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Senate Environment and Communications Legislation Committee
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Inquiry into the Offshore Electricity Infrastructure Legislation Amendment Bill 2022

Dear Mr Palethorpe

Thank you for the opportunity to make a submission to the Inquiry into the *Offshore Electricity Infrastructure Legislation Amendment Bill 2022* (OEI Bill).

We are academic staff members at the University of Wollongong's (UOW) Australian National Centre for Ocean Resources and Security (ANCORS), specialising in the law of the sea (Dr Camille Goodman) and oceans and coastal management (Dr Michelle Voyer). ANCORS is the primary multidisciplinary centre in the Southern Hemisphere for academic, professional and industry expertise in ocean law, policy and governance. It brings together geographers, marine biologists, economists, lawyers and social scientists to work with governments and communities to design, innovate, integrate and implement ocean and coastal management policies, strategies and regulations and translate evidence into practice to offer practical solutions to global challenges, public policy and commercial endeavours.

UOW ranks in the top 200 universities globally. UOW is a research-intensive university with an outstanding reputation for its specialist research institutions and Innovation Campus, which includes ANCORS, the SMART Infrastructure Facility, the Australian Institute for Innovative Materials, the Defence Materials Technology Centre and the Steel Research Hub. The combined talent of these institutions has been brought together as the Energy Futures Network, positioning UOW to be at the forefront of the emerging offshore renewable energy industry. We have consulted with other colleagues from the Network in preparing this submission.

The Illawarra Region has a strong foundation to support a large offshore renewable energy industry with established mining and manufacturing companies, such as BlueScope Steel, Energy Australia and South 32 entrenched in the region as well as a number of small to medium enterprises (SME) established to support these companies in the supply chain. New industry entrants to the region include Oceanex, Energy Estate and Squadron Energy. The Illawarra Region also has key industry development groups such as i3net, Business Illawarra and Southern Manufacturing Innovation Group. These groups provide supportive business environments, meet on a regular basis, and help industry connect with each other and parties globally.

We welcome and support the development of a regulatory framework to underpin the establishment of an offshore renewable energy industry in Australia's waters and have been

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engaging with the *Offshore Electricity Infrastructure Act 2021* (Cth) (OEI Act) framework in our research and teaching.¹ In this submission we make some general comments regarding the overall approach to Australia’s regulatory framework for offshore electricity infrastructure, to provide context for the Committee, followed by some specific comments that the Committee may wish to consider with respect to the OEI Bill’s proposed amendments to the *Customs Act 1901* (Cth) (Customs Act).

General comments on the framework for offshore electricity infrastructure

While Australia has significant experience in regulating the exploitation of offshore oil and gas, the new opportunities of offshore renewable energy present both a challenge and a chance to design regulations that are specifically adapted to renewable energy resources, and reflect Australia’s unique geographic, strategic, economic, social and cultural circumstances and the contemporary values and expectations of the Australian community. This observation underlies our general comments about Australia’s approach to the framework for offshore electricity infrastructure.

Maximising regulatory opportunity in Australia’s offshore areas

Both the OEI Act and the amendments to the Customs Act that are proposed in the OEI Bill generally apply a uniform regulatory scheme to offshore renewable energy activities in all ‘Commonwealth offshore areas’ beyond 3 nautical miles. This is consistent with the division of responsibilities between the Commonwealth and the states and territories under domestic law, as reflected in the Offshore Constitutional Settlement arrangements.² However, it may not take full advantage of Australia’s rights under the 1982 *United Nations Convention on the Law of the Sea* (LOSC),³ pursuant to which coastal States have the opportunity to apply stricter regulations in the 12 nautical mile territorial sea than in the 200 nautical mile exclusive economic zone (EEZ). This is particularly relevant in relation to installations for exploiting offshore renewable energy resources such as wind, which (in contrast to oil and gas) directly generate electricity at sea, and are thus commonly located closer to land in order to minimise transmission losses. For example, most of the offshore wind developments currently contemplated for Australia’s waters are proposed for construction in areas between 5.5 and 25 kilometres off the coast.⁴

In the territorial sea (stretching to 12 nautical miles—or 22.224 kilometres—from the coast), Australia has sovereignty and can apply and enforce laws and regulations for the safety of navigation and the protection of installations and submarine cables, provided only that those laws do not impede or prevent the ‘innocent passage’ of foreign vessels.⁵ In principle, sovereignty over energy resources in the territorial sea applies in the same way as sovereignty over land territory, subject to the need to respect the innocent passage of foreign vessels. As such, Australia can deploy offshore installations in the territorial sea as it sees fit, provided that they do not unreasonably hinder or prevent the right of innocent passage or infringe the obligation to protect the marine environment, and may require foreign vessels exercising innocent passage to use sea lanes and traffic separation schemes to protect the installations and ensure the safety of navigation.⁶

¹ See, eg, Camille Goodman, ‘Winds of Change in Australian Waters : The Offshore Electricity Infrastructure Act 2021’ (2022) 7(1) *Asia-Pacific Journal of Ocean Law and Policy* 137.

² *Offshore Constitutional Settlement: A Milestone in Cooperative Federalism* (AGPS 1980), <https://www.ag.gov.au/international-relations/publications/offshore-constitutional-settlement-milestone-cooperative-federalism>.

³ Opened for signature 10 December 1982, entered into force 16 November 1994, 1833 UNTS 3.

⁴ Renew Economy, *Offshore Windfarm Map of Australia*, <https://reneweconomy.com.au/offshore-wind-farm-map-of-australia/>.

⁵ LOSC, Articles 2 and 17 to 19.

⁶ LOSC, Article 22.

In contrast, in the EEZ (from 12 to 200 nautical miles—or 370.4 kilometres—from the coast) the rights of the coastal State diminish, and the rights of other States increase. In the EEZ, Australia has sovereign rights to explore and exploit natural resources, including ‘activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds’, as well as jurisdiction over ‘the establishment and use of artificial islands, installations and structures’.⁷ This includes the exclusive right to construct, authorize, and regulate the construction, operation, and use of installations in the EEZ, and to designate safety zones of up to 500 metres around them, in order to ensure the safety of those installations, and of navigation.⁸ But in exercising these rights, Australia must have ‘due regard’ for the rights and duties of other States—in particular, their rights of navigation, overflight, laying of submarine cables and pipelines, and other related internationally lawful uses of the sea.⁹ In particular, Australia is precluded from placing installations or structures and safety zones in areas where they might cause interference to recognized sea lanes that are essential to international navigation.¹⁰

Noting that offshore energy infrastructure—including the submarine cables transmitting the electricity to land—will constitute ‘critical infrastructure’ supplying Australia’s energy needs, it will be important to ensure that it is as well protected as possible (within the limits of Australia’s rights and obligations under international law), particularly in light of recent incidents from the sabotage of the Nord Stream gas pipelines¹¹ to the cuts to submarine cables in France and the United Kingdom.¹² If the regulatory framework for offshore energy activities is applied uniformly beyond 3 nautical miles, and no distinction is drawn between the territorial sea and the EEZ, Australia may be missing out on the opportunity to apply and enforce stricter regulations with respect to the protection of offshore energy infrastructure within 12 nautical miles of its coastline. While these considerations are not obviously applicable to the limited issues raised in the OEI Bill, it may be useful to consider if there are any practical benefits to adopting a more differentiated approach to some aspects of the regulatory framework, depending on where offshore electricity infrastructure is likely to be installed.

Adopting a strategic approach to marine spatial planning

Like some of those who made submissions to the inquiry relating to the OEI Act,¹³ we strongly support the adoption of a strategic, integrated approach to planning the use of Australia’s offshore areas: one which is informed by the recognition that activities in the ocean space ‘are closely interrelated and need to be considered as a whole’,¹⁴ and by a proper consideration of the environmental, cultural and social impacts of offshore energy infrastructure activities. An integrated approach is also consistent with Australia’s commitments to sustainably manage 100% of its ocean jurisdiction, undertaken as part of its membership in the High-Level Panel for a Sustainable Ocean Economy.¹⁵ The European experience of offshore wind has clearly

⁷ LOSC, Article 56.

⁸ LOSC, Article 60.

⁹ LOSC, Article 58.

¹⁰ LOSC, Article 60(7).

¹¹ See, eg, Centre for Strategic and International Studies (CSIS), ‘Security implications of Nord Stream sabotage’, 29 September 2022, <https://www.csis.org/analysis/security-implications-nord-stream-sabotage>.

¹² See, eg, Sebastian Moss, ‘Saboteurs cut fiber cables in France, in second incident this year’, 24 October 2022, <https://www.datacenterdynamics.com/en/news/saboteurs-cut-fiber-cables-in-france-in-second-incident-this-year/>.

¹³ See, eg, Marine Conservation Society, *Offshore Electricity Infrastructure Bill 2021 and Offshore Electricity Infrastructure (Regulatory Levies) Bill 2021*, Submission 10, 15 September 2021; Macquarie University, *Submission on Offshore Electricity Infrastructure (Regulatory Levies) Bill 2021 and Offshore Electricity Infrastructure Bill 2021*, Submission 14, 15 September 2021; UTS Sydney, *Offshore Electricity Infrastructure (Regulatory Levies) Bill 2021 and Offshore Electricity Infrastructure Bill 2021*, Submission 3.

¹⁴ LOSC, Preamble.

¹⁵ See generally <https://oceanpanel.org/>.

demonstrated the importance of Marine Spatial Planning (MSP) as a tool through which to manage the competing and at times complementary uses of ocean spaces, including commercial and recreational fisheries, shipping, aquaculture and conservation. Twenty-two European Union member coastal States, as well as the United Kingdom, have now adopted MSP processes.¹⁶

A diverse range of rights and interests must be taken into account in regulating Australia's offshore areas: commercial, recreational and indigenous fishing; aquaculture; shipping; marine conservation; tourism and recreational activities; native title sea claims; Indigenous cultural heritage or other underwater cultural heritage; and submarine data cables. Some of these uses will be further influenced by climate-driven changes for which data is not yet available—such as the redistribution of fish stocks and rising sea levels. In addition, the establishment of new offshore industries such as wind will have a different footprint and different limitations to the oil and gas industry with which Australians are familiar, giving rise to new and different social, cultural and economic considerations. For example, to the extent that offshore wind turbines might be installed within 5.5 and 25 kilometres of the coastline and occupy a footprint of up to 700 km²,¹⁷ they are more likely to interact with recreational fishing and sailing boats than would be the case for traditional oil and gas platforms.

The OEI Act does not address the interaction of offshore energy infrastructure activities with other marine activities or industries, or establish any processes to manage or reconcile conflicts between potential uses or users of the Commonwealth offshore area.¹⁸ In this context, as some stakeholders observed during the development of the legislation, it is not clear how conflicting user rights will be integrated in practice—or who will bear the costs. However, the Exposure Draft of the *Offshore Renewable Energy Infrastructure Regulations 2022* suggests that this responsibility falls to the industry, and that individual developers need to consult with other marine industries and users to address potential conflicts.¹⁹ This means that developers will need to liaise with the various industries, community groups and other stakeholders who use the marine environment—but it also means that those stakeholders will have to liaise with multiple individual developers.

Marine spatial planning can provide a robust, transparent and inclusive framework for managing multiple uses and achieving multiple objectives in our offshore area in a way that could not be achieved through piecemeal consideration, siloed consultation, or project-by-project approval. And as we outline further below, another benefit of a more integrated approach is that it provides opportunities for a more coordinated and streamlined approach to stakeholder engagement.

Ensuring effective, inclusive and efficient consultation with stakeholders

The regulatory framework established in the OEI Act involves a wide range of consultation and approval. For example, the Minister is required to conduct public consultation in relation to any proposal to 'declare' an area for offshore electricity infrastructure activities. The first public consultation has just occurred in relation to the proposed area off the coast of Gippsland in Victoria,²⁰ and consultation on five more areas has already been foreshadowed. Attending public meetings and making submissions to these consultations will require significant time and energy from members of the public, particularly groups whose interests relate to multiple areas.

¹⁶ <https://maritime-spatial-planning.ec.europa.eu/msp-practice/countries>.

¹⁷ *Draft Offshore Electricity Infrastructure Regulations 2022*, Section 35.

¹⁸ See further, Goodman (n 1) 147.

¹⁹ Exposure Draft, *Offshore Renewable Energy Infrastructure Regulations 2022*, Section 85, available at <https://consult.industry.gov.au/oeif-regulations-and-cost-recovery>. The *Explanatory Statement* notes that in applying the 'national interest' test in Section 85(4), the Minister may consider 'conflicts that might arise with other uses or users of the licence area and any measures that are proposed to mitigate these'.

²⁰ See <https://consult.industry.gov.au/oei-gippsland>.

Once areas are declared, a range of different approvals must be obtained by developers before they can apply to the Minister for a licence to conduct offshore electricity infrastructure activities—including under the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)*, the *Environmental Protection (Sea Dumping) Act 1981 (Cth)*, the *Underwater Cultural Heritage Act 2018 (Cth)*, the *Great Barrier Reef Marine Park Act 1975 (Cth)*, and relevant state and territory legislation. Obtaining these approvals (and securing the evidence and support to demonstrate that their application is ‘meritorious’ and in the national interest)²¹ will involve a further range of consultation with members of the public, community groups, and traditional owners—this time by the offshore renewable energy industry.

The introduction of offshore renewable energy to Australian waters represents an entirely new use of ocean spaces and the transition may not be an easy one. Australians have limited experience with highly industrialised seascapes and social acceptance will require careful and meaningful engagement with community concerns and aspirations. International experiences have demonstrated that community opposition can be a critical obstacle in the development of renewable energy infrastructure.²² Careful consideration should be given to how community involvement can be managed in a way that minimises stakeholder fatigue whilst maximising meaningful engagement opportunities (in other words, quality over quantity). For example, there may be scope to streamline and coordinate consultation in relation to individual projects through some of the broader spatial planning initiatives recommended above.

An area which requires dedicated resourcing and consideration is the issue of underwater cultural heritage in offshore areas, and interactions with nearshore and onshore culture heritage concerns around transmission infrastructure. As Australia transitions to new energy futures and new uses of ocean spaces there is an opportunity to also explore new models of partnership with traditional custodians and First Nation communities around Sea Country management and use. These need to focus on building respectful long-term relationships focused on reciprocity. Legislation that requires procedural consultations with traditional custodians can put a considerable burden on Land Councils and other Aboriginal Organisations, without commensurate time and resourcing support. Careful consideration needs to be given as to how consultation models can be developed in a way that builds capacity within these organisations. Empowering and supporting meaningful, culturally appropriate and culturally safe engagement requires consideration of the ways in which Aboriginal people, and Sea Country, benefit from the consultation (and from the subsequent development).

The development of an offshore renewable energy industry in Australia offers new possibilities as to who may share in the economic benefits of these industrial scale projects. As offshore wind projects are being planned in industrial regions where workers have historically relied on carbon-intensive industries, careful planning will assist in softening the economic impacts of decarbonising in these regions. This includes opportunities for workers transitioning from carbon-intensive industries, as well as local content from supply chains. As an emerging industry, opportunities should also be planned to include people historically locked out of the direct economic benefits of industrial projects, such as First Nation people and women. In addition, the establishment of the industry offers the opportunity to see beyond the direct economic benefits and look to the possibilities for circular economies and links to community-run initiatives around decarbonisation.

²¹ See Exposure Draft, *Offshore Renewable Energy Infrastructure Regulations 2022*, Section 85 and *Explanatory Statement*, pp 10-11.

²² See, eg, Benjamin JA Walker, Bouke Wiersma and Etienne Bailey, ‘Community Benefits, Framing and the Social Acceptance of Offshore Wind Farms: An Experimental Study in England’ (2014) 3 *Energy Research & Social Science* 46.

Specific comments on the OEI Bill

The OEI Bill amends the Customs Act to address issues relating to the treatment of offshore electricity infrastructure for customs purposes, and the OEI Act to address administrative arrangements relating to the Offshore Infrastructure Registrar. As such, they do not raise issues of serious concern for us, and we welcome further steps toward an operational regulatory framework for offshore renewable energy. However, we note the following small issues—which flow on from the framework established by our general comments above—for the Committee’s information. In particular, while we appreciate the declared intention of the Bill to ensure that offshore energy installations can be treated in the same way as other sea and resources installations for customs purposes and that existing controls can be used to secure the border,²³ we recall our comments above regarding the need for caution in the transition to new uses of the ocean space—particularly when those uses occur close to shore, in areas that Australians currently use for boating, fishing and other activities.

Item 7: Installation of overseas offshore energy installations

Pursuant to Section 15 of the OEI Act, it is an offence to install, commission, operate, maintain or decommission fixed or tethered infrastructure in the Commonwealth offshore area unless pursuant to a licence or other authorisation or requirement under the Act. A licence can only be obtained if a management plan is in place and financial security has been provided. Pursuant to Item 7 of the OEI Bill (which proposes to insert Section 5BA in the Customs Act), it is an offence to cause an overseas offshore energy installation to be installed in the Commonwealth offshore area unless the person has permission from the Comptroller-General of Customs, which may be granted subject to conditions including in relation to biosecurity risks.

It is not clear, on the face of the legislation, how these two requirements interact. For example, it appears that a licence to install offshore energy infrastructure could be granted by the Minister under the OEI Act, but that permission to install an offshore energy installation could be refused by the Comptroller-General under the Customs Act. The Committee may wish to consider whether the Comptroller-General’s consent could be better sequenced or integrated with the OEI Act process, particularly noting that the issues to be considered by the Comptroller-General include biosecurity risks, which should presumably be considered as part of the management plan and environmental assessment under the OEI Act.

Item 19: Prohibition on transferring goods within 500 metres of an installation

Item 19 of the OEI Bill proposes that Section 175(3B)(d) of the Customs Act be amended to include ‘Australian offshore electricity installations’ in the list of installations within 500 metres of which it is an offence for a master of a foreign ship on an international voyage or a prescribed voyage to transfer goods to a coastal trading ship without the consent of the Comptroller-General. The provision does not specify the location of the relevant offshore electricity installations, but since Section 175(3B)(c) prohibits such transfers in the territorial sea, it appears to refer to installations in the EEZ (and in this respect, presents a good example of the need to differentiate between areas within and beyond 12 nautical miles).

The jurisdictional basis for applying this requirement to the master of a foreign ship in the EEZ is not clear. The Explanatory Memorandum states that this prohibition is necessary ‘to ensure border security risks may be managed’.²⁴ However, there is no specific power for coastal States to restrict the navigational activities of foreign ships in the EEZ on the basis of border security risks. It may be intended to be based on the right of a coastal State to establish a 500-metre


²³ *Offshore Electricity Infrastructure Amendment Bill 2022, Explanatory Memorandum*, 4.

²⁴ *Offshore Electricity Infrastructure Amendment Bill 2022, Explanatory Memorandum* [52].

safety zone around installations and structures under Article 60(5) of the LOSC, in which case such zones should be clearly established and due notice of them given in accordance with the LOSC. This also raises questions about how such zones will apply in the context of offshore wind installations which, unlike oil and gas platforms, are generally clustered in groups. If this restriction were to apply to all the installations making up an offshore wind farm, it could result in foreign vessels having to travel a significant distance in order to transfer goods to another ship. In any case, since this prohibition already applies to the owner or master of the relevant coastal ship (for which Australia has a sound jurisdictional basis) pursuant to Section 175(2), it might not be necessary to apply a separate prohibition to the master of a foreign ship.

We can be contacted through the channels below should the Committee require any additional information.

Yours sincerely



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