



7th October 2022

## **Submission on the Proposed Gippsland Offshore Renewable Energy Infrastructure Area**

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 Proposed Gippsland Offshore Renewable Energy Infrastructure Area and contribute to the approach to best develop the offshore renewable energy sector in Victoria.

As this is a new sector and projects in the proposed area of Gippsland, Victoria will be leading the way with the development of the offshore renewable energy sector in Australia, it is important to invest the appropriate resources to establish the policy settings and engagement processes that enables Traditional Owners to exercise their right to self-determination and cultural 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 Australian 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.

Victorian Traditional Owners are largely supportive of the development of the renewable energy sector as it is recognised that the outcomes are aligned Caring for Country objectives, while they have concerns about the scale of offshore and onshore renewable energy developments and the cumulative impacts on cultural landscapes and seascapes, local environmental values, and their economic interests in the proposed areas for these projects. Traditional Owner groups have expressed that they are keen to identify ways that the development of renewable energy projects can contribute to achieving their economic development aspirations and ability to access and manage land according to their cultural obligations.

To achieve these outcomes from the development of the offshore renewable energy sector it is recommended that:

- There is an assessment of the coordination and consistency between state and federal renewable energy policy settings that contribute to the best outcomes for Traditional Owners.
- Legislative and policy frameworks are amended to mandate that project developers engage with Traditional Owners at the early stages of project development in a manner that is consistent with the principle of free prior and informed consent, and Traditional owners unceded rights that will continue to evolve during the lifetime of projects.

- Tailor place-based approaches to engaging Traditional Owner groups in offshore renewable energy planning processes, including adequately resourcing culturally safe engagement processes with Traditional Owner groups without formal recognition.
- Negotiating benefit sharing agreements that are developed with reference to best practice approaches in the sector, are aligned with each nation's economic development aspirations and enhances Traditional Owners' ability to exercise their land and sea rights.

### **Traditional Owner Rights and Interests in relation to offshore renewable energy developments**

The Gunaikurnai, Bunurong and Boon Wurrung people have asserted traditional land and sea rights and interests in the proposed area for the establishment of renewable energy generation projects off the Gippsland coast and the adjacent land that would host transmission infrastructure. These groups 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. The land and sea Country areas surrounding Wilson's Promontory hold great spiritual significance for multiple Traditional Owners, contributing to land rights for the area remaining contested. Based on this complexity it will be important to invest adequate resources to engaging Traditional Owners in the planning and approval processes of developments in the area in the appropriate and culturally sensitive manner.

In the case of offshore renewable energy 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 renewable energy projects will cross land that has more clearly established Traditional Owner rights and 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, renewable energy projects developed in the proposed areas 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. 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>2</sup>. This is demonstrated through the recent initiation of processes to establish the

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

<sup>2</sup> Smyth, D (2004) Kooyang Sea Country Plan, Framlingham Aboriginal Trust and Winda Mara Aboriginal, Heywood

Nanjit to Mallacoota Sea Country Indigenous Protected Area (IPA) on the Gippsland Coast<sup>3</sup>, and the development of tourism operations adjacent to the areas proposed for the development of offshore renewable energy projects.

As is outlined in the First Nations Clean Energy Network submission, the legislative and policy regime relevant to offshore renewable energy development in Victoria is yet to be completed. Victoria's Offshore Wind Implementation Statement which will detail how the Victorian government will support the offshore wind sector yet to be finalised. 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 renewable developments. It is important to note that the EPBC Act is currently under review.

The Offshore Electricity Infrastructure Act 2021 (OEI Act) does not presently enable an approach that best respects Victorian Traditional Owner rights, responsibilities and aspirations to benefit from projects developed under the Act. The Act acknowledges that there is the possibility the projects have the potential to interfere with native title rights and interests as defined by the NTA, under which circumstances a license holder under the Act would face a penalty. It is recommended that this definition be extended to be consistent with Traditional Owner rights and interests established through state-based legislation, such as the Victorian TOSA. Based on the recognition that land and sea rights of affected Traditional Owner Groups will continue to evolve in coming years during the lifetime of the offshore renewable energy projects, it is recommended that the OEI Act mandate that Traditional Owners be engaged in project planning at a stage when it is possible to identify potential interference with their rights and interests and establish measures to mitigate the risk of this interference in a proactive manner.

We recommend that an assessment be undertaken to ensure there is consistency and coordination between all state and federal legislation and policy that will determine the outcomes for Traditional Owners from the development of offshore renewable energy projects. Approaches to Traditional Owner 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. We encourage reference to the Best Practice Principles for Clean Energy Projects developed by the First Nations Clean Energy Network<sup>4</sup> when conducting such an assessment.

### **Culturally safe approaches to engagement and partnering with Traditional Owners**

Traditional Owners should be engaged at the early stages of the project development process when they can be engaged as partners in the design and implementation of projects, not merely for compliance purposes. Clarifying such requirements in policy and legislation will also create investor

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<sup>3</sup> <https://www.dcceew.gov.au/environment/land/indigenous-protected-areas/sea-country-grant-opportunity>

<sup>4</sup> <https://www.firstnationscleanenergy.org.au/>

certainty enabling the efficient roll out of projects and avoid delays at later stages of project development.

For Traditional Owner groups which 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 government or project proponents.

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. 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, as 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 land and sea Country, and use various methods of engagement, so participants are able to participate in a forum in which they feel comfortable and culturally safe. 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.

Benefits sharing arrangements should be designed with reference to best practice approaches in the sector recommended by the Clean Energy Council<sup>5</sup> and First Nations Clean Energy Network<sup>6</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 renewable energy projects 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 context 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 legislation and policy based on the best available information. The Federation is well placed to contribute to 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.

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<sup>5</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>6</sup> <https://www.firstnationscleanenergy.org.au/resources>