



30th August 2022

## **Submission on the Offshore Wind Policy Directions Paper**

The Federation of Victorian Traditional Owner Corporations is a state-wide body advocating for the rights and interests of Victorian Traditional Owner Corporations. We welcome the opportunity to make a submission to provide feedback on the Offshore Wind Policy Directions Paper and contribute to the approach to best develop the offshore wind energy sector in Victoria.

As this is a new sector and Victoria will be leading the way with the development of Offshore Wind projects in Australia it is important to invest the appropriate resources to establish the policy settings in a way that achieves optimal benefits for regional communities. We commend the Victorian Government's commitment to developing the state's Offshore Wind resource in a way that is consistent with Pupangarli Marnmarnepu and developing innovative approaches to ensuring developments are aligned with Traditional Owners exercising their right to self-determination and obligations to care for Country. A key component of self-determination is achieving economic independence. There is an opportunity for the expansion of the renewable energy sector in coming decades to decarbonise the Victorian economy, and also be part of a holistic approach to rebuilding the economic base of Traditional Owners in a way that recognises, and is consistent with, their unceded rights and interests.

### **Traditional Owner Rights and Interests in relation to Offshore Wind developments**

The Traditional Owners of Country along the south coast of Victoria whose interests will be affected by the development of offshore wind energy projects have differing recognition of their land rights under the *Native Title Act 1993*, *Traditional Owner Settlements Act 2010* (TOSA) and the *Aboriginal Heritage Act 2006* (AHA). Some groups have negotiated Native Title determinations on at least part of their Country, some have negotiated Recognition and Settlement Agreements under TOSA, while some are in the process of doing so. Some groups are recognised as Registered Aboriginal Parties under the AHA, while some groups do not have this formal recognition under these pieces of legislation. And some land areas on the south coast, such as that surrounding Wilson's Promontory, remain contested between neighbouring Traditional Owner Groups. Based on this complexity it will be important to invest adequate resources to engaging Traditional Owners in the planning of these developments in the appropriate and culturally sensitive manner.

In the case of offshore wind projects, much of the key generation infrastructure will fall in Commonwealth waters beyond the extent of existing Native Title determinations<sup>1</sup> and Recognition and Settlement Agreements under TOSA, whereas the key transmission infrastructure to enable offshore wind projects will cross land that has more clearly established Traditional Owner rights and

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<sup>1</sup> Native Title determinations only include areas to the low tide mark.

interests. Although several High Court decisions have confirmed the existence of Native Title in offshore areas and provided some clarification, considerable uncertainty remains regarding the extent that Indigenous Sea Country rights can be accommodated in contemporary Australian law. Despite this lack of recognition of Sea Country rights, as has already been seen with currently proposed offshore wind projects in Victoria, these projects have the potential to negatively impact culturally and spiritually significance sites, landscapes and seascapes, and environmental values of the project area that are of concern for Traditional Owners<sup>2</sup>. Victorian Traditional Owners have asserted in a range of forums their continuous cultural connection and interests in managing coastal and marine areas, including protection of cultural and environmental values, and participating and sharing benefits from the commercial utilisation of marine resources<sup>3</sup>. This is demonstrated through the recent initiation of processes to establish the Gunditjmara Sea Country Indigenous Protected Area (IPA) and Nanjit to Mallacoota Sea Country IPA<sup>4</sup>.

The *Environmental Protection and Biodiversity Conservation Act 1999* (EPBC), provides for the protection of certain Aboriginal cultural heritage sites, and recognises the important role for Indigenous Australians in the sustainable development and conservation of biological diversity, including marine areas. It provides a trigger for the engagement of Traditional Owners in the management of impacts of offshore wind developments, and therefore, as is stated in the OWPDP, it will be important for the Victorian government to coordinate with Commonwealth authorities when it comes to engaging Traditional Owners in the negotiating approvals and management of offshore wind projects. It is important to note that the EPBC Act is currently under review.

The recognition of land and sea rights of affected Traditional Owner Groups will continue to evolve in coming years during the lifetime of the offshore wind projects. Therefore, as is recommended in the literature regarding identifying best practice approaches to negotiating Traditional Owner benefits from renewable energy sector expansion<sup>5</sup>, Traditional Owner groups should be engaged and see benefits from renewable energy projects based on the acknowledgement that sovereignty was never ceded, and the First Nations people retain sovereignty over all land in Australia, whether this is currently recognised in Australian law or not. Approaches to engagement and benefit sharing agreement negotiations should be aligned with the United Nations Declaration on the Rights of Indigenous People, including the principle of free, prior and informed consent.

### **Early engagement of Traditional Owners**

Due to the complex and evolving legal context of offshore wind projects and the requirements to engage Traditional Owners, it is recommended that the Victorian government includes in its policy settings for offshore wind projects requirements for project developers to engage Traditional

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<sup>2</sup> <https://www.theage.com.au/national/victoria/a-sacred-island-called-deen-maar-and-an-approaching-wind-storm-20211216-p59i9d.html>

<sup>3</sup> Smyth, D (2004) Kooyang Sea Country Plan, Framlingham Aboriginal Trust and Winda Mara Aboriginal, Heywood

<sup>4</sup> <https://www.dcceew.gov.au/environment/land/indigenous-protected-areas/sea-country-grant-opportunity>

<sup>5</sup> O'Neill, L., Thorburn, K. and Hunt, J. (2019), Ensuring Indigenous benefit from large-scale renewable energy projects: Drawing on experience from extractive industry agreement making, Working Paper No. 127, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra.

Owners in the project approval process and negotiate benefit sharing agreements. This engagement should be at the early stages of the project development process when Traditional Owners can be engaged as partners in the design and implementation of projects, not merely for compliance purposes. Clarifying such requirements in policy will also create investor certainty enabling the efficient roll out of projects and avoid delays at later stages of project development.

For Traditional Owner groups who have formal recognition under the above pieces of legislation, Traditional Owner Corporations (TOCs) are bodies that solely have the formal authority to represent the Traditional Owner Nation's collective rights and interests for a specific area and facilitate input into planning, decision-making and negotiation processes. It is important to recognise that each of the TOCs are at differing stages of establishment, with differing internal capacities and capabilities, and demands on their time and resources. The agenda, nature and timeliness of engagement processes should be determined in collaboration with the TOCs, not only by DELWP or offshore wind energy project developers.

TOCs have a broad range of responsibilities and obligations and are called on to contribute to many planning processes. They need to be adequately resourced to meaningfully participate in the complex and technical processes for developing offshore wind projects, including having dedicated staff to build the required knowledge bases and internal engagement with TOC directors, management and community members to be able to partner from an informed and empowered position. TOCs should also be resourced to obtain qualified and independent legal, technical, scientific, business and other advice to enable informed positions in relation to offshore wind energy planning processes. This should include information enabling Traditional Owners to assess the cumulative impacts of offshore and onshore projects, and grid infrastructure on cultural significant sites and landscapes and environmental values.

It will be important to engage Traditional Owners in a way that is sensitive to the current status of the recognition of land rights, where offshore wind projects may cause impacts in areas that are contested between multiple groups, or where groups do not have formal recognition. Efforts should be made to mitigate against inherent risks including:

- Creating conflict amongst a group or between groups, for example where multiple Traditional Owner groups hold or assert rights and interests over an overlapping area. This could hinder or detract from progress towards formal recognition.
- For groups without formal recognition and an agreed representative body, there is the risk of amplifying or legitimising the voices of certain organisations or individuals which do not represent the collective rights and interests of Traditional Owners for that area.

In the latter case adequate time and resources must be assigned to enable engagement processes to be designed and lead by Traditional Owners who are able to navigate the cultural and historic complexities. While lessons can be learnt from previous engagement processes, they should be tailored to each region and for the purpose of the engagement, based on the understanding the community dynamics and relationships are constantly evolving. Efforts should be made to ensure engagement processes are inclusive, aiming to empower all Traditional Owners who assert rights

over Country, and use various methods of engagement, so participants are able to participate in a forum they feel comfortable & culturally safe in. It will be important to recognise and respect existing protocols that have been established regarding relationships between different groups and organisations, as well as Traditional Owner culture and agreement making processes.

### **Approaches to sharing benefits with Traditional Owners from the energy transition**

There are established approaches for preparing benefit sharing arrangements for renewable energy projects based on proximity to the project, i.e. hosts, neighbours and the broader community. It could be seen that Traditional Owners fit in all these categories. We encourage Traditional Owners groups be considered as rights holders, not merely as a subset of community stakeholders. Benefit sharing agreements and processes should be based on thorough consultations with Traditional Owner groups and aligned with meeting their needs, aspirations and development objectives. Most of the TOCs will have identified their development priorities in their Whole of Country Plans and other internal strategy documents. These form a starting point for more comprehensive conversations with TOCs.

Every Traditional Owner group or nation is at a different stage in their pathway to activating their rights and interests and more work may need to be done with some Traditional Owner groups to clarify their development priorities to ensure they are optimally targeted. There will need to be differing benefit sharing arrangements amongst groups, especially for groups without formal recognition, as there will not be a representative body which can coordinate and negotiate these arrangements internally.

Many Traditional Owner groups have indicated that they are keen to build their businesses' capacities to be able to position themselves to make the most of the procurement opportunities that will arise from the expansion of the renewable energy sector. It can be expected that capacities and capabilities of Traditional Owner businesses will vary greatly amongst Traditional Owner groups, and therefore it is recommended that a targeted information, training and education program be developed to enable Traditional Owner businesses and individuals to understand the opportunities, make strategic decisions about preparing for and taking up these opportunities.

We encourage a holistic view and innovative approaches to ensuring Victorian Traditional Owners can access benefits from offshore wind energy developments and associated infrastructure, based on a recognition of unceded rights, and the expectation that land and sea rights will continue to evolve during the lifetime of projects. Benefit sharing arrangements should be comparable to Traditional Owner groups in other parts of Australia, where the land tenure context is less of an impediment to obtaining the recognition of land and sea rights through Native Title processes. Offshore wind energy projects do not trigger requirements for negotiation of benefit sharing arrangements with Traditional Owners based the current legal context. This disparity can be addressed through policy levers that could be incorporated into the approval process of offshore wind projects, or as obligations imposed on renewable energy generation projects in return for gaining 'access rights' to use transmission infrastructure. Benefits sharing arrangements should be designed with reference to best practice approaches in the sector recommended by the Clean

Energy Council<sup>6</sup> and First Nations Clean Energy Network<sup>7</sup>, and other literature on the topic<sup>1</sup>, and contribute to Traditional Groups enhancing their ability to exercise their land and sea rights.

This submission has pointed to some strategies and complexities of partnering with the Traditional Owner groups in the development of offshore wind energy given the diversity of their formal recognition and institutional establishment, and evolving nature of Traditional Owner land and sea Country rights. This is not an exhaustive assessment, and due to the significant opportunity and risks at stake, it is recommended that a technical working group designed by Traditional Owners be formed to bring together Traditional Owner representatives and sector experts with an understanding of the Victorian Traditional Owner landscape to conduct a thorough assessment of the differing components of Traditional Owner engagement with the renewable energy sector in Victoria, enabling the provision of strategic advice on the design of the renewable energy related policy based on the best available information. The Federation is well placed to facilitate such a process, having done so to inform strategy and policy development for a broad range of sectors, and having established networks with Traditional Owner groups and appropriate sector experts.

### **Key recommendations:**

- Adequately resource Traditional Owner groups to engage in offshore wind development processes, including accessing required technical, scientific, legal and business advice, and assessments of the cumulative impacts of multiple renewable energy projects.
- Tailor place-based approaches to engaging each Traditional Owner groups in offshore wind development processes, including adequately resourcing culturally safe engagement processes with Traditional Owner groups without formal recognition, and where there are multiple groups with interest in an area.
- Ensure engagement processes are designed by Traditional Owners.
- Identify ways to include Traditional Owner as partners at the highest levels of planning and decision-making regarding the offshore wind sector, including the implementation stage with active management to minimise impacts on environmental and cultural values of project sites and connecting infrastructure.
- Engage with Traditional Owners in a way that recognises that they retain sovereignty over all Australian land, whether this is recognised in Australian law or not.
- Enable diverse benefit sharing arrangements suitable for differing circumstances, priorities and aspirations of different Traditional Owner Groups.

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<sup>6</sup> Clean Energy Council (2019) A Guide to Benefit Sharing Options for Renewable Energy Projects, at <https://www.cleanenergycouncil.org.au/advocacy-initiatives/community-engagement/benefit-sharing-for-renewable-energy-projects>

<sup>7</sup> <https://www.firstnationscleanenergy.org.au/resources>

- Support the development of tailored training and education programs for Traditional Owners to enable them to take up procurement and employment opportunities.
- Develop innovative policy approaches to ensuring Traditional Owner access optimal benefits from offshore wind energy developments, such as requirements embedded in approval processes or for gaining 'access rights' to use grid infrastructure.