National Native Title Council

spirit of Change

ABN 32 122 833 158

12-14 Leveson Street
PO Box 431
North Melbourne 3051

PO Box 6337
East Perth 6892

31 January 2024

The Hon. Chris Bowen
Minister for Climate Change and Energy
PO Box 6022
House of Representatives
Parliament House
Canberra ACT 2600

Via email: offshorerenewables@dcceew.gov.au

Dear Minister Bowen,

Proposed Northern Tasmania, Bass Strait, TAS Declared Area for future offshore renewable energy projects

On behalf of the National Native Title Council (**NNTC**), I am pleased to put forward the following submission. The NNTC is the peak body for Australia's Native Title and other Traditional Owner organisations. The NNTC represents Native Title Representative Bodies and Service Providers as well as Prescribed Bodies Corporate (**PBCs**) recognised under the *Native Title Act 1993* (**NTA**) and other equivalent Traditional Owner Corporations (**TOC**) established under parallel legislation such as the Victorian *Traditional Owner Settlement Act 2010*.

Our submission highlights the legislative framework within which it is contemplated that a declaration of Declared Areas is made under the *Offshore Electricity Infrastructure Act 2021* (Cth) (the **Act**). The submission examines the criteria upon which a declaration is made and the circumstances under which it is appropriate to make a declaration subject to conditions. The submission sets out a range of matters relevant to Traditional Owners' interests in the proposed declared area in Lutruwita/Tasmania.

The submission concludes by recommending that any declaration, in respect of both areas under consideration, should be made only subject to it having no significant impact on the affected Traditional Owners. This should be undertaken through a condition that the grant of any licence within the declared area should be subject to a requirement:

> *that the licence will have no significant impact upon the interests of affected Traditional Owners without the consent of the Traditional Owners to the grant of that licence.*

Legislative Framework

General approach

The establishment and operation of offshore renewable energy infrastructure is regulated under the Act and the regulations made under that Act, the *Offshore Electricity Infrastructure Regulations 2022* (Cth.) (the **Regulations**). The process of offshore use for renewable energy projects, under regime established within this framework, involves three key steps:

- Declaration of a Commonwealth offshore area as a Declared Area under s 17 of the Act. A declaration of this kind is made by the Minister for Climate Change and Energy (**Minister**).
- The application for and grant of a licence (of various types) under Part 3 of the Act and the Regulations. The grant of a licence is made by the Minister with the advice of the Registrar of the Act.
- The management and operation of a Licence Area under Part 4 of the Act. Notably the regulations relevant to the management and operation of licence areas are still (the NNTC understands) in the process of development. The NNTC will be making submissions on these future regulations at an appropriate juncture.

Sections 17 – 20 of the Act set out the matters the Minster shall have regard to in making a declaration under s 17 and determining whether to impose any conditions upon that declaration. A number of these provisions are specifically relevant to this submission.

A declaration of a Declared Area is made pursuant to s 17(1). Pursuant to s 17(3)(d), a declaration under s 17(1) should only be made if *"the Minister is satisfied the area is suitable…"*. Pursuant to s 17(4) a Declared Area need not be continuous and need not cover the entire area which, under s 18, is the subject of a notice advising of consideration of the declaration of an area. In addition, under s 19(b)(ii) an area may be declared subject to conditions imposed under s 20. These are discussed below.

Conditions

Section 20 deals with the imposition of conditions with respect to a Declared Area. Pursuant to s 20(2) a declaration of a Declared Area may prohibit the grant of one or more:

- feasibility licences,
- commercial licences, or
- research and demonstration licences;

within a declared are or specified part of it. Pursuant to s 20(4), the declaration of a Declared Area may provide that any of the licence types referred to above can only be granted subject to specific condition under which the declaration of the Declared Area is made.

The grant of the licence types referred to above is required to be subject to the conditions specified in s 20.[1] Notably, pursuant to s 35, a feasibility licence may be granted subject to conditions prescribed by the licensing scheme (the Regulations) (s 35(1)(c)) or such other conditions as the Minister thinks fit (s 35(2)). Further, these conditions may 'flow on' to any subsequent commercial license (s 35(3) and s 42(1)(g)). The conclusion to be drawn is that s 20 creates the basis for conditions to be applied *generally* to *all* licenses granted within a Declared Area (or specified portion of it). The additional provisions at ss 35(1)(c) and s 35(2) allow for the imposition of conditions more specifically crafted to the individual licence under consideration.

Notably, the power to impose conditions is with respect to the grant of a licence. This is in addition to any ability to impose conditions on subsequent Management Plans pursuant to s 114 and s 115 of the Act. The existence of the power to impose conditions pursuant to s 20 (and have these flow through to any subsequent licences per ss (s 35(3) and s 42(1)(g)) is an indication of the legislature's intent. When determining whether to exercise the power to impose a condition, it is therefore not sufficient to assume that all relevant matters can be addressed in conditions imposed under the relevant Management Plans (per s 114 and s 115). Such an approach would deny s 20 (and per ss (s 35(3) and s 42(1)(g)), any "work to do" and would defeat the legislature's clear intent.

Criteria

Section 19 sets out the matters the Minister must have regard to in determining whether to make a declaration of a Declared Area. Relevant to the purposes of this submissions are the matters specified in subsection 19(1), (a), (b), (d) and (2).

Subsection 19(1)(a) requires the Minister to have regard to the potential impacts of offshore energy infrastructure activities on "the marine users and interests". Subsection 19(1)(b) requires consideration of matters raised in submissions received in relation to the proposed declaration. This submission on proposed the Northern Tasmania, Bass Strait, TAS Declared Area for future offshore renewable energy projects constitutes such a submission under this subsection.

Subsection 19(1)(d) requires consideration of "Australia's international obligation in relation to the area." Relevantly, these obligations would include the obligations of Australia as a signatory to the Convention on Biological Diversity[2] (**CBD**) and the *United Nations Declaration of the Rights on Indigenous Peoples*[3] (**UNDRIP**).

Finally, subsection 19(2) requires the Minister to have regard to any other matters the Minister considers relevant. There are two clearly relevant considerations in this regard. First, is the provisions of the *Environment Protection and Biodiversity Conservation Act*

[1] See, for example, 35(1)(b) in relation to feasibility licences and s 42(1)(d) is relation to commercial licences.
[2] 5 June 1992 (*1760 U.N.T.S. 69*)
[3] *United Nations Declaration of the Rights on Indigenous Peoples* GA/res/61/295 Ann. 1 (Sept 13, 2007).

1999 (Cth) (**EPBC**) regarding matters that may have an impact upon the environment of Commonwealth marine areas. Second is the Commonwealth Government's stated commitment to respecting the principles of Self-Determination and Free Prior and Informed Consent (**FPIC**) as set out in UNDRIP. This commitment was recently re-iterated in the Commonwealth response to the Parliament "Juukan Gorge Inquiry".[4]

These last two matters may require some brief elaboration. The EPBC regulates any action that may have a significant impact on the environment of a Commonwealth marine area (as defined in the EPBC). Without elaborating, it can broadly be stated that a "Commonwealth offshore area" under s 8 of the Act broadly equates with a "Commonwealth marine area" under s 24 of the EPBC.

The "environment" at s 528 of the EPBC is defined as including:

> (a) ecosystems and their constituent parts, including people and communities; and
> (b) natural and physical resources; and
> (c) the qualities and characteristics of locations, places and areas; and
> (d) heritage values of places; and
> (e) the social, economic and cultural aspects of a thing mentioned in paragraph (a), (b), (c) or (d).

This is not to suggest that the making of a declaration under s 17 of the Act is a "controlled action" for the purposes of s 23 of the EPBC. Rather, it is to assert that in making a declaration under s 17 of the Act a relevant consideration for the Minister is what consequential impact the making of that declaration (including a decision as to whether to impose conditions on the making of the declaration) may have on the environment of a Commonwealth marine area. It is also to assert that matters such as the existence of heritage values and places, social and cultural aspects of ecosystems locations and places, all form a component of the Commonwealth marine area environment that need be regarded. Such an approach, it is suggested, is also in conformity with the principles of Ecologically Sustainable Development set out in s 3A of the EPBC and are also therefor a relevant consideration in the making of a s 17 declaration.

The Commonwealth Government's stated commitment to respecting the principles of self-determination stands, pursuant to s 19(2), as a relevant consideration independently of the Australia's obligations as a signatory under the CBD and UNDRIP.

---

[4] Australian Government, 2022, *Australian Government's Response to the Joint Standing Committee on Northern Australia's: "A Way Forward: Final Report into the Destruction of Indigenous Heritage Sites at Juukan Gorge"; and "Never Again: Inquiry into the Destruction of 46,000 Year Old Caves at the Juukan Gorge in the Pilbara Region of Western Australia"* (Government Response), 5.

Areas under Consideration

The Minister has recently proposed two areas in Australian Commonwealth waters to support future renewables development and supply electricity to the region, which could include offshore wind, wave or tidal generation projects under s 18 of the Act.

Two areas under Phase Two have been declared, one in New South Wales and one across both Victoria and South Australia. These have been described as follows.

> The area in the Southern Ocean was proposed as suitable for offshore renewable energy on 28 June 2023. The declared area covers approximately 5,136 km2, extending from Warrnambool, Victoria to Port MacDonnell, South Australia.
>
> The area in the Pacific Ocean off the coast of the Illawarra region, was declared as suitable for offshore renewable energy on 14 August 2023. The declared area covers approximately 1,461 km2, extending from Wombarra in the north to Kiama in the south and is at least 10km from the coast. Consultation was open until 16 October 2023.

The contents of this submission applied to both these proposed declarations.

Traditional Owner Interests in Sea Country and the Impact of Offshore Infrastructure

The National Oceans Office South-East Regional Marine Plan, *Sea Country an Indigenous Perspective*[5] (the **Plan**), notes the connectedness of land and sea for Traditional Owners impacted by the proposed Lutruwita/Tasmanian region.

> *"Together they form people's "Country" – a country of significant cultural sites and "Dreaming Tracks" of the creation ancestors. As a result, coastal environments are an integrated cultural landscape/seascape that is conceptually very different from the broader Australian view of land and sea."*

The impact of offshore infrastructure is therefore much broader, relating to both tangible and intangible Cultural Heritage. Citing archaeological records, the Plan identifies the extraordinary amount of time for which today's Traditional Owners' families have had responsibility for caring for this multi-faceted Country.

> *"Aboriginal people occupied, used and managed coastal land and sea environments within the Region for many thousands of years before the current sea level stabilised about 5000 years ago. Aboriginal people's cultural and economic relationship with the Region begins before the current coastal ecosystems were established. This relationship includes knowledge and use of lands that now lie beneath the ocean all around the coast, and between mainland Australia and Tasmania."*

[5] National Oceans Office, Commonwealth Government of Australia, *Sea Country – an Indigenous perspective* The South-east Regional Marine Plan Assessment Reports, 2002

Injudiciously considered offshore infrastructure poses a significant threat to Traditional Owner rights to live their cultural connections to this Country. Potential impacts are far more diverse than damage to submerged physical sites, they also include the visual interference on the cultural landscape and affect on cultural species.

In Victoria for example, Eastern Maar Traditional Owners have stated that there should be nothing in front and nothing behind Deen Maar. Whilst there has been some increase in the coastal waters exclusion area for the Proposed Southern Ocean Region area, from 10km to 20km, it is not enough to limit the impact on the Deen Maar cultural landscape.

Marine plants and animals also play a significant role in a cultural landscape, providing more than trade and food outcomes but spiritual relationships through totems and songlines.

Consideration of these rights in Commonwealth Waters have already been identified by Parks Australia through the Australian Marine Parks Engagement Principles. Principle Two states that *"management of Australian Marine Parks should be undertaken on the basis that native title exists in sea country within Commonwealth waters."*[6]

The Marine Plan Partnership for the North Pacific Coast (MaPP) initiative is a partnership between the Province of British Columbia (B.C.), Canada and 17 member First Nations that developed and is implementing marine use plans for B.C.'s North Pacific Coast. One of the initiatives currently being undertaken is regional Kelp monitoring. The project highlights the cultural significance of the marine environment as,

> "*each First Nation along the coast has a unique relationship with kelp. Generally, kelp are culturally important as First Nations have harvested many kinds of seaweeds including kelp for thousands of years and continue to use kelp species for food, medicine, tools, fertilizer, and many other uses."*

Initiatives such as these take the establishment of culturally safe and inclusive processes, requiring support and time as part of broader environmental and cultural marine plans. Work such as this must be undertaken prior to both identifying Priority Areas for Assessment and, subsequently, the Minister proposing an area for public consultation. Once areas have been declared, Traditional Owners must be involved at all stages of design, construction and project life on a regulatory level. This must include the provision of cultural consent in accordance with rights afforded for FPIC under UNDRIP.

Judicial Consideration of Offshore First Nations Interests

There is a wealth of jurisprudence recognising the existence and legal relevance of First Nations interests in offshore areas. To commence with recent examples.

[6] Australian Marine Parks, *Indigenous Engagement Principles*, https://parksaustralia.gov.au/marine/management/programs/indigenous-engagement/principles/

In December 2022, the Full Federal Court[7] confirmed a decision of Broomberg J[8] of the Federal Court to overturn an approval by NOPSEMA, of an offshore drilling Environment Plan (**EP**). The EP was submitted by Santos and related to the 'Barossa Basin' which lies offshore from the Kimberley and Northern Territory Coasts.

Then relevant regulations required a process of consultation with all people who have interests ("function, interest or activity") in both the immediately affected area of operations, and within the 'Environment that May be Affected' (**EMBA**).

The decision was based on the finding that Santos had not undertaken any or sufficient consultations with Traditional Owners who had interests in the area.

The Court at first instance found the interests of Mr Tipakalippa included interests arising from his cultural association with the EMBA. These included intangible dreaming lines, tangible manifestations of cultural heritage, his cultural connection to the relevant marine environment, interests in coastal areas that may be affected by any environmental incident (spill) and interests as someone who used the marine environment for fishing and other traditional and contemporary purposes.

The judgments both at first instance and on appeal[9] refer to and accept the following extract from the Appendix C of the EP as a summary description of those interests.

> Marine resource use by Aboriginal and Torres Strait Islander peoples is generally restricted to coastal waters. Fishing, hunting and the maintenance of maritime cultures and heritage through ritual, stories and traditional knowledge continue as important uses of the nearshore region and adjacent areas. However, while direct use by Aboriginal and Torres Strait Islander peoples [of] deeper offshore waters is limited, many groups continue to have a direct cultural interest in decisions affecting the management of these waters. The cultural connections Aboriginal and Torres Strait Islander peoples maintain with the sea may be affected, for example, by offshore fisheries and industries**.** In addition, some Indigenous people are involved in commercial activities such as fishing and marine tourism, so have an interest in how these industries are managed in offshore waters with respect to their cultural heritage and commercial interests.

Their Honours later note in relation to those interests:

> Mr Tipakalippa's and the Munupi clan's interests in the EMBA and the marine resources closer to the Tiwi Islands are immediate and direct. Furthermore, they are interests of a kind well known to contemporary Australian law. Thus, interests of this kind, which arise from traditional cultural connection with the sea, without any proprietary overlay, are acknowledged in federal legislation, such as, for

[7] *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193 ("*Santos FFC"*)
[8] *Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority (No 2)* [2022] FCA 1121 ("*Tipakalippa*").
[9] Santos FFC per Kenny and Mortimer at [39]

> example, the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), and have been considered by the courts.[10]

Their Honours further pursue the matter at [74]:

> By these references to the Heritage Protection Act, we are not intending to suggest that the Heritage Protection Act was applicable to Santos' proposed drilling activities. Rather, we refer to that Act to make it clear that the law recognises the kind of interests that Mr Tipakalippa contends required Santos to consult with him and the Munupi clan. Reference to the Heritage Protection Act demonstrates that by this Act the federal Parliament has expressly contemplated the protection of areas of the sea from activities harmful to the preservation of Aboriginal tradition. The Parliament has done so without requiring the existence of particular proprietary interests; rather requiring only the existence of a connection by Aboriginal tradition.[11]

Similar views have been expressed by the High Court, in the context of consideration of the existence of native title rights and interests in offshore areas, when the majority of the Court in *Commonwealth v Yarmirr* stated:

> What has been established is the existence of traditional laws acknowledged, and traditional customs observed, whereby the applicant community has continuously since prior to any non-Aboriginal intervention used the waters of the claimed area for the purpose of hunting, fishing and gathering to provide for the sustenance of the members of the community and for other purposes associated with the community's ritual and spiritual obligations and practices. Members of the community have also used, and continue to use, the waters for the purpose of passage from place to place and for the preservation of their cultural and spiritual beliefs and practices.[12]

What is abundantly clear from this review of administrative practice and judicial authority is that Traditional Owners have interests which include (per Santos FFC) *"interests arising from […] cultural association with the EMBA including intangible dreaming lines, tangible manifestations of cultural heritage, his cultural connection to the relevant marine environment, interests in coastal areas that may be affected by any environmental incident"*. These interests have also been described (per *Yarmirr) as "hunting, fishing and gathering to provide for the sustenance of the members of the community and for other purposes associated with the community's ritual and spiritual obligations and practices".*

---

[10] *Ibid* at [68].
[11] *Ibid* at [74].
[12] *Commonwealth v Yarmirr* [2002] HCA 56; 208 CLR 1 per Gleeson CJ, Gaudron, Gummow, and Hayne JJ.

Submission

The foregoing has analysed the legislative framework within which the contemplated declaration is to be made. It has also examined the nature of the general power to make that declaration, subject to an overriding condition that will apply to all feasibility licences, commercial licences or research and demonstration licences granted within that area. The submission has gone on to consider the criteria which should be taken into account in making such a declaration.

These criteria relevantly included consideration of the legally recognised Traditional Owner cultural and activity-based interests within the proposed declaration. They also included regard to the principles of self-determination and FPIC as described (but not exclusively referred to) in UNDRIP. The submission has pointed to judicial authority and administrative materials that suggest that these interests may be adversely affected by offshore renewable energy projects. The submission has also identified that a potential impact on the environment of Commonwealth marine areas, through a negative impact on the cultural aspects of that environment, may arise.

In these circumstances and in respect of both areas under consideration, the NNTC submission is that any declaration should be made subject to condition. Such condition would be pursuant to s 20, that the grant of any licence within the Declared Area should by subject to a requirement that it will have no significant impact upon the interests of affected Traditional Owners without the consent of the Traditional Owners to the grant of that licence.

Further, as highlighted above, it is also the NNTC submission that it would represent an error in the construction of the Act to assume that these matters are appropriately dealt with by the imposition of conditions under any subsequent Management Plan.

Accordingly in the submission of the NNTC, to make the contemplated declaration without imposing the suggested consideration pursuant to s 20 of the Act would constitute a reviewable error which it would be desirable to afford. In addition, to impose such a condition would accord with Government's international obligations stated policy and broader legislative objective.

The NNTC would be happy to discuss this submission further with you or your officers in the event you think this desirable.

Yours sincerely,

Jamie Lowe
Chief Executive Officer