

Where licence activities are the subject of a listed species and ecological community permit under section 201 of the EPBC Act, the OEI Act management will need to address how the licence holder will comply with conditions attached to the permit.

⁹ Macquarie Dictionary, online edition, accessed May 2024.

Other authorisations

Conditions may also be attached to other types of authorisations under EPBC Act instruments. For example, under marine park management plans the Director of National Parks (DNP) may authorise allowable activities in certain park zones and attach conditions to the authorisation. Compliance with conditions imposed by the DNP is considered an EPBC Act obligation that must be addressed in the OEI Act management plan.

While the Government's priority areas for offshore wind and OEI Act declared areas do not overlap Australian marine parks, transmission infrastructure licences (TILs) are not restricted to declared areas. Licence holders are encouraged to engage early with the DNP if they are considering transmission infrastructure within an Australian marine park.

Requirements relating to referrals

The referral requirement in section 68 of the EPBC Act is ongoing and is not time limited. This means that if a licence holder proposes to make changes to **licence activities**¹⁰ that they did not originally consider required referral, or which has been the subject of a previous decision under section 75 of the EPBC Act, the referral requirement may be engaged.

In practice a licence holder would decide whether or not they think a change to licence activities requires referral following a self-assessment process carried out in accordance with [referrals and environmental assessments](#) advice published by DCCEEW.

In this context licence-holders should include the reference to a self-assessment process and a commitment to make a referral if necessary as management system elements of the OEI Act management plan.

If the licence holder decides to refer an action as a result of changed licence activities, compliance with any particular manner prescriptions or conditions of approval as a result of any further EPBC Act process would need to be addressed in a revised management plan.

Requirements relating to Part 13 permit applications

Noting that offences in Part 13 of the EPBC Act concern actions taken in Commonwealth areas licence holders should seek advice as to the need to apply for a permit under section 200 given their particular circumstances.

If the licence holder has been granted a permit with conditions these conditions must be addressed in the OEI Act management plan. If the licence holder did not have a permit under section 201 of the EPBC Act but required to apply for one, compliance with any conditions attached to the permit would need to be addressed in a revised management plan.

Obligations limited to those that are in relation to licence activities

The OEI Act management plan must address EPBC obligations that are in relation to activities to be carried out under the **licence**¹¹ and licence activities. What constitutes a sufficient connection or association

¹⁰ Defined under the Exposure Draft OEI Amendment Regulations 2024 as an offshore infrastructure activity or other activity carried out, or to be carried out under the licence.

¹¹ See section 115 of the OEI Act

between EPBC obligations on the licence holder and the licence activities will be circumstance-specific and a matter of case-by case judgement. In general:

- EPBC Act obligations that need to be addressed in an OEI Act management plan are those that have a direct relationship to managing environmental impacts of licence activities.
- If there is no clear connection between the action subject to approval conditions under the EPBC Act and licence activities, and no geographic overlap, an OEI Act management plan would not need to address obligations arising from those conditions of approval under the EPBC Act.

The term 'in relation to' is commonly used in legislation and can have broad meaning and scope. In this context, an EPBC obligation in relation to licence activities may require management measures to be implemented outside of the *licence area*¹² or even outside of the *Commonwealth offshore area*¹³. There is also potential for there to be obligations under the EPBC Act that apply in relation to activities carried out under more than one licence (e.g. commercial licence and transmission and infrastructure licence activities). For example, if an EPBC Act condition requires:

- the licence holder to report certain things to the Minister for the Environment that are relevant to managing environmental impacts of licence activities, complying with this condition would be an EPBC Act obligation to be addressed in the OEI Act management plan.
- an offset to counterbalance the impact of licence activities, providing that offset would be an obligation in relation to licence activities even if it were to be delivered outside the licence area or even the Commonwealth offshore area.

The full scope of an offshore renewable energy project may extend beyond the boundaries of an OEI Act licence area, extend beyond the application of the OEI Act and extend to activities within State jurisdiction. Given this, it is likely EPBC Act approval conditions may be applied to manage environmental impact associated with activities that are not in relation to licence activities (e.g. activities carried out in Commonwealth waters outside the licence area boundary, or in State areas and not associated with OREI).

A documented rationale for why certain EPBC Act obligations are considered to be 'in relation to' licence activities, and why some are not (where this is applicable), may help impart clarity to a management plan's content. Documenting and keeping records of the rationale used within a management system could provide a basis for demonstrating ongoing compliance to the OIR after a management plan has been approved.

General obligations applying to EPBC Act approval holders

EPBC Act approval holders have a general obligation to notify third parties such as contractors that rely on the approval that there is an EPBC Act approval, the approval has conditions attached, and complying with approval conditions is a legal requirement for both the approval-holder and the contractor.

¹² See section 8 of the OEI Act

¹³ Ibid

10.1. Describing EPBC Act obligations and measures

It is expected that content of an OEI Act management plan will include a description of the EPBC Act obligations that apply in relation to licence activities. This content could be provided by directly quoting relevant conditions or general obligations.

EPBC Act obligations associated with conditions attached to an approval or a permit may look different depending on the approach taken to condition setting. How obligations and measures are described in the OEI Act management plan will need to vary depending on the form and specifics of EPBC Act conditions.

Regardless of the type or construct of the EPBC Act obligations that apply, licence holders are encouraged to describe measures in the OEI management plan considering the 'SMART' (specific, measurable, achievable, relevant and time bound) principles.

Describing measures in this way can provide licence holders with a level of internal compliance assurance by establishing well defined foundations for internal compliance monitoring and management.

At the same time, a SMART approach to describing measures can reduce ambiguity and provide for more efficient and effective compliance monitoring by the OIR against environmental management obligations documented in an OEI Act management plan.

When assessing and making approval decisions with respect to OEI management plans, the OIR will consider the description of EPBC Act obligations and associated measures in the context of relevant assessment and decision-making criteria in the final OEI Regulations.

11. Compliance monitoring

Once the management plan has been approved, licence holders can expect that the OIR will conduct routine inspections with the purpose of verifying whether the licence holder is complying with the approved management plan.

Compliance inspections and any enforcement action that may arise will be carried out in accordance with the OEI Act and published OIR policies.

The OEI Act provides for the OIR to share offshore infrastructure information with other Commonwealth agencies. Licence holders should note that under this arrangement, the OIR may share compliance information with DCCEEW.

The compliance information may be associated with the OIR's inspections, investigations and enforcement actions or incident notifications to the OIR. A key purpose of information sharing with DCCEEW will be to allow that agency to determine whether to take its own compliance action under the EPBC Act.