First Nations Clean Energy Network
Summary of key legislation applying to offshore renewable development areas

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The First Nations Clean Energy Network collaborated with the Federation of Victorian Traditional Owner Corporations in the development of this paper. The information in it applies to all Commonwealth waters around Australia, and to Traditional Owner groups around Australia who may have offshore wind developments proposed on sea country.

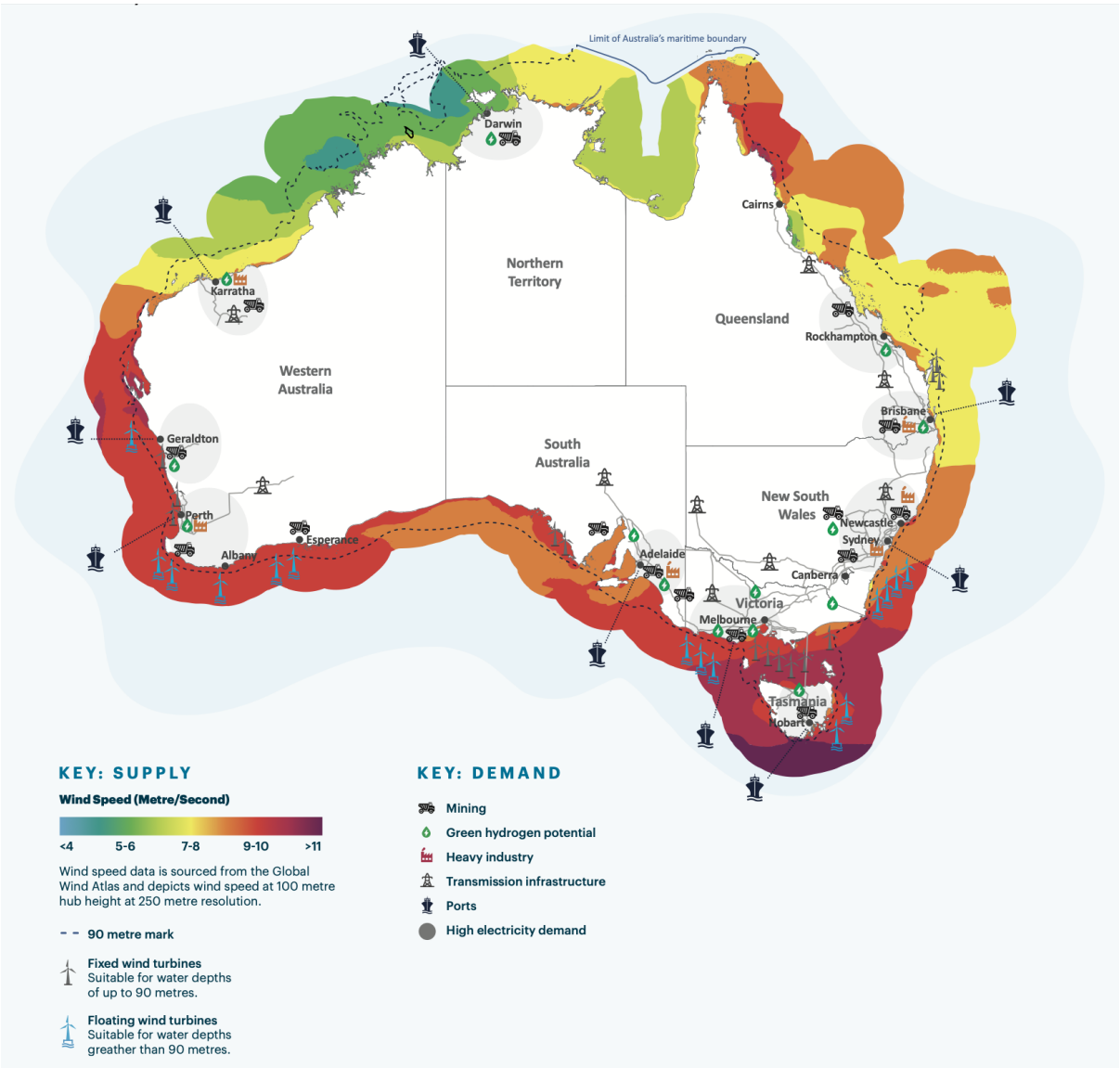
Introduction

The Australian Government has established a legislative framework to enable offshore infrastructure projects to be undertaken in Australian Commonwealth waters - generally waters from three nautical miles from the coastline extending to the end of Australia's exclusive economic zone. A key aspect of this framework is the Offshore Electricity Infrastructure Act 2021.

While offshore wind energy projects have been an initial focus for renewable energy in Commonwealth waters, the Offshore Electricity Infrastructure Act 2021 regulates offshore renewable energy more broadly - not just offshore wind energy, but also generation and transmission infrastructure associated with the sun, ocean tides and currents, rain, geothermal and other potential sources.

This paper summarises the Offshore Electricity Infrastructure Act 2021 and other key legislation relating to Aboriginal and Torres Strait Islander peoples' rights and interests in 'sea country' - that is, in offshore areas or Commonwealth waters.

Figure 1: Estimated offshore wind energy potential



Source: NOPSEMA Offshore Wind Energy Brochure, October 2021

1. Offshore Electricity Infrastructure Act 2021 (Cth)

The Offshore Electricity Infrastructure Act 2021 (Cth) (OEI Act) commenced in June 2022. It provides a regulatory framework, including licensing regime, for offshore renewable energy infrastructure and offshore electricity transmission infrastructure.

The OEI Act regulates offshore electricity infrastructure by:

> (a) prohibiting unauthorised offshore renewable energy infrastructure and offshore electricity transmission infrastructure in the Commonwealth offshore area;
>
> (b) providing for the Minister to declare areas that are suitable for offshore renewable energy infrastructure; and

(c) providing for the Minister to grant various kinds of licences authorising offshore renewable energy infrastructure and offshore electricity transmission infrastructure in the Commonwealth offshore area. This includes licences for commercial exploitation of renewable energy resources.

The OEI Act provides that the Offshore Infrastructure Regulator is the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA). NOPSEMA has similar powers and responsibilities in relation to the regulation of offshore petroleum and gas.

As noted, the OEI Act establishes the framework for the Minister to declare areas in the Commonwealth offshore area (excluding State/Territory coastal waters) to be areas in which various licences may be granted for purposes related to offshore renewable energy development and/or transmission. The Minister may make a declaration following the requirements and process set out in the OEI Act, which includes providing notice of a proposed declaration.

Currently, there are two areas declared under the OEI Act: in Bass Strait (offshore of Lakes Entrance, Gippsland Victoria) and offshore from the Hunter region of New South Wales.

Also currently, there is a notice of proposal to declare an area offshore from Warrnambool (Victoria) to Port MacDonnell (South Australia). Submissions from the public must be invited on a notice of proposal to declare an area and the Minister must have regard to any submissions received. Traditional Owners may make submissions as part of this process.

Companies wanting to undertake offshore renewable energy infrastructure projects need to obtain a licence under the OEI Act. Declared areas for which applications for feasibility licences have been open or are currently open, include: the declared areas in Bass Strait (offshore of Lakes Entrance, Gippsland Victoria) and the Hunter Declared Area (offshore from the Hunter region of NSW).

Regulations under the OEI Act set out the matters the Minister must consider in awarding a feasibility licence.

The OEI Act creates an offence for licence holders who carry out activities in the Commonwealth offshore area under or for the purposes of a licence and those activities interfere with the exercise of Native Title rights and interests. Similarly, a licence holder contravenes the OEI Act if another person (other than the licence holder) carries out activities on behalf of the licence holder or under an arrangement with the licence holder and those activities interfere with the exercise of Native Title rights and interests.

The OEI Act is not the only law relevant to offshore renewable energy projects that applies in Commonwealth waters. Other important laws are summarised below. In addition, many renewable energy projects in sea country (offshore areas) will include components that are located in State or Territory coastal waters (and/or onshore areas).

2. Native Title Act 1993 (Cth)

Native title comprises rights and interests in relation to land and waters possessed under traditional law and custom by people who have a traditional connection with those areas, which is recognised under Australian law. Native title is a bundle of rights and interests, some or all of which may be extinguished by inconsistent interests granted to others in the past, such

as land tenures, public works and exclusive possession interests.

The Native Title Act 1993 (Cth) (Native Title Act) establishes the processes for making native title claims and recognising native title rights and interests in relation to land and waters in Australia. It sets out the ways in which native title and non-native title interests interact and how acts that affect Native Title can be validly done (including 'future act' requirements).

The most common type of 'future act' under the Native Title Act is an act that takes place after 1 January 1994, and which affects native title (ie: the act extinguishes native title or is wholly or partly inconsistent with the continued existence, enjoyment or exercise of native title rights). The nature and content of the terms of an authorisation, lease, licence, tenure or right to access/use/occupy an area are important as they inform whether they affect native title, and if so, which future act category under the Native Title Act applies.

A future act will be invalid to the extent it affects native title, unless it complies with the 'future act' procedures set out in the Native Title Act. These procedures vary depending on the nature or purpose of the future act. In some cases, the procedure may require notification or comment, however in other cases it may involve a right to negotiate, in good faith, for at least six months. Some governments and companies seek to negotiate Indigenous land use agreements (ILUAs) with native title groups to confirm consents, interactions with native title rights and interests and facilitate renewable energy development in areas subject to a registered native title claim or determination.

The Native Title Act applies to land and waters within States and Territories, as well as offshore / Commonwealth waters. The High Court of Australia has confirmed that native title may be recognised in Australia's territorial waters, which extend beyond the seaward limits of States and Territories.[1] Also, the application of the Native Title Act to offshore areas is reflected in procedural rights under section 24NA (subdivision N of the future act regime), as well as potential compensation for future acts in offshore areas under the Native Title Act.

Like other areas to which the Native Title Act applies, the protection and recognition afforded to native title rights and interests in sea country depends on being able to satisfy requirements or demonstrate connection in accordance with the Native Title Act.

3. Environment Protection and Biodiversity Conservation Act 1999 (Cth)

The Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act) is a national law that operates to protect 'matters of national environmental significance' (MNES). MNES can include World Heritage properties and National Heritage places listed because of their Aboriginal cultural heritage and Indigenous values. Few Aboriginal cultural heritage sites are listed on either list, as the process for listing can be involved. World Heritage and National Heritage listings provide a means to directly protect Aboriginal cultural heritage values.

Engagement with traditional owners and associated impacts of proposed developments are

[1] *Commonwealth v Yarmirr* (2001) 208 CLR 1

relevant to other matters protected by the EPBC Act. MNES also includes Ramsar wetlands, listed threatened species and ecological communities, and Commonwealth marine areas (being any part of the sea within Australia's exclusive economic zone and/or over the continental shelf of Australia, that is not State or Northern Territory waters).

The EPBC Act applies to sea country areas (offshore or Commonwealth waters). Offshore renewable energy infrastructure activities are subject to environmental approval requirements under environmental legislation, including the EPBC Act.

Licences issued under the OEI Act are separate to approvals under the EPBC Act and approval under one Act does not guarantee approval under another.

EPBC Act approval is generally needed for proposed actions that will or may have a significant impact on MNES. Referral and assessment processes for EPBC Act approvals typically require information about impacts on Traditional Owner interests, including Aboriginal cultural heritage values, as well as broader environmental and social impacts. Further, EPBC Act referral and assessment processes provide opportunity for public comment, including comments and submissions from Traditional Owners.

In July 2023, the Department of Climate Change, Energy, the Environment and Water released a guideline on 'key environmental factors for offshore wind farm environmental impact assessment under the EPBC Act'.[2] This Guideline confirms that identifying cultural heritage values that may be impacted by an offshore wind farm should consider First Nations peoples' beliefs, practices and connections to sea country, places of cultural significance and cultural heritage sites in the Commonwealth marine area.[3]

Following an independent review of the EPBC Act in 2020, several proposed reforms to the EPBC Act have been identified. Among these is the development and implementation of a national standard in relation to Indigenous engagement and participation. This standard is being developed and once completed and implemented, will likely influence approaches to engagement as part of future EPBC Act processes.

4. Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)

The Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) (ATSIHP Act) enables applications and declarations to protect culturally significant areas (significant Aboriginal area) and objects (significant Aboriginal objects) from harm.

A 'significant Aboriginal area' is defined under the ATSIHP Act to mean:

a) an area of land in Australia or in or beneath Australian waters;

b) an area of water in Australia; or

c) an area of Australian waters;

[2] DCCEEW, Key environmental factors for offshore windfarm environmental impact assessment under the Environment Protection and Biodiversity Conservation Act 1999, July 2023 (accessed 2 August 2023)
[3] See page 23 of the Guideline (op cit)

being an area of particular significance to Aboriginals in accordance with Aboriginal tradition. Further an 'area' includes a site.

A 'significant Aboriginal object' is defined under ATSIHP Act to mean an object (including Aboriginal remains) of particular significance to Aboriginal people in accordance with Aboriginal tradition. Under the ATSIHP Act, the term 'Aboriginal' is defined to include Torres Strait Islander peoples, so the protections and processes set out in this summary also apply to Torres Strait Islander peoples.

The ATSIHP Act applies to sea country (offshore or Commonwealth waters).

A declaration to protect cultural heritage areas or objects can be made under the ATSIHP Act where the area or object is under threat of injury or desecration and where it is considered that State or Territory law does not provide effective protection. The ATSIHP Act provides for declarations and emergency declarations to be made. Emergency declarations may be made when damage or destruction to a significant area or significant object is serious and immediate.

Declarations relating to a 'significant Aboriginal area' can be made in relation to sea country (Australian waters, which is defined to include territorial waters).

Harm to culturally significant areas and objects is prohibited following a declaration from the Minister that they are to be protected. Where the Minister is satisfied that the law of a State or of any Territory makes effective provision for the protection of an area or object to which a declaration applies, the Minister will revoke the declaration to the extent that it relates to the area or object.

5. Underwater Cultural Heritage Act 2018 (Cth)

The Underwater Cultural Heritage Act 2018 (Cth) (UCH Act) protects underwater cultural heritage in Commonwealth waters, or which has been removed from Australian waters. The UCH Act also protects Australia's underwater cultural heritage in waters outside of Australia from actions by Australians. The UCH Act replaced the Commonwealth Historic Shipwrecks Act 1976 and primarily focuses on the protection of shipwrecks and sunken aircraft of importance to Australia.

The UCH Act defines an article of 'underwater cultural heritage' as "…any trace of human existence that: (a) has a cultural, historical or archaeological character; and (b) is located under water." A 'trace' of human existence is generally taken to be a physical trace (rather than something intangible), such as a site, structure, building, artefact, human and animal remains, vessels, aircraft etc. Also, the location may be partially, totally, periodically, or continuously under water.

Under the UCH Act, the Minister can declare an area containing protected underwater cultural heritage to be a protected zone, if the area is in Australian waters and the declaration would be consistent with the objects of the UCH Act. The declaration may regulate or prohibit the kinds of activities that can be undertaken in the protected zone.

Protected cultural heritage under the UCH Act could include objects of Aboriginal or Torres Strait Islander cultural heritage, however the legislation has not yet been used for this purpose.

Certain shipwrecks and aircraft are afforded automatic protection under the UCH Act, however other forms of cultural heritage – including Aboriginal cultural heritage – require the Minister to be satisfied that the cultural material is of heritage significance in order to provide a protective declaration. The discrepancy between automatic and non-automatic listing received attention in the Juukan Gorge inquiry.

The UCH Act applies to sea country (offshore or Commonwealth waters).

6. Other considerations and developments

Other relevant considerations include the October 2021 report of the Joint Standing Committee on Northern Australia inquiry into destruction of cultural heritage at Juukan Gorge in Western Australia (Report) made several observations and recommendations relevant to engagement with traditional owners. These included:

- recommended reforms to the ATSIHP Act and EPBC Act to increase proactive protection of cultural heritage and provide for the Minister for Indigenous Australians to be responsible for all cultural heritage matters;

- new legislation for cultural heritage protection at the national level, co-designed with Aboriginal and Torres Strait Islander peoples and incorporating minimum standards for State and Territory heritage protections consistent with relevant international law (including the UN Declaration on the Rights of Indigenous Peoples) and the principle of free and prior informed consent; and

- Victoria's AH Act was considered by many submitters, including the National Native Title Council to be best practice in Australia in a number of ways, including Aboriginal peoples' representation in decision making.

The Western Australian Government has amended its cultural heritage legislation following the Juukan Gorge incident and Report.

The recent (2022) decision of the Federal Court of Australia in *Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority* (No 2).[4] This case involved review of a decision of a delegate of NOPSEMA under the Offshore Petroleum and Greenhouse Gas Storage Act 2006 (Cth) (OPGGSA) to accept an environment plan which did not set out relevant information regarding consultations with traditional owners required for that plan.

A Tiwi Island traditional owner asserted that he and other traditional owners have sea country in the area relevant to the environment plan and were not consulted in the manner required for preparation and acceptance of an environment plan under the OPGGSA. Asserted rights to that sea country were based upon long standing spiritual connections, as well as traditional hunting and gathering activities in which they and their ancestors had engaged.

The Court held that NOPSEMA failed, in accordance with the OPGGSA Regulations, to assess whether the environment plan demonstrated that the company concerned had consulted with

[4] *Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority (No 2)* [2022] FCA 1121

each person that it was required to consult with under those regulations.

There are other laws that apply to Commonwealth areas, States and Territories as well as activities undertaken by people in Australia that may be relevant to protecting, managing and enhancing traditional owner rights and interests (including traditional knowledge) in, and cultural values relating to, sea country.

This paper summarises key Commonwealth statutes applying to offshore areas and the protection and management of Aboriginal and Torres Strait Islander peoples' interests. This summary is a guide and is not legal advice. Legal or other professional advice should be sought on specific matters and circumstances of interest or issues relevant to developments in sea country.