



31st August 2023

## **Submission on the Proposed Offshore Renewable Energy Infrastructure Area- Southern Ocean Region**

The Federation of Victorian Traditional Owner Corporations (FVTOC) is a state-wide body advocating for the rights and interests of Victorian Traditional Owners. We take the opportunity to make a submission to provide feedback on the Proposed Offshore Renewable Energy Infrastructure Area- Southern Ocean Region (Proposed Area) and advocate for embedding the principles of Traditional Owner self-determination and free, prior and informed consent in the development of the offshore renewable energy sector.

The renewable energy transition is taking place at a rapid pace in order to meet the Commonwealth and Victorian governments' ambitious renewable energy targets. It will see the biggest industrialisation of Victorian Land and Sea Country since Victorian Traditional Owner Corporations were established under the *Native Title Act 1993* (NTA), *Traditional Owner Settlements Act 2010* (TOSA) and the *Aboriginal Heritage Act 2006* (AHA).

As a relatively new sector, the renewable energy industry, if developed in an appropriate way, provides an opportunity for Traditional Owners to rightfully derive meaningful economic and social benefits from the use of resources on Country. Which, in turn, can contribute to reinstating elements of Traditional Owner's economic base, which were degraded and appropriated through colonisation and the dispossession of Land and Sea Country, and be a foundation for true self-determination.

Victorian Traditional Owners have largely expressed qualified support for renewable energy developments as the decarbonising outcomes are seen to be compatible with caring for Country cultural obligations. However, they have significant concerns about the potential cumulative impacts on culturally and spiritually significant landscapes, cultural heritage, culturally significant species, and current and future economic activities.

The renewable energy sector must be developed in accordance with the *United Nations Declaration on the Rights of Indigenous People* (UNDRIP), with governments enabling the right of Traditional Owners to participate effectively in decision-making in matters which effect their interests through representatives chosen by them in accordance with their own procedures. This must include obtaining their 'free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them'<sup>1</sup>. The Commonwealth Government must partner

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<sup>1</sup> UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295, available at: <https://www.refworld.org/docid/471355a82.html>

with Traditional Owners as rights holders in decision making in relation to the renewable energy sector development, not merely consulted as one of many stakeholder groups.

Traditional Owners should have been formally engaged as partners, based on acknowledgment of their sovereignty and unceded Sea Country rights, at an earlier stage of this process of identifying suitable areas for the development of offshore renewable energy infrastructure, so that concerns regarding impacts on culturally significant sites and seascapes could have been adequately reflected in the proposed area prior to this public consultation process.

Going forward, the Commonwealth Government must provide Traditional Owners with the required resources, information and time to enable meaningful participation in renewable energy decision making processes in accordance with the relevant group's decision-making procedures. Government parties must commit to reaching good faith agreement with Traditional Owners in relation to the Proposed Areas, including the designation of necessary exclusion zones, and, more broadly, the terms on which these developments occur on Country.

*Traditional Owner rights and interests in this proposed area for offshore renewable energy infrastructure*

Gunditj Mirring Traditional Owner Aboriginal Corporation (GMTOAC) and Eastern Maar Aboriginal Corporation (EMAC) have a statutory and community responsibility to manage the collective rights and interests of members, including those affected by both the designation of any Proposed Areas and the developments within those areas.

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, whereas the key transmission infrastructure to enable offshore renewable energy projects will cross land with recognised Traditional Owner rights and interests under the NTA and AHA. Several High Court decisions have confirmed the existence of Native Title in offshore areas and provided some clarification<sup>2</sup> and Commonwealth agencies such as Parks Australia conduct the work on the basis that native title exists in sea country within Commonwealth waters<sup>3</sup>. However, there is a long way to go before Indigenous Sea Country rights are adequately recognised under contemporary Australian law.

Despite this lack of recognition of Sea Country rights, renewable energy projects developed in the proposed areas can be expected to negatively impact unceded culturally and spiritually significant sites, landscapes and seascapes, and environmental values that are of concern for Traditional Owners. Gunditj Mirring and Eastern Maar 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

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<sup>2</sup> Commonwealth v Yarmirr (2001) 208 CLR 1

<sup>3</sup> <https://parksaustralia.gov.au/marine/management/programs/indigenous-engagement/principles/>

commercial utilisation of marine resources<sup>4</sup>. This is demonstrated through the initiation of processes to establish the Gunditjmara Sea Country Indigenous Protected Area (IPA)<sup>5</sup>, and the Nyamat Mirring (Sea Country) Plan, and the development of tourism operations adjacent to the areas proposed for the development of offshore renewable energy projects which will likely be impacted Sea Country developments<sup>6</sup>.

Developments such as the December 2022 Federal Court ruling in the *Santos NA Barossa Pty Ltd v Tipakalippa*<sup>7</sup> case and the current review of *Environmental Protection and Biodiversity Conservation Act 1999* and other Commonwealth cultural heritage protection legislation<sup>8</sup>, indicate that the recognition of Traditional Owners Sea Country rights and interests will continue to evolve during the lifetime of renewable energy projects within the Southern Ocean Region. On this basis, planning processes, such as is the focus of this consultation must be conducted in a manner which acknowledges Traditional Owner sovereignty and unceded rights. They must enable Traditional Owners to proactively declare certain areas not appropriate for offshore renewable energy infrastructure development and require and enable Traditional Owner free, prior and informed consent. This will not only ensure projects are aligned with UNDRIP, but will also enable investor certainty, the efficient roll out of projects and avoid delays at later stages of project development.

#### Key potential impacts on Victorian Traditional Owner interests to consider

While this submission does not purport to provide an exhaustive list of potential impacts on Traditional Owner interests from offshore renewable energy projects in the area, there are a few key impacts which must be considered in the declaration of this area as suitable for offshore renewable energy infrastructure development. Firstly, Deen Maar is an offshore island of immense cultural and spiritual significance for Traditional Owners. This area should never have been proposed as a potential area for renewable energy infrastructure as it is disrespectful of Traditional Owners and creates an environment of great stress due to the scale of risk to Traditional Owners identity and cultural and spiritual wellbeing. Planning the location of renewable energy infrastructure must respect the spiritual integrity of this cultural landscape as defined by the Gunditj Mirring and Eastern Maar Traditional Owners. Protection of Deen Maar's spiritual integrity must include establishing an exclusion zone of adequate size so as not to impact the horizon or views in front of, around and beyond the island from anywhere along the coast, and also from any elevated position from areas further inland.

Secondly, the installation and operation of renewable energy infrastructure can be expected to significantly impact a range of species which are culturally and economically significant for the Gunditj Mirring and Eastern Maar communities, including blue whales, sea birds, eagles, southern

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<sup>4</sup> Smyth, D (2004) Kooyang Sea Country Plan, Framlingham Aboriginal Trust and Winda Mara Aboriginal, Heywood

<sup>5</sup> <https://www.dcceew.gov.au/environment/land/indigenous-Protected-Areas/Sea-Country-Grant-Opportunity>

<sup>6</sup> DCCEEW (2023) Guidance- Key Environmental Factors For Offshore Windfarm Environmental Impact Assessment Under The Environment Protection And Biodiversity Conservation Act 1999, Department of Climate Change, Energy, the Environment and Water, Canberra

<sup>7</sup> Santos NA Barossa Pty Ltd v Tipakalippa

<sup>8</sup> <https://culturalheritage.org.au/cultural-heritage-reform/>

right whales and eels, amongst others. The proposed Southern Ocean Region includes the Bonny Upwelling, one of the most four most productive upwellings globally creating the conditions for the area becoming one of twelve identified feeding areas for blue whales globally which migrate to the area in summer months<sup>9</sup>. Southern right whales migrate to the area for calving during winter. Both species are culturally significant for the Gunditj Mirring and Eastern Maar communities, and these migrations are the basis of songlines, ceremony, identity and cultural systems.

Underwater noise effects the behaviour of whales and other species by interfering with of sounds used for communication, location of food sources and navigation, and have been shown to cause temporary or permanent hearing loss<sup>10</sup>. Underwater noise of differing intensities can be expected at all stages of an offshore renewable energy project from geophysical testing to construction, operation and decommissioning. While the physical presence of renewable energy infrastructure can displace or interfere with migration patterns by creating a barrier, undersea cables which carry electricity from renewable energy generation infrastructure produce magnetic fields have the potential to affect the migratory and feeding behaviour a range of species including eels. Eel species are culturally significant for the Gunditj Mirring and Eastern Maar communities, and they migrate inland to areas such as the World Heritage listed Budj Bim Cultural Landscape. As well as their cultural significance they are economically important as a food source for consumption and sale, and a key to tourism activities at Budj Bim. Traditional Owners can be expected to expand commercial fishing and aquaculture activities in the future, including potentially acquiring fishing rights via the Treaty process underway in Victoria, and these interests must be considered in this process.

It will be important to consider the impacts on these and other culturally significant species prior to declaring any of the Southern Ocean Region suitable for offshore renewable energy developments, and the management of environmental impacts of individual projects, not only for their biodiversity values but also for their cultural values. Traditional Owners have cultural responsibilities to care for these species and all of Country, therefore Traditional Owners must be provided with adequate resources, information and time to assess these potential biocultural impacts, and ongoing active management of these species and Land and Sea Country.

### **Impacts on submerged cultural landscapes and cultural heritage**

The ancestors of the Gunditj Mirring and Eastern Maar communities occupied much of the proposed area prior to the dramatic rise of sea levels following the last ice age 7-12,000 years ago.

Understanding of submerged cultural heritage from this time is still at a nascent level. Although studies such as the pilot Nyamat Mirring study undertaken by Wessex Archaeology with the GMTOAC have been able to reconstruct the submerged landscapes and identify areas of likely densities of cultural heritage objects by extrapolating from known data on land<sup>11</sup>. Impacts on

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<sup>9</sup> Gill, Pirzl, Morrice and Lawton (2015) Cetacean diversity of the continental shelf and slope off southern Australia. *Journal of Wildlife Management* 79(4):672–681; DOI: 10.1002/jwmg.867

<sup>10</sup> DCCEEW (2023) Guidance- Key Environmental Factors for Offshore Windfarm Environmental Impact Assessment Under The Environment Protection And Biodiversity Conservation Act 1999, Department of Climate Change, Energy, the Environment and Water, Canberra

<sup>11</sup> <https://www.extentheritage.com.au/news/exploring-extent-heritages-sector-leading-work-on-sea-country>

submerged cultural heritage must be considered in the designation of areas for offshore renewable energy infrastructure. Protection of submerged cultural heritage in Commonwealth waters is currently guided by the *Underwater Cultural Heritage Act 2018* and the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*. The provisions for protection of Aboriginal underwater cultural heritage are currently inadequate, and can be expected to be strengthened in coming years, so as to be aligned with the 2001 *UNESCO Convention on the Protection of the Underwater Cultural Heritage* if Australia ratifies it<sup>12</sup>.

### **Concluding remarks**

This submission has pointed to the importance and complexities of partnering with the Traditional Owner groups in the planning and development of offshore wind energy in the Southern Ocean Region given the evolving nature of Traditional Owner land and sea Country rights and interests. It will be important to engage with each Traditional Owner group on their own terms and to understand their particular set of rights, interests and objectives in order to be aligned with the principles of self-determination, as each of the affected Traditional Owner groups in Victoria and South Australia can be expected to have some shared interests, but also some differing priorities. Differing approaches to partnering with Traditional Owner representative bodies will be needed given the differing internal capacities, capabilities and ways of working with their community members to gain their perspectives on the issues at stake. Given the high stakes, technical nature and likely significant impacts of offshore renewable energy infrastructure on Traditional Owner interests they should be provided with adequate resourcing, information and time to be able to engage in decision-making processes in an effective and meaningful way that enables free, prior and informed consent. Traditional Owners must be engaged as sovereign partners with unceded rights, not merely a subset of community stakeholders in this consultative process and subsequent stages of planning and implementing renewable energy infrastructure. This should be done in a coordinated manner with Victorian government agencies as there is substantial overlap and intersection of Commonwealth and state legislative, policy and regulatory frameworks.

This Statement was developed independently by FVTOC and does not attempt to comprehensively represent the views of Gunditj Mirring and Eastern Maar Traditional Owners. We understand that both GMTOAC and EMAC will make submissions on the Southern Ocean Region Proposed Area directly to DCCEEW, and we strongly encourage recommendations in these submissions are heeded.

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<sup>12</sup> <https://www.firstpeoplesrelations.vic.gov.au/symposium-assessments-submerged-landscapes>