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Clean Energy News and Analysis

Offshore wind: Perpetuating the myth of ‘terra nullius’ in Australia waters could prove costly

Jonathan Kneebone (https://reneweconomy.com.au/author/jonathan-kneebone/) 4 August 2023 15

Offshore wind is poised to play a critical role in Australia's energy transition.

An area has already been declared (https://www.dcceew.gov.au/energy/renewable/establishing-offshore-infrastructure/gippsland) suitable off Gippsland and another off the coast of the Hunter (https://www.dcceew.gov.au/energy/renewable/establishing-offshore-infrastructure/hunter).

Further declarations (https://storage.googleapis.com/files-au-climate/climate-au/p/prj277c859b0985319bc8c1a/public_assets/Notice%20of%20Proposal%20to%20Declare%20an%20Area%20-%20Southern%20Ocean%20Region.pdf) appear imminent with consultations (https://consult.dcceew.gov.au/oei-southern-ocean) confirming likely locations up and down the coast of New South Wales, Victoria, Tasmania, South Australia and Western Australia.

Much needed new clean energy investment is backing development.

BlackRock, the world's largest asset manager, is seeking a stake. And global developers like Shell, Equinor, Orsted (https://www.theaustralian.com.au/subscribe/news/1/?sourceCode=TAWEB_WRE170_a_GGL&dest=https%3A%2F%2Fwww.theaustralian.com.au%2Fbusiness%2Frenewable-energy-economy%2Foffshore-wind-developers-mull-plan-b-in-victoria-as-gippsland-decisions-loom%2Fnews-

story%2Fe7363839882ea7b81a2fdc1d31ce7648&memtype=anonymous&mode=premium&v21=dynamic-high-control-score&V21spcbehaviour=append), BlueFloat Energy, Iberdrola and GPG (https://www.austrade.gov.au/news/insights/insight-spanish-energy-leaders-invest-in-australia-s-world-class-wind-resources) are competing with local players for feasibility licences to begin projects.

First Nations rights, interests and responsibilities in Sea Country

Beneath the swirl of excitement, proponents may be concerned a very real risk has been ignored.

For First Nations people, Sea Country is inseparable from terrestrial Country.

Just as the courts found with land, marine areas have been owned and cared (https://parksaustralia.gov.au/marine/management/resources/scientific-publications/sea-country-indigenous-perspective/) for by First Nations for millenia through complex systems of responsibilities and management of rights including ownership, use, and exclusion of others.

As described in evidence (https://www.tandfonline.com/doi/abs/10.1080/00049189508703133) by one Traditional Owner, "The earth and the sea, the water is not empty." There is an ongoing relationship with both that ethically, and legally, should not be ignored.

Australia's failure to recognise this has resulted in First Nations' relationships with Sea Country being made "invisible (http://classic.austlii.edu.au/au/journals/JlIndigP/2004/5.pdf)".

While perhaps a matter of great convenience to government, it should cause immediate concern for energy proponents.

Perpetuating the myth of *terra nullius* in Australia's offshore areas could prove costly.

Recent court case recognises 'rights holders of the sea'

A Federal Court case in December 2022 unexpectedly turned around (https://www.afr.com/companies/energy/santos-has-barossa-gas-appeal-dismissed-by-court-20221202-p5c34w#:~:text=The%20Albanese%20government%20could%20be,built%20off%20the%20Australian%20coast.) this notion that First Nations' rights, interests and responsibilities are absent in offshore areas.

At a massive cost to Santos, that decision confirmed the company must meaningfully consult on its massive $2.4 billion Barossa gas project with the Munupi clan from Tiwi Islands – the rights holders of the sea in that area.

As in the Munupi 'sea' case, south-western Victoria's Gunditjmara people had to prove (https://www.facebook.com/mldrin/posts/3696330017100044/) a "special interest" in their own Country in their High Court 'land' case (https://eresources.hcourt.gov.au/showbyHandle/1/11533) against Alcoa of Australia. They also won

Although Australia's systems of law and policy still requires First Nations – who have been here for 65,000 years – to go to Court to prove (https://www.facebook.com/mldrin/posts/3696330017100044/) a special interest in land or sea, just like Munupi did, this case and others should offer pause to offshore wind proponents and investors aiming to reduce project risk.

The Offshore Electricity Act must be refined

Despite increasing government narratives of energy policy investment certainty, this unjust 'onus of proof' is replicated in the Federal government's legislative scheme for offshore wind.

The Offshore Electricity Act 2021 (https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6774#:~:text=Introduced%20with%20the%20Offshore%20Electricity,transmission%20infrastructure%20in%20the%20Commonwealth) conveniently maintains the invisibility of First Nations' rights, interests and responsibilities in Sea Country, perpetuating the myth of *terra nullius*.

Declarations to thousands of kilometres of Sea Country can be made without a requirement to engage with the Traditional Owners for these areas.

Similarly, the Act and regulations are silent on the role of Traditional Owners in the granting of feasibility and commercial licences, or in embedding Traditional Owners in processes or decisions.

This is short-termism.

Perpetuating *terra nullius* in Sea Country will create investor risk and uncertainty and a higher likelihood of legal contestation, delay and dispute for offshore wind projects over their operating life.

This isn't what investors and proponents want as they enter Australian waters.

Capital demands certainty and risk needs to be minimised at every point. Yet the Australian government has silenced the very people who can provide this.

Governments must design rules that include First Nations and mandate free, prior and informed consent to decrease risk, delay and uncertainty

Australia's legislative and policy systems that set the rules for engagement with First Nations are outdated by global standards.

They were formed either in an atmosphere of concocted hysteria following *Mabo* (https://eresources.hcourt.gov.au/showbyHandle/1/8925), *Wik* (https://eresources.hcourt.gov.au/showbyHandle/1/11830) and the 10-point plan (https://www.smh.com.au/politics/federal/the-10-point-plan-that-undid-the-good-done-on-native-title-20110531-1feec.html), or worse, in a by-gone era when First Nations' culture and accompanying rights, interests and responsibilities were conveniently made invisible and so rendered silent.

These old rules and old ways don't meet the needs of stakeholders.

Like the Munupi, Indigenous people across the globe are moving beyond minimal corporate social responsibility and tokenistic consultations to demand a new realism.

First Nations people are no longer just the passive hosts of projects or a mere regulatory hurdle to be jumped over as quickly as possible.

Promising jobs or business opportunities as the only benefit flowing from projects doesn't cut it a[illegible]

Proponents know this. Risk conscious financiers are increasingly insisting on the need for FPIC engagement (https://social.desa.un.org/issues/indigenous-peoples/united-nations-declaration-on-the-rights-of-indigenous-peoples).

Stalled progress on a variety of projects attest to the growing urgency of including Free Prior and Informed Consent (FPIC) rights in Australian legislation, and, if consent is given, to fully include First Nations in the early planning, design, execution and management of projects.

Doing so is not some utopian wish.

Rather, proper process makes sound, practical business sense for energy investors.

It will *decrease* uncertainty and project risk resulting in a range of additional economic, environmental, social and political benefits to all parties.

The Australian Government must create investment certainty for offshore wind proponents and demonstrate that perpetuating the myth of *terra nullius* is no longer adequate or appropriate.

In the emerging new zero-carbon economy, rules that render the rights, interests and inherent responsibilities of First Nations people invisible will not work effectively for anyone.

Investors beware.

Jonathan Kneebone is from the First Nations Clean Energy Network

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Ren Stimpy

4 hours ago edited

Jonathan you need to stop living in this hyper-woke bubble (offshore land rights?) that could easily send Australia down the same cleanly-cleaved path that America has turned into. Nearly half the voting people in the US voted for a sh*t-feeding, borderline-retarded, useless whining fat sook by the name of Trump - as a reflex response to people like you who make these vapid claims which simply hit centre voters hard with the incredulity of the highly unfounded 'wokeness' of it. YOU are to blame for Trump's success!

Having said that, maybe your aim is just to pick a fight (I can empathise). But the centre vote WANTS to make a GENUINE huge shift to support for our long-suffering indigenous people, AND save the world from climate change. Don't cleave the path so they have to choose one or the other - because wokeness will lose!

1 0 Reply • Share ›

Robert

12 hours ago

Interesting article. Have there been any High Court cases which explained where the First Nation's right to sea territory is limited to? 12 kms off shore, 50 km offshore? Obviously there has to be some limit in terms of international waters and other countries' maritime claims. It would certainly be an

interesting test case.

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C **Craig Fryer** → Robert

11 hours ago

I haven't checked all the case law, but one of the cases that I have looked at was very limited in scope. The determination only covered the right to "fish" in their territorial waters for self consumption and that they were not subject to state government limits on size and quantity (bag limit). The extent of the native title territory was not covered in that case.

The native title laws are fundamentally flawed and stacked against the first nations to the point that forced removal from their traditional territory is used against them in determining the recognition of their territory. Such clauses in the law would in all likelihood be struck down by the courts, but again it would mean very expensive litigation just to obtain the token recognition by state and federal governments. Even when their native title rights are recognised, state governments continue to harass, arrest, criminally charge and torture them.

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R **Robert** → Craig Fryer

11 hours ago

The abalone cases are interesting – trying to balance First Nations' rights to collect abalone but balance it with conservation of those abalone fields and the industry as an export industry...competing right, competing interests - the power game's played everywhere. Of course, those with the most power (big corporations, big end of town) usually win.

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C **Craig Fryer** → Robert

11 hours ago

Regarding the conservation of fish stocks, including abalone, the only option that the state governments have, is to close access to all, but the native title holders. After all, it isn't the fault of the first nations that the fish stocks were over fished.

I would expect in the future that the access to fishing, and possibly even other activities, at least within what is currently considered state waters will have to be ceded. I would also expect that some if not all of the federal waters will also have to be ceded. The issue of fishing rights is different to other rights as even if the first nations did not actively fish in a location further off shore, they benefited from the fish stocks that used the resources off shore, but then occasionally moved into the areas where they did fish.

they did fish.

In terms of other activities further off shore, any activity that would be considered detrimental to their fishing activities (yields) closer to shore where they traditionally fished, would be need to be considered.

0 0 Reply • Share ›

N **Nick Kemp** → Craig Fryer

6 hours ago edited

"After all, it isn't the fault of the first nations that the fish stocks were over fished."

Maybe, but there would still have to be limits. First nations people are just as capable as anyone of driving species to extinction

0 0 Reply • Share ›

C **Craig Fryer** → Nick Kemp

5 hours ago

While there should be limits, it will depend on the nature of the native title that has been recognised. To date the High Court has specifically said that they have not recognised commercial exploitation of fishing resources by native title holders. The court specifically mentioned that they had not considered that issue as it was not raised in the case. Having said that, there is plenty of evidence that many first nations traded fishing resources with other first nations. Indeed in Western Victoria there is the massive engineering works for the industrial scale farming and smoking of eels that were traded deep into what is now NSW.

Of course there is no reason a state government can't negotiate to pay a first nation not to take or fish in agreed locations.

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C **Craig Fryer**

12 hours ago

Many were critical of my prior concerns about various governments not taking this issue seriously. The right of approval for off shore projects is not that of the state or federal government. The right of approval and the issuer of the licence and the receiver of any royalties or rent is the relevant first nation. State governments have failed to recognise territorial rights of first nations cover off shore areas. This has continued to have occurred even though the right has been determined by the High Court.

Ultimately the failure of state and federal governments to recognise the rights of first nations is going to result in massive delays in the development of off shore wind farms. These delays could be ten

to result in massive delays in the development of off shore wind farms. These delays could be ten years or may result in the complete failure of projects. I would expect that we will see cases taken to the International Court due to the ongoing failures of state governments to respect the rights of the first nations and their people.

0 0 Reply • Share ›

R **Robert** → Craig Fryer

12 hours ago

Good point Craig, but just far "off shore" was the High Court talking? If it's a clear kilometre limit. then at least that is a start in terms of clarity.

0 0 Reply • Share ›

C **Craig Fryer** → Robert

11 hours ago

Don't forget that even a wind farm that is further off shore would still need permission and pay for access, both on shore and off shore, to land the power cables.

0 0 Reply • Share ›

R **Robert** → Craig Fryer

11 hours ago

Yes, that's true. But there doesn't seem to be any rulings as far as I can see as to where the First nation's rights to the sea might extend to. No doubt that will be decided, hopefully in the not too distant future.

0 0 Reply • Share ›

C **Craig Fryer** → Robert

11 hours ago

It can only be determined by a challenge that results in a determination by the High Court or an International Court. Alternatively a State Government could reach an agreement (treaty) that cedes control of the waters currently under state government control, but I can't see that happening in the next 20 years.

0 0 Reply • Share ›

R **Robert** → Craig Fryer

11 hours ago

Maybe hopefully earlier like in Victoria, now there's a First Nations Assembly. But the High Court has the end say, so it will take the inevitable case to decide it – luckily our High Court isn't run by reactionary goons

like the U.S.'s Supreme Court is.

0 0 Reply • Share ›

C **Craig Fryer** Robert

11 hours ago

I sometimes think that Victoria or SA might be further ahead. However it needs to be remembered that Victoria, and likely SA, to this day continue to torture first nations children and adults in prisons. This term torture is as defined by a UN treaty that Australia is a signatory. In the last few weeks a WA court has ruled that the some of the treatment of prisoners in their jails was unlawful.

This historic and continuing torture of first nations people would be illegal under international law as being at a minimum a crime against humanity and potentially genocide and/or a war crime*. The perpetrators in this case is not the state, but the individuals involved that could include premiers, ministers for corrections, police, prison officers, judges and attorneys generals. Indeed it is possible that all members of parliament that voted for or against legislation could be found guilty as well.

*war crime as there is no doubt that activities conducted in the past were of a war like nature and there has never been an armistice or treaty. Yet today the territories of the first nations continue to be occupied today and the occupation continues to be enforced with physical force, therefore could be considered to be a state of war.

0 0 Reply • Share ›

R **Robert** Craig Fryer

10 hours ago

Ok, well, no doubt 1788 was an invasion, and no doubt compared to tens of thousands of years of constant slaughter and battles in Europe (now war in Ukraine continuing the bloody trend), 65,000 years of not being invaded was an absolute blessing, and sad that it was going to inevitably end (by the British, French, Dutch etc). But at least the Mongols never got here – they wiped out 10% of the world's population and made the British and even the Belgium Empires look tame by comparison. Short of selling your

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