Australian Government
Department of Climate Change, Energy, the Environment and Water

David Hatfield
Director, Competition Exemptions
Australian Competition and Consumer Commission

Via email: david.hatfield@accc.gov.au; jaime.martin@accc.gov.au

Dear Mr Hatfield

Thank you for your letter of 28 March 2024 regarding the request for information to assist with the application for authorisation (ref:AA1000662) lodged with the Australian Competition and Consumer Commission on 15 March 2024 concerning proposed industry collaboration to resolve overlapping geographic areas in feasibility licence applications for declared offshore wind areas.

Our responses to the information request questions are at **Attachment A**.

If you would like to discuss any of the responses, please contact Lindsay Villani [redacted] Lindsay.Villani@dcceew.gov.au.

Yours sincerely,

[redacted]

Paul Murphy
Branch Head, Offshore Renewable Energy

29 April 2024

Attachment A

Responses to ACCC information request

Question 1

1. The ACCC seeks to understand to what extent the Offshore Electricity Infrastructure Regulations 2022 (the OEI Regulations) contemplate or permit ongoing collaboration by the relevant parties once feasibility licences are granted in a declared area. For instance, can you please explain:

    a. Whether it is possible to 're-open' a feasibility licence area if, for example, a licence holder decides not to proceed to apply for a commercial licence for the area. If the answer is yes, please outline how that application process would be conducted and whether the overlap resolution process could potentially be initiated by the Offshore Infrastructure Registrar (the Registrar).
    b. If two or more overlapping applications in a declared area are ultimately determined by financial offer, could further feasibility licence applications be invited for the remaining areas from the unsuccessful applications?

Response to 1a:

Yes, it is possible to re-open an area to invite further feasibility licence applications. If a feasibility licence holder surrenders their licence, or there are vacant areas in a declared area following an application process, the Minister may invite eligible people to apply for feasibility licences in the declared area. Given feasibility licences cannot overlap, applicants would need to apply for vacant area within the declared area.

The process for inviting feasibility licence applications and granting licences to successful applicants is set out in Part 2 of the OEI Regulations (*The licencing scheme*). Whether applications are received through an initial 'invitation to apply' or a subsequent invitation, the assessment process is the same.

Applications would need to be submitted by the closing date. The Registrar would assess the applications and provide advice to the Minister. If two or more applicants apply for the same area and the Minister considers these to be of equal merit then section 11 of the OEI Regulations, *Applications for feasibility licences that overlap—Minister may determine overlapping application groups,* would apply. If the Minster determines an overlapping group of two or more applicants, then under section 12, the Registrar may invite applicants in overlapping application group to revise and resubmit applications.

To date, no licences have been granted under the *Offshore Electricity Infrastructure Act 2021* (OEI Act). Given the outcome of the current licensing rounds is unknown and the location and extent of vacant area is yet to be determined, the re-opening of a declared area for feasibility licence applications is not currently being contemplated.

Response to 1b:

As per the response to 1a, following the outcome of the first licensing round, the Minister may issue a subsequent invitation for feasibility licence applications to undertake projects in a declared area. As feasibility licences cannot overlap, applicants would need to apply in the vacant areas of the declared area.

Any unsuccessful applicants may re-apply during a subsequent invitation round, including those that previously participated in a financial offer round.

Question 2

2. At paragraph 32 of the application, DCCEEW notes that it anticipates the "licensing rounds for the six prioritised areas will be completed by 2026 assuming no more areas are identified and invitations are not re-opened for existing declared areas" (emphasis added). Could you please indicate how likely the following items are to occur, including reasons:
    a. new areas being identified (and subsequently declared) in Australian waters, and
    b. feasibility licence invitations being re-opened for existing declared areas.

Response to 2a:

The Minister prioritised six regions to consider for potential future offshore wind development through a declaration process. The Minister has yet to determine whether any further regions should be considered beyond the six already prioritised.

Response to 2b:

As per the response to 1a, we currently have no plans to re-open existing declared areas for feasibility licence applications. This course of action may be considered, and a decision may be made following the conclusion of the existing licence rounds and an assessment of the demand for more offshore wind projects.

Question 3

3. Please explain the likely timing implications if either of these were to occur.

Response:

As noted above, the Minister has yet to determine whether any further regions should be assessed for suitability for offshore wind development or to undertake subsequent licensing rounds in existing declared areas.

Question 4

4. At paragraph 30 of the application, DCCEEW states that "[a]ssessment of applications in the next licensing round in the recently declared Southern Ocean area will commence in July 2024 and is not expected to be completed until mid-2025". Please outline the steps in each assessment process, including how long each assessment process is expected to take from the point that an area is declared, and how long it would take to move from declaring an area to the overlap resolution process beginning.

Response:

The licensing process commences at the point of an area being declared suitable when applications for feasibility licence open and is completed once all licences are granted. At the time of writing the licensing round for the first declared area is still underway, 12 months after applications closed on 27 April 2023. This area received 37 applications with all but one overlapping. The assessment was not only complex but the first that was undertaken by the Registrar. We anticipate that the assessment process in subsequent areas will be faster due to the lessons learned from previous assessments. Accordingly, in the authorisation application the Department estimated the assessment of the applications received in the southern ocean declared area to be around 10-12 months. The key steps in the process, with indicative estimates are set out in the table below.

These timeframes will vary depending upon the number of applicants and the complexity of the assessment.

Step	Description	Timeframe
Application period	Minister invites feasibility licence applications to undertake projects in the declared area. Eligible persons prepare applications for submission.	Up to 4 months
Applications assessed	Registrar assesses the licence applications against the merit criteria and other legislative requirements and provides advice to the Minister. Assessment period is dependent on the number of applications and extent of overlap.	3-6 months
Procedural fairness processes	Applicants are advised on the Minister's preliminary decision to refuse an application and can make a submission. The granting of a licence under the OEI Act is a future act under the *Native Title Act 1993*. First Nations people must be notified of the intention to grant a licence and can provide a submission on how their rights and interests may be impacted by the future act. The Minister must consider these submissions before making a final decision on granting or refusing a licence.	30 days
Offers, grants and refusals Overlapping process	Offers are sent to applicants whose applications were considered of higher merit than an application in which it overlapped or met the merit criteria in the case of a standalone application. Applicants have 14 days to accept the offer. Licence will be granted following acceptance. Overlapping applicants are invited to revise and resubmit application to remove overlap within 21 days. Unsuccessful applicants are notified.	14 days 21 days
Register assessment	Registrar assesses revised applications from overlapping applicants.	14-21 days
Procedural fairness process	For those applications that successfully removed the overlap – consultation is required with First Nations people on the future act of granting a licence. Consultation on licence that may proceed to financial offer process also undertaken for efficiency and to reduce consultation fatigue.	30 days
Financial offer process	If the overlap cannot be resolved financial offers will be invited.	7-14 days
Offers and grants for applicants in financial offer groups	A licence may only be offered to the highest bidder in a financial offer group. Applicants have 14 days to accept the offer. Licence will be granted following acceptance.	14-21 days

Question 5

5. Please explain how transmission and storage will interact with the feasibility and commercial licence process. For example, will these be managed by separate permits that overlap with the feasibility and commercial licence areas? If so:

a. What is the anticipated timing of such processes taking place for each declared area?
b. Does DCCEEW expect there will likely be overlap resolution collaboration by applicants for storage and transmission licences?

Response to 5a:

Construction and operation of transmission projects (including storage infrastructure) will be authorised under transmission and infrastructure licences (or TILs). These licences are separate to, and may permissibly overlap with, feasibility or commercial licences.

As per section 61 of the OEI Act, the Minister may grant a TIL that authorise activities in the licence area of another licence if the Minister is satisfied that the activities undertaken under the proposed TIL licence will not unduly interfere with the activities of the holder of the other licence.

If an application for a TIL covers an area that is, or is part of, the licence area of an existing OEI licence, it is expected (but not mandated) that the person should have consulted with the existing licence holder prior to applying for the TIL. Subsection 21(4) of the OEI Regulations provides that the Registrar may at its discretion invite the existing licence holder to make a submission in relation to the potential grant of the transmission and infrastructure licence. The Explanatory Statement to the OEI Regulations clarifies that this is only likely to occur "where a transmission and infrastructure licence application falls short" regarding consultation.

As the framework is being implemented through a staged approach, applicants will not be able to apply for a TIL until the third quarter of 2024 at the earliest, after the first feasibility licences have been granted.

Response to 5b:

In the department's view, the granting of TILs is not a competitive process because the licence area of a TIL can overlap with the licence area of another OEI licence. It is not necessary to hold licensing rounds for TILs as applicants are not competing against each other for exclusive rights to an area. Eligible persons will be able to apply for TILs at any time and applications will be assessed on a case-by-case basis against the merit criteria set out in section 62 of the OEI Act. This differs from the process for feasibility licences where applications must be submitted before a closing date so they can be assessed on a comparative basis.

It may be the case that TIL applicants would prefer their licences to have non-overlapping licence areas if possible. If TIL applications cover wholly or partly the same area, the Registrar may notify the applicants of the overlap and invite them to revise and resubmit their applications to remove the overlap. The notification must:

- Be in writing.
- Specify the day by which a revised application must be resubmitted.
- Refer to the requirements in section 23 of the OEI Regulations that must be met for a revised application to be successfully resubmitted.
- Provide the names of all applicants whose applications overlap the applicant's application, as well as the areas of overlap and details of the kinds of projects involved. The Registrar may also at its discretion provide any other information that it considers reasonable, such as information about any other applications adjacent to or nearby the applicant's application.

While this overlap resolution process is similar to the overlap resolution process for feasibility licences, overlapping TIL applications do not need to be considered as equal merit before they are invited to revise and resubmit their application. There is also no financial offer process for TILs as overlaps do not need to be resolved in order for a licence to be granted.

As per s 61(1)(b) of the OEI Act, TILs may overlap with other OEI licences if the Minister is satisfied that the activities undertaken under the TIL licence will not unduly interfere with the activities of the holder of the other licence.

Due to the permissibility of overlapping TIL areas, as well as the lower number of expected applications and the absence of 'licensing rounds' for TIL applications, we consider that the likelihood of overlap resolution collaboration for TIL applicants is extremely low. We will consult with the ACCC if this situation occurs.

Question 6

6. We note that under section 13 of the OEI Regulations, revised submissions should be "substantially similar to the original application", and that in assessing whether an application is substantially similar, the Registrar may consider the location, shape and size of the licence areas proposed by the revised and original application, details of the proposed commercial offshore infrastructure projects of the revised and original application, and anything else that the Registrar considers relevant.
    a. Please outline any metrics or guidelines you have around what would be considered substantially similar, and when a revised and re-submitted application would be considered to have changed too much to be considered substantially similar.

Response:

Any revisions for the purposes of section 12 of the OEI Regulations should be the minimum necessary to meet the objectives of the revision and resubmission process. In the *Guideline: Offshore Electricity Infrastructure Licence Administration – Feasibility Licences*, the Registrar provides the following guidance to applicants in relation to a revised application that is substantially similar:

- The revised application must be, so far as is reasonably possible, substantially similar to the original application.
- In considering the "substantially similar" test, the Registrar may take into account anything it considers relevant, including the location, shape and size of the original and revised proposed licence areas and the details of the original and revised proposed projects. A proposed 1 GW wind project with a licence area of 500 km² should remain substantially a 1 GW wind project with a licence area of 500 km² after any application revisions, and any proposed relocation should be for the minimum distance necessary to resolve any overlaps with other applications.
- The revised application must not overlap with any other application for a feasibility licence, including other applications that are not in the overlapping application group.
- An applicant may choose not to revise and resubmit its application, in which case the original application remains for the purposes of sections 14-16 of the OEI Regulations.

In addition, the invitation letter to applicants to revise and re-submit an application provides the following guidance:

- "This invitation to revise and resubmit provides overlapping application group members the opportunity to resolve their overlaps by revising their applications. The revisions should be the minimum necessary to achieve this aim. Revised applications must be substantially similar to the original application as per paragraph 13(1)(a) of the Regulations. Please refer to Attachment B for additional guidance regarding the 'substantially similar' requirement".

Attachment B is attached for your reference. We note that this guidance is issued by the Registrar and may be updated over time.

Question 7

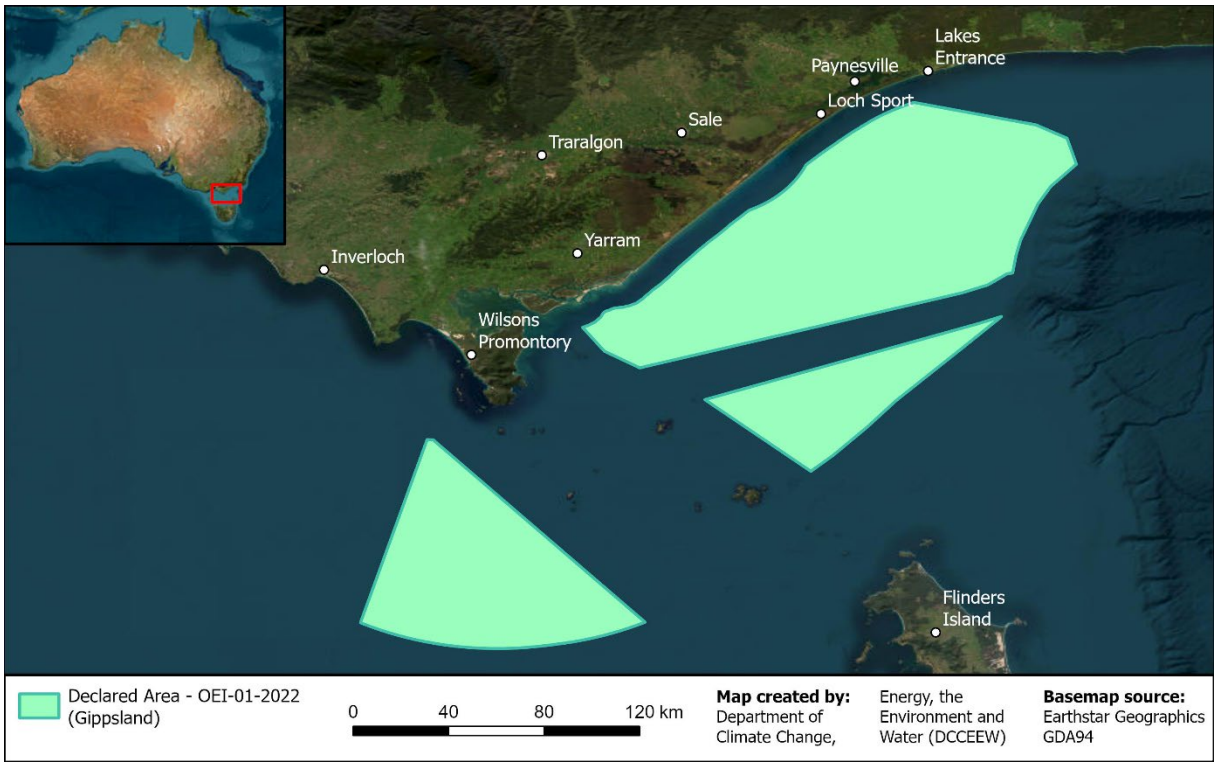
7. Can you please provide a general overview of the size and location of each of the currently identified priority areas, including maps, and set out an estimate of the maximum number of feasibility licences that could be granted in each area.

Response:

Existing declared areas:

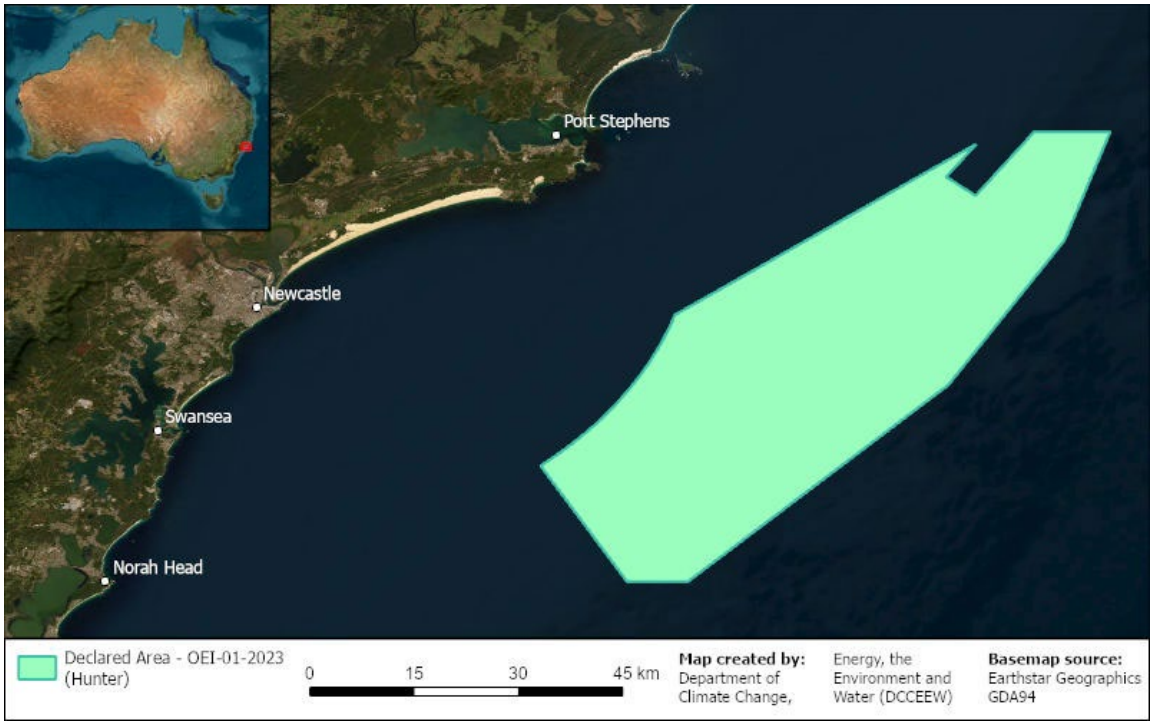
Gippsland declared area

- The declared area off Gippsland covers approximately 15,000 square kilometres. It is offshore of Lakes Entrance in the east, to south of Wilsons Promontory in the west.
- The area could theoretically support 21 feasibility licences if each licence area was 700 square kilometres.



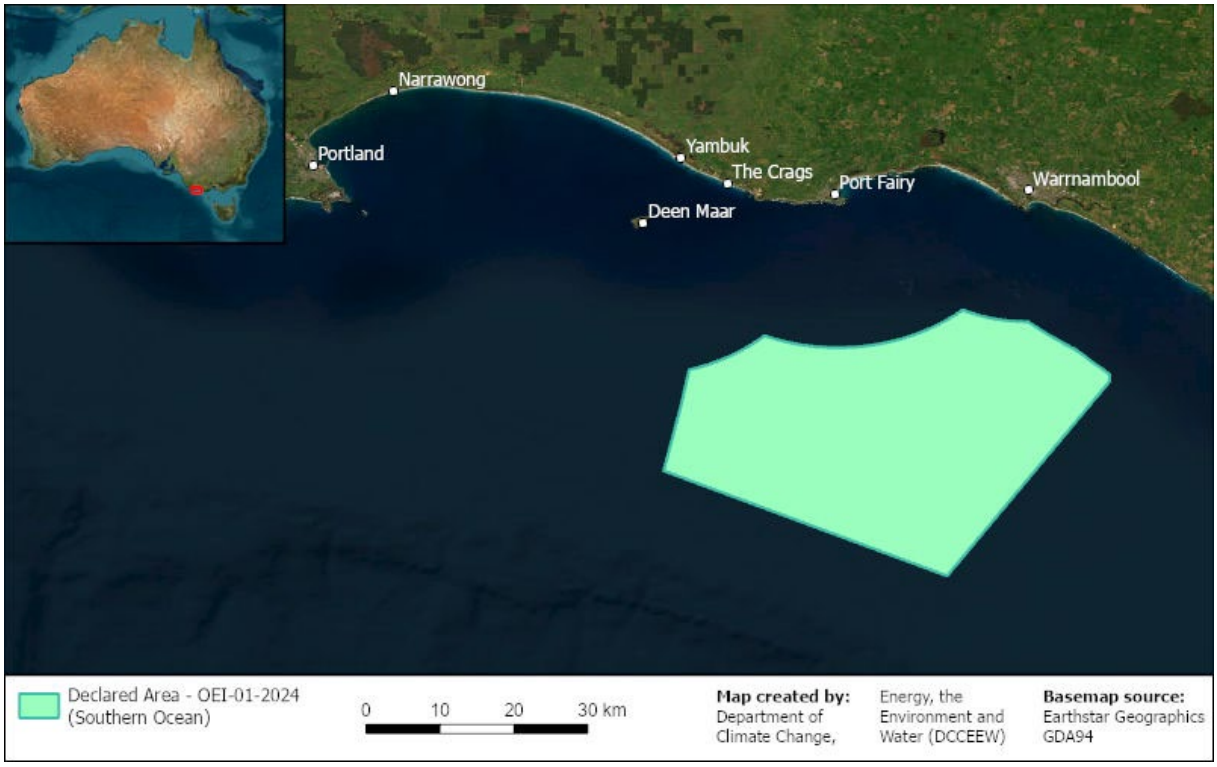
Hunter declared area

- The declared area off the Hunter covers 1,854km2 and extends from offshore of Norah Head in the south, to Port Stephens in the north.
- The area could theoretically support 2 feasibility licences if each licence area was 700 square kilometres.



Southern Ocean declared area

- The declared area in the Southern Ocean off Victoria covers 1,030km2 and is offshore from Warrnambool and Port Fairy, in western Victoria.
- The area could theoretically support 1 feasibility licence if the licence area was 700 square kilometres.

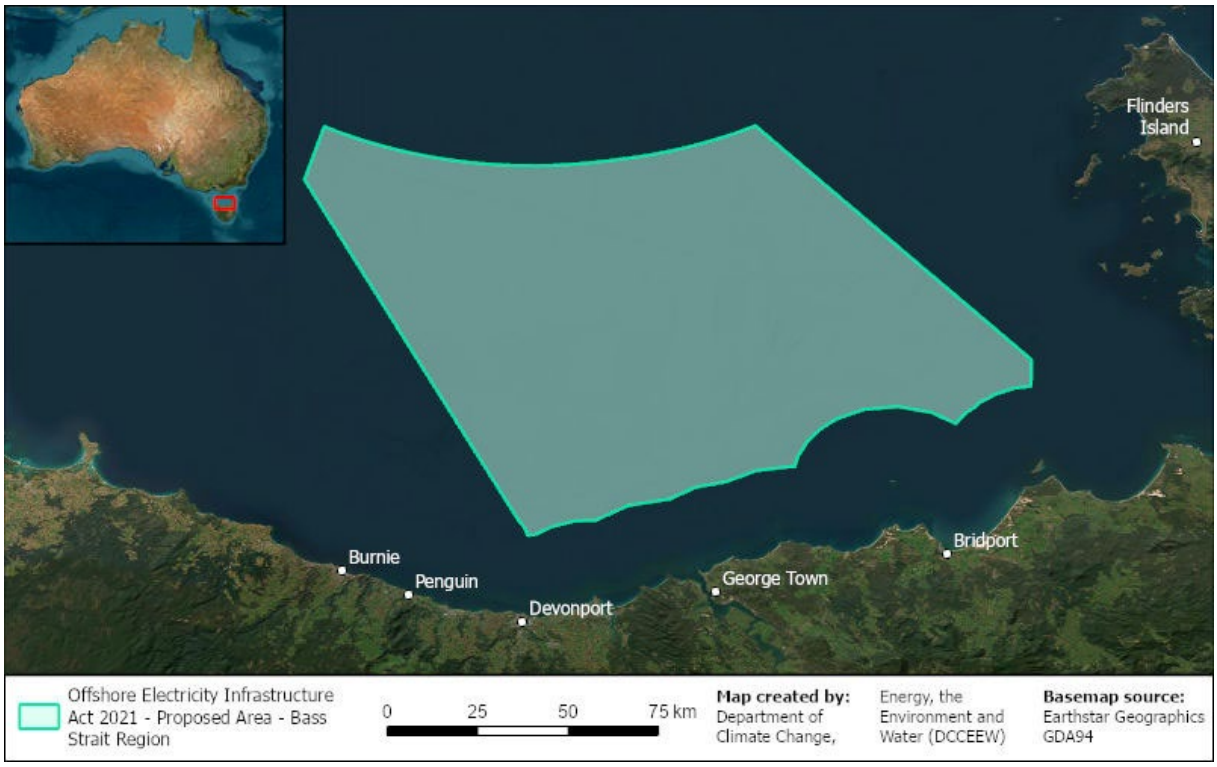


Areas under consideration:

Please note the following areas are still being considered for suitability. Following consultation the Government considers the feedback and refines the area as necessary. The final area declared may reduce in size. It cannot increase.

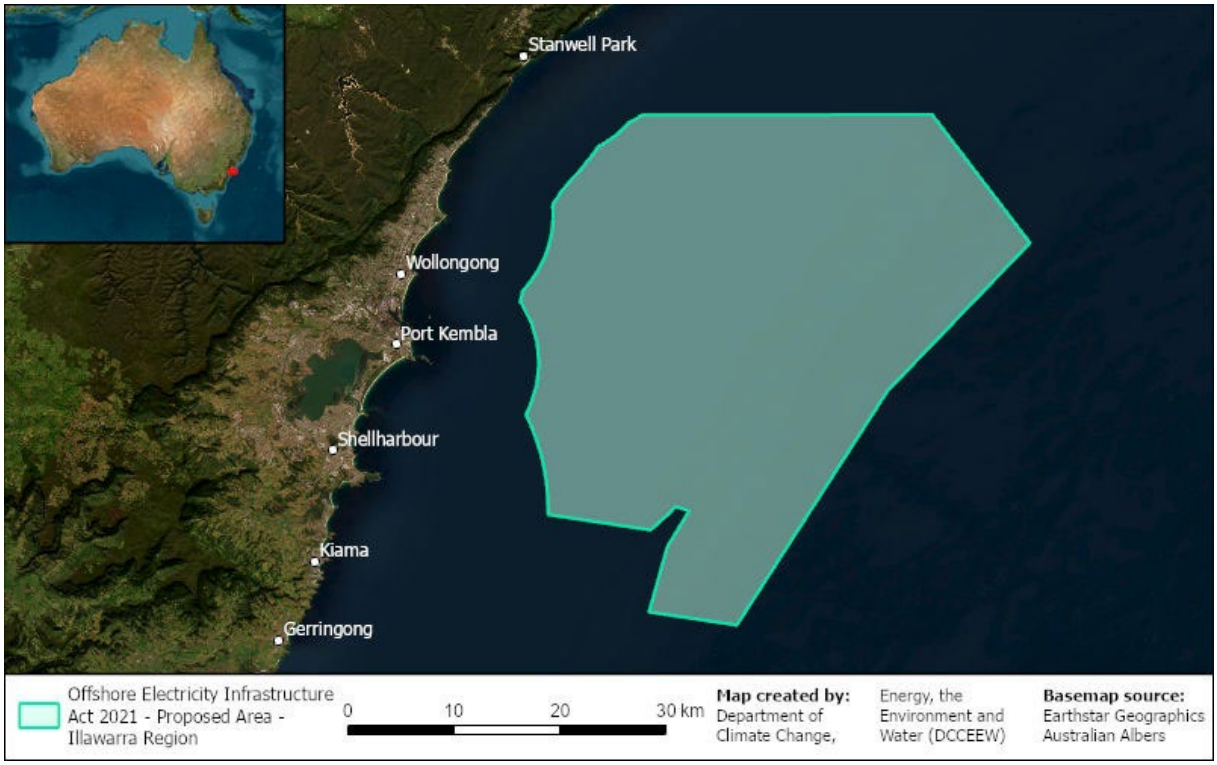
Bass Strait proposed offshore area

- The proposed area covers 10,136km2 and extends offshore of Bridport in the east to Burnie in the west.
- The area could theoretically support 14 feasibility licences if each licence area was 700 square kilometres.



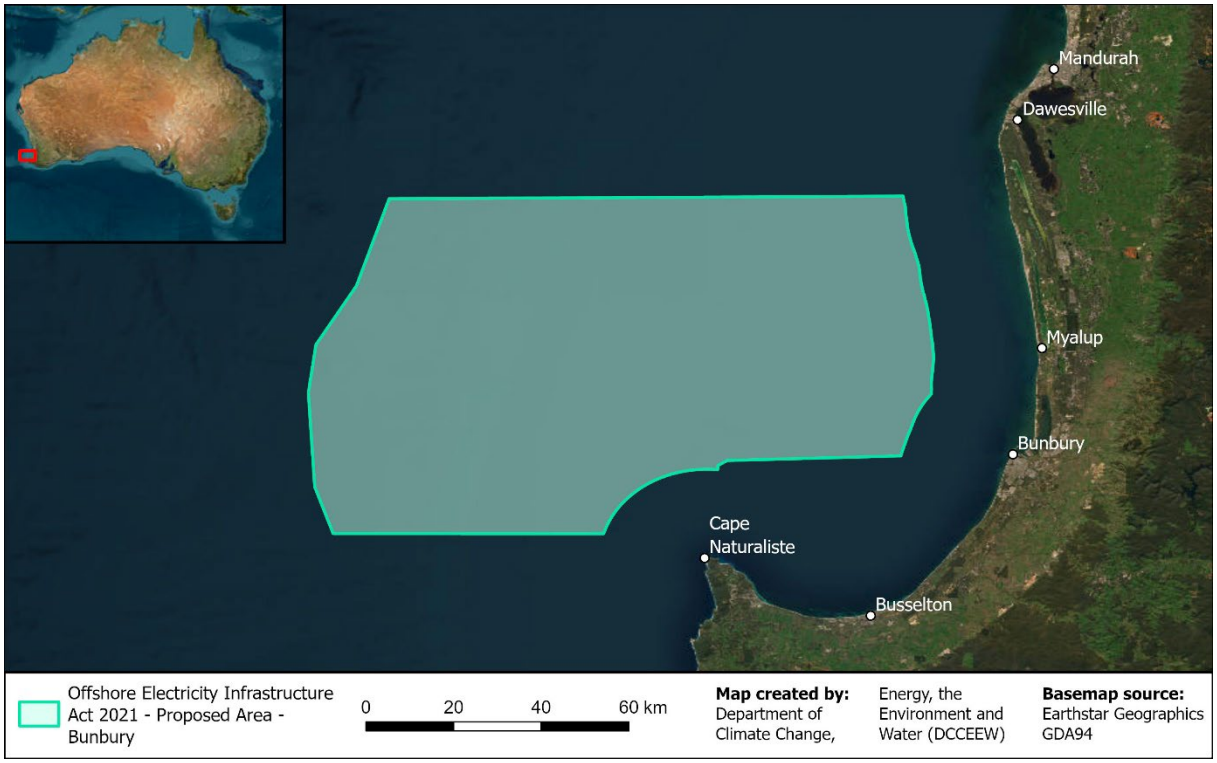
Illawarra proposed area

- The proposed area covers 1,461km2 and extends offshore of Wombarra in the north to Kiama in the south.
- The area could theoretically support 2 feasibility licences if each licence area was 700 square kilometres.



Bunbury proposed area

- The proposed area covers 7674 km2 and is set back at least 20kms from the shore. The area is located offshore between Dawesville and Cape Naturaliste, WA.
- The area could theoretically support 10 feasibility licences if each licence area was 700 square kilometres.



Information about the identified priority areas and declared areas is available on the DCCEEW website: https://www.dcceew.gov.au/energy/renewable/offshore-wind/areas

Question 8

8. Once feasibility licence application overlaps are resolved (and licences granted to the relevant parties), does DCCEEW anticipate requiring participants to collaborate on any other aspect of the feasibility and/or commercial licence process?

Response:

There are no further requirements in the OEI Act or the OEI Regulations for feasibility and/or commercial licence applicants or licence holders to collaborate.

If made, the OEI Amendment regulations, which are currently under development, will require the licence holder, as part of developing a management plan, to make reasonable efforts to consult any other holder of a licence granted under the OEI Act that has a licence area that covers wholly or partly the same area as the licence area of the relevant licence. For feasibility licence holders, this may be the holders of TILs or research and demonstration licences (as a feasibility licence cannot overlap with another feasibility or commercial licence). This consultation is for the purpose of ensuring activities are undertaken safely and in a coordinated way to avoid interference.

Question 9

9. We note that the application references 37 feasibility licence applications being received in Gippsland, but Annexure A lists less participants than this. Could you please explain the difference in these numbers for the Gippsland licence round.

Response:

Annexure A lists only the parties to the proposed conduct as identified at the time of the application for authorisation. These are the applicants, the Minister made a preliminary assessment to be considered of equal merit and who were proposed to be invited to progress through the overlap resolution process. Since submitting the authorisation application, the remaining applicants have either been:

- offered a licence because their application either did not overlap with another application or they were considered of higher merit than an overlapping application; or
- refused a licence as they either did not meet the merit criteria or were considered less meritorious than an overlapping application.

Attachment B

Substantially similar' requirement for revised applications

Section 13 of the *Offshore Electricity Infrastructure Regulations 2022* (the Regulations) sets out the requirements for revised applications through the invitation to revise and resubmit process.

As per subsection 13(1) of the Regulations, the Registrar must be satisfied that:

(a) the revised application is, so far as is reasonably possible, substantially similar to the original application; and
(b) the revised application does not overlap any other application for a feasibility licence made in response to the same invitation under section 9 (including other applications that are, or are not, in the same overlapping application group).

In relation to paragraph 13(1)(a) of the Regulations, subsection 13(2) sets out the matters that the Registrar may consider:

(a) the location, shape and size of the licence areas proposed by the revised application and the original application; and
(b) the details of the proposed commercial offshore infrastructure projects of the revised application and the original application; and
(c) anything else the Registrar considers relevant.

As per the Explanatory Statement to the Regulations:

'The intention of section 12 is to give overlapping application group members the opportunity to resolve their overlaps by revising their applications, the revisions should be the minimum necessary to achieve this aim. Subsection 13(2) ensures that overlapping application group members cannot submit revised applications that unreasonably alter the design, size, location or other key details of their original project. For example, a proposed 1 Gigawatt (GW) wind generation project with a licence area of 500 km^2 should remain substantially a 1 GW / 500 km^2 project after any application revisions, and any proposed relocation should be for the minimum distance necessary to resolve any overlaps with other applications. Applicants should not treat the revision process in section 12 as an opportunity to submit an essentially new project proposal.'

Registrar expectations

In determining whether a revised application satisfies subsection 13(1)(a), the Registrar will expect:

- Revisions to applications are the minimum necessary to meet the objectives of the revision and resubmission process.
- The location of the licence area to comprise a portion of the area included in the original application;
- The size of the revised application to reflect the area available to resolve any overlap;
    - a revised application should not be larger than the original application;
    - any reduction in the size of the revised application should:
        - reflect the available area - i.e. the size of a revised application should only be reduced where there is insufficient suitable area for all applications in an overlapping application group to maintain their existing size, or
        - reflect a more efficient use of the area– i.e. where the same generation capacity is proposed in a smaller proposed licence area.

- The shape of a revised application area should be similar, where possible. It is also expected that the shape will be consistent with the efficient use of the area and not adversely impact the availability of areas for possible future licence areas in the Declared Area.
- The proposed commercial offshore infrastructure project in the revised application should be consistent with that proposed in the original application in that:
    - It considers the same technology; and
    - Generation capacity remains substantially the same, subject to area availability – for example, a 1 GW project in 500 km² should substantially remain a 1 GW project in 500 km² through the revision process. As above, should only a smaller area be available, the Registrar would expect that the density would be unchanged (or it may increase) but the generation capacity may be less, reflecting the revised size of the area. The Registrar would generally not expect that the size of the area be reduced by more than 50 per cent through the revision process.