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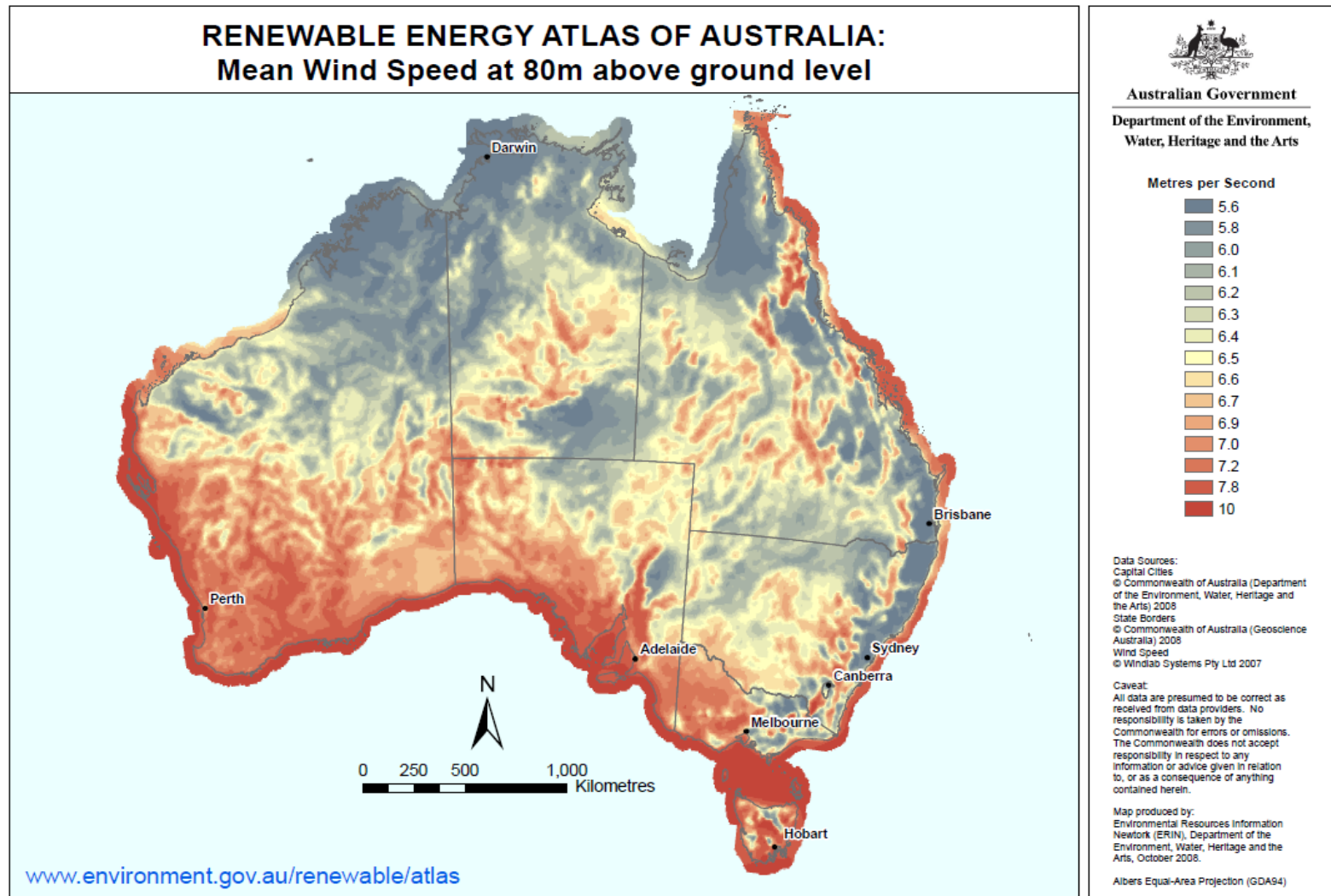
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Commercial Fishing and the Development of Offshore Wind Energy in Australia

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seek LIGHT

Offshore Wind Resources in Australia



SOURCE: Windlab Systems Pty Ltd and the Commonwealth of Australia (Department of the Environment, Water, Heritage and the Arts), 2008.

Potential impacts of OWE on fishing

- **Impact on fish resources**
 - construction noise displacing fish species from breeding and feeding grounds
 - disturbance to habitat on the sea floor from turbine construction, cable placement and barge anchorage
 - impacts of electromagnetic fields from cables and connections
 - impacts of operational noise
 - but increased fish numbers, as the turbines act as artificial reefs
- **Safety/exclusion zones & displacement of fishing vessels**
 - longer steaming distances to alternative fishing grounds
 - changes in fishing patterns
 - increased conflict over diminished fishing grounds
 - but where there is reduced access, offshore wind farms can act as conservation areas
- **Damage to fishing gear**

Legal issues

- **Rights to consultation**
 - part of planning and environmental law
 - through submissions and feedback on EI documentation
- **Rights to compensation**
 - Common law
 - Constitutional law
 - Fisheries legislation
 - Voluntary?

Jurisdiction over offshore areas & fisheries

- Jurisdiction over offshore waters is complex

Offshore wind energy developments:

- The issue of which level of government has the right and responsibility to regulate OWE is a matter of constitutional law, Commonwealth and state law, and political agreement (1979 Offshore Constitutional Settlement)
- State/Territory governments regulate *onshore* developments on land, including on the coastline, and developments in internal waters and ‘state coastal waters’ (generally speaking, waters seaward from the low water mark to 3 nm).
- The Commonwealth legislates over ‘offshore areas’, that is, waters seaward from 3 nm to 200 nm (the outer limit of the EEZ), and on the continental shelf where that extends beyond the 200 nm limit of the EEZ

Fisheries

- Generally, the States regulate fisheries in state coastal waters, pursuant to state fisheries legislation
 - Eg: *Fisheries Management Act 2007* (SA)
 - Administered by the Fisheries and Aquaculture division of Primary Industries and Regions SA (PIRSA)
- The Commonwealth regulates fisheries in Commonwealth waters pursuant to Commonwealth legislation
 - *Fisheries Management Act 1991* (Cth): defines the Australian Fishing Zone (AFZ) and establishes the system of statutory fishing rights (SFRs) in Commonwealth waters
 - Administered by the Australian Fisheries Management Authority (AFMA)
- But more complex than a simple State-Commonwealth divide between state coastal waters and Commonwealth waters
 - By political agreement, SA has jurisdiction over some fisheries to the 200 nm limit; conversely, SA has ceded management of the Southern and Eastern Scalefish and Shark Fishery in State coastal waters to the Commonwealth government

SA commercial fisheries and fisheries legislation

- Marine commercial fisheries regulated under the *Fisheries Management Act 2007* (SA) are:
 - Northern Zone Rock Lobster Fishery & Southern Zone Rock Lobster Fishery
 - Spencer Gulf ,West Coast Prawn Fishery, and Gulf St Vincent Prawn Fishery
 - Abalone Fishery
 - Blue Crab Fishery
 - Marine Scalefish Fishery
 - Sardine Fishery
 - Lakes and Coorong Fishery
- Aquatic resources are owned by the Crown in right of the State. Commercial fishing is prohibited without a licence or permit granted in respect of a fishery under the Act.

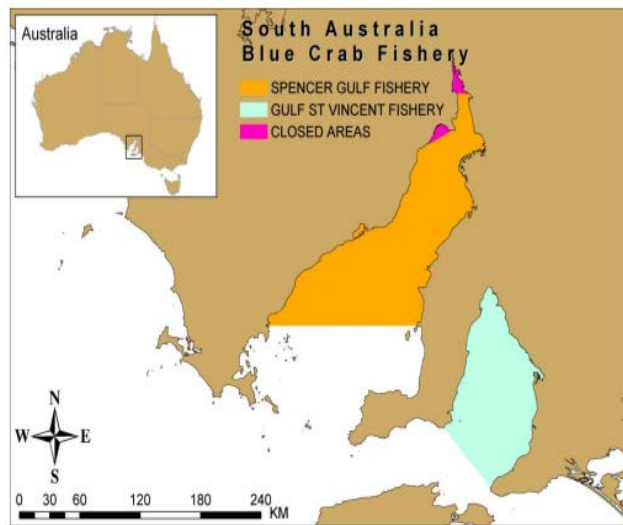


Figure 14. Area of the Blue Crab Fishery

Source: PIRSA, *Management Plan for the South Australian Blue Crab Fishery*, November 2012, Figure 14, p 35.

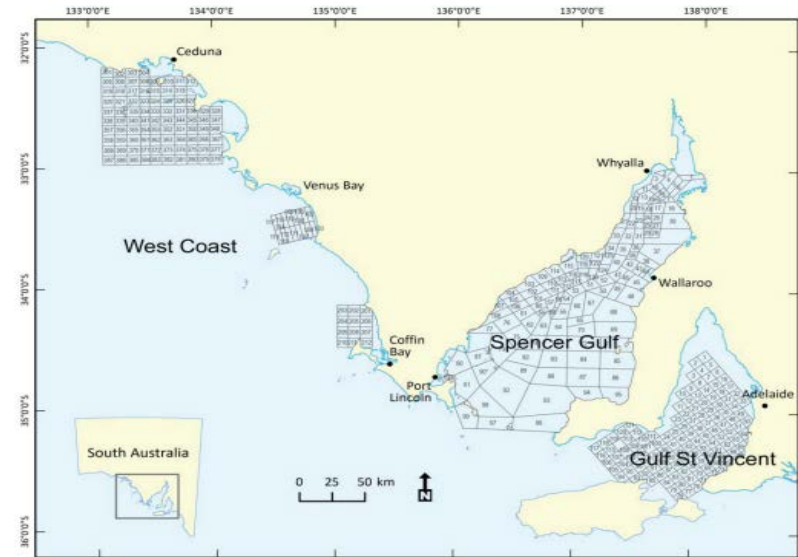
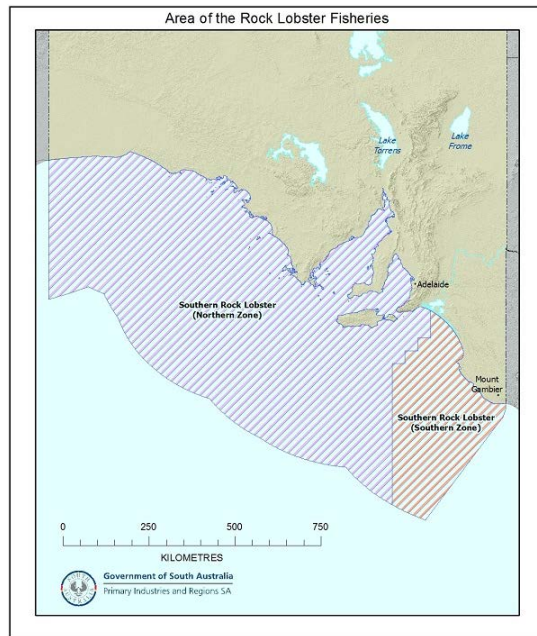


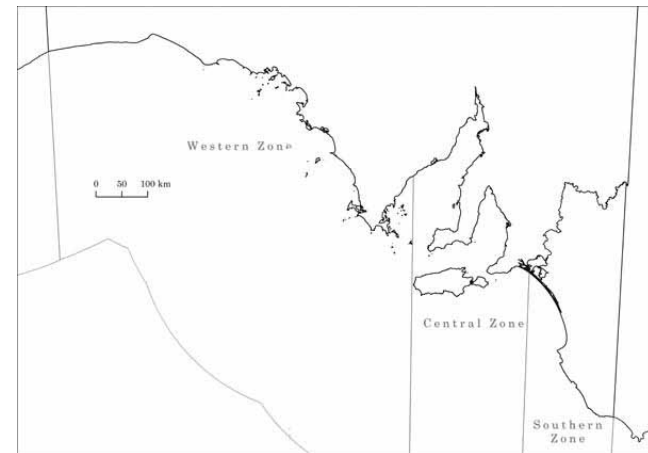
Figure 1: Map of fishing blocks in the three commercial prawn fisheries of South Australia.

Source: PIRSA, *Management Plan for the South Australian Commercial Spencer Gulf Prawn Fishery*, 23 October 2014, Figure 1.



SOURCE:
http://www.pir.sa.gov.au/fishing/commercial_fishing/fisheries/rock_lobster_fishery

SA Commercial Abalone Fishery



SOURCE: http://www.pir.sa.gov.au/__data/assets/image/0019/239113/Abalone_fisheries_zone.jpg



SA Commercial Marine Scalefish Fishery.

SOURCE: PIRSA,

http://www.pir.sa.gov.au/_data/assets/image/0020/239114/MSF-fishery-area.jpg

Over 60 species taken commercially. Main species taken are: King George Whiting; Southern Garfish; Snapper; and Southern Calamari.

Sardine Fishery



Figure 1: The area of waters of the sardine fishery.

SOURCE: PIRSA, *Management Plan For The South Australian Commercial Marine Scalefish Fishery Part B—Management Arrangements For The Taking Of Sardines*, 1 November 2014.

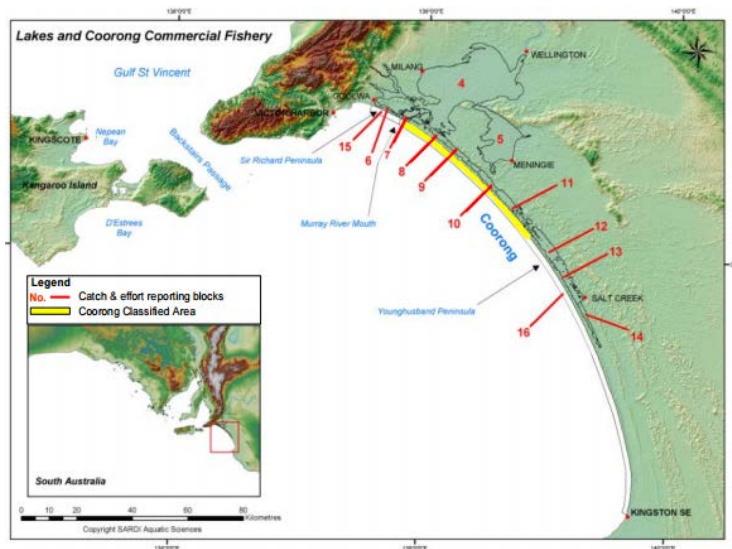
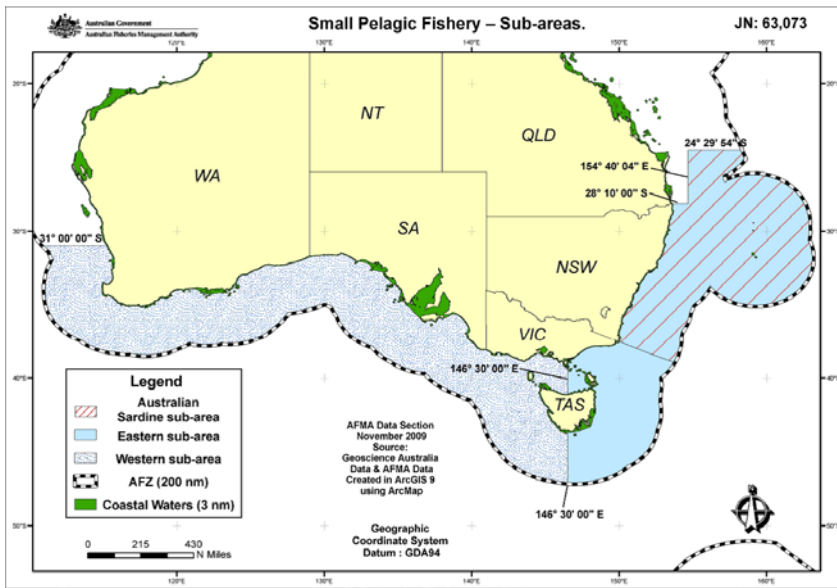


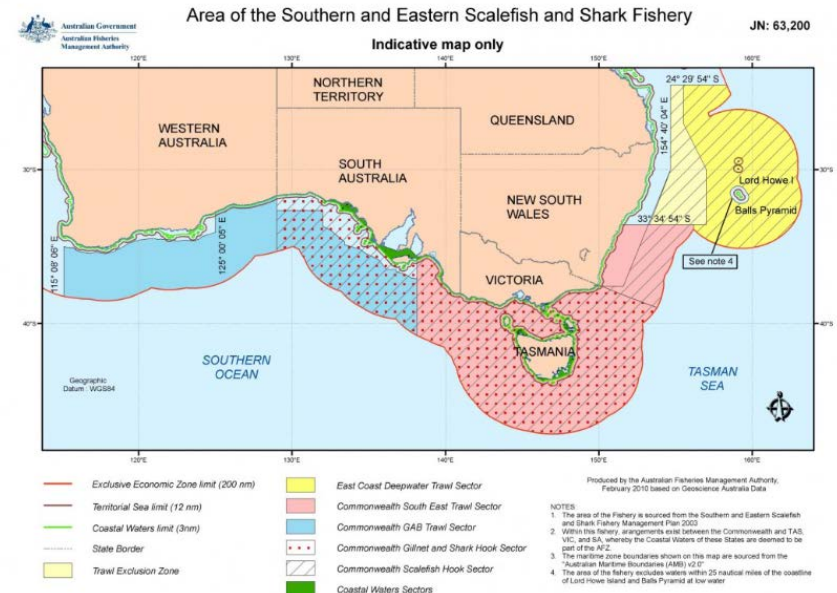
Figure 3: Map of the South Australia Murray Mouth, Lower Lakes and Coorong region.

SOURCE: PIRSA, *Management Plan For The South Australian Commercial Lakes And Coorong Fishery*, 1 March 2016.

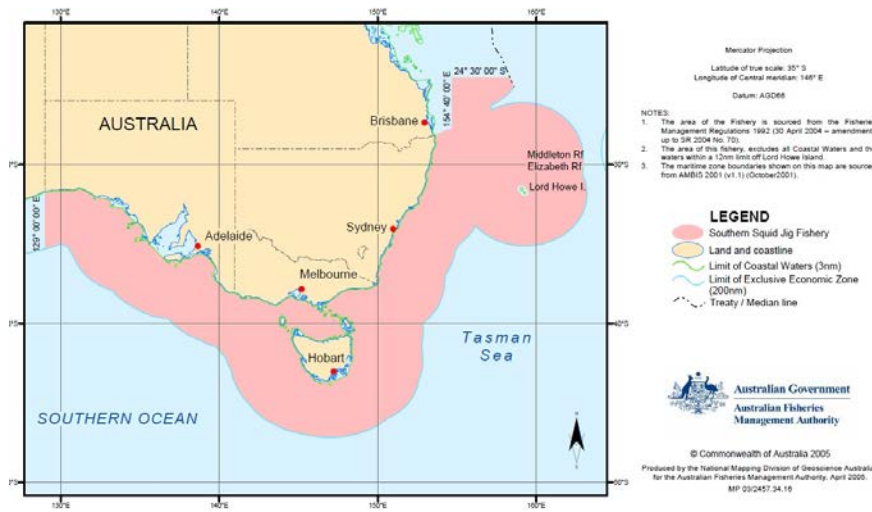
- Commercial fisheries in the AFZ adjacent to SA coastal waters, managed under the *Fisheries Administration Act 1991* (Cth), are:
 - Southern Bluefin Tuna Fishery
 - Western Tuna and Billfish Fishery
 - Southern and Eastern Scalefish and Shark Fishery
 - Small Pelagic Fishery
 - Western Skipjack Tuna Fishery
 - Southern Squid Jig Fishery
- The Act prohibits commercial fishing without the necessary authorisation. For commercial fishing, a fishing concession or scientific permit is required.
- A fishing concession is a statutory fishing right; or a fishing permit; or a foreign fishing licence. Section 21 of the Act sets out a number of separate statutory fishing rights, eg a right to take a particular quantity of fish; a right to use a particular type of boat or fishing equipment in a managed fishery



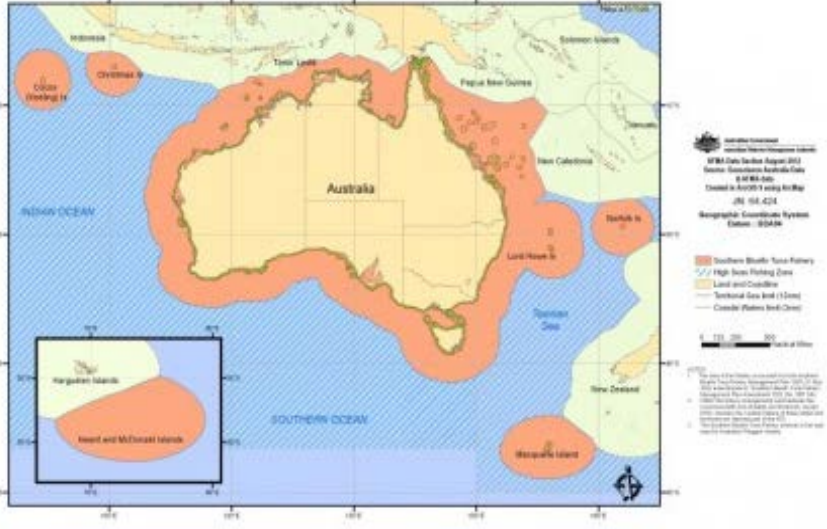
All maps are used courtesy of the Australian Government, Australian Fisheries Management Authority.



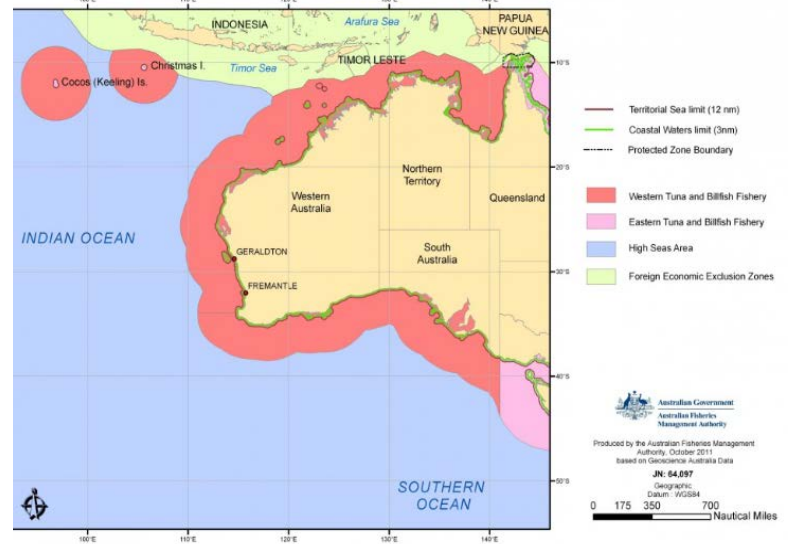
Area of the Southern Jig Squid Fishery



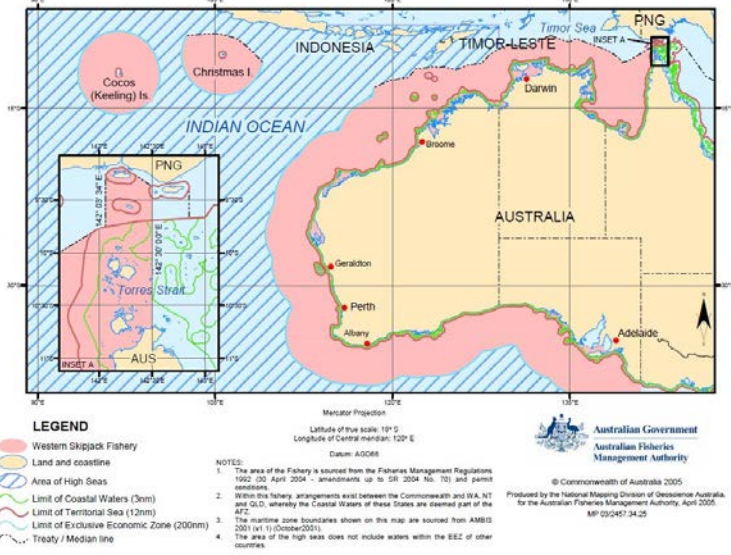
Area of the Southern Bluefin Tuna Fishery



Area of the Western Tuna and Billfish Fishery



Area of the Western Skipjack Fishery



All maps are used courtesy of the Australian Government, Australian Fisheries Management Authority.

Consultation with fishing industry: development assessment and approval for OWE

1. OWE developments in SA coastal waters

- *Development Act 1993 (SA)*: planning/development assessment and authorisation for OWE
 - Crown development and public infrastructure procedure (s 49)
 - Major development procedure (s 46)
- Both involve the right to public consultation and the right of the public to make submissions, including the commercial fishing industry, after a development application has been made and draft EI documentation has been prepared by the proponent
- Application must be assessed against the Coastal Waters Development Plan and its Objectives and Principles of Development Control.
- Decision-maker must take into account submissions when deciding whether or not to approve a development.

Coastal Waters Development Plan

Objectives and Principles of Development Control

There are various Objectives and Principles of Development Control that pertain to “renewable energy facilities” or wind energy facilities in particular
 - but these are generally aimed at onshore development
 e.g. Renewable Energy Facilities Objective 40

The “location, siting, design and operation of renewable energy facilities to avoid or minimise adverse impacts on the natural environment *and other land uses*” (italics added)
 - no equivalent Objective mentioning avoiding or minimising impacts on other users of the marine environment.

Aquaculture Development Objective 35(b)

“Development *of the marine environment* and in particular the marine aquaculture industry ... in a manner which recognizes other users of marine and coastal areas and ensures a fair and equitable sharing of marine and coastal resources.”

Principle 25

Offshore development should be located “to take into account the requirements of both traditional Indigenous and non-Indigenous historic fishing grounds”.

Principle 39

Offshore development should not take place “if there is the potential for significant conflict with likely development which benefits the wider community based on any of the special economic or physical resources of coastal areas”.

- After consultation with and submissions by fishing industry, the parameters of an OWE project may be changed, and/or conditions to protect fishing may be placed on the authorisation eg monitoring & evaluation.
- But the Objectives and Principles of Development Control only provide guidance to decision-makers.
- OWE project can be approved under the Crown Development and Major Development procedures even if “seriously at variance” with the Development Plan
- No appeal against the decision to approve or reject the application.
- Unlikely offshore wind energy facility would be approved if it seriously affected fish species and the commercial fishing industry

2 OWE developments in Commonwealth waters adjacent to SA coastal waters

- No sectoral-specific legislation for assessment and approval of offshore renewable energy facilities in Commonwealth waters
- No general Commonwealth planning law that applies to all development in Commonwealth waters
- *Environment Protection and Biodiversity Conservation Act 1999* (Cth) establishes a system for Commonwealth environmental assessment and approval of 'controlled actions'
- Most common controlling provisions (or 'triggers') are the nine 'matters of national environment significance' set out in the Act.
- But the EPBC Act is not a planning instrument, designed to allow assessment of competing commercial interests

Compensation for devaluation or extinguishment of fishing rights

- The rights associated with commercial fishing are granted under fisheries legislation.
- The fishing industry has long argued that statutory fishing entitlements are property rights.
- If a legislative fishing entitlement is recognised by the law as “property”, then its holder may be able to assert a right to compensation where the entitlement is extinguished or devalued
- Three possible avenues by which the commercial fishing industry might look to seek compensation:
 - Common law
 - Constitutional argument
 - Fisheries legislation

Common law

- Common law presumption – that compensation is payable when the government takes away property rights:
 - in the exercise of a prerogative power (c.f. a statutory power)
 - by legislation.
- Presumption can be rebutted if there is a clear legislative intent that parliament intended to take the right away without paying compensation.
- No general and definitive High Court ruling that statutory fishing entitlements are ‘property’ for the purposes of the common law.
- Since *Harper v Minister for Sea Fisheries*: the rights and benefits granted by legislative fishing entitlements have been considered by the courts as “deriving solely from statute, with no common law rights underpinning them”, as they are “inherently susceptible of modification or even extinguishment”. They are a new type of statutory right, “the nature and extent of which depends entirely on the terms of the legislation”.
- As they derive solely from statute, they are not as secure as private property rights: can be changed by amendments to the legislation which created them without requiring compensation to be paid.

Constitutional law

- As a matter of constitutional law, the South Australian government has no obligation to pay compensation for the deprivation or acquisition of property rights.
- The position is more complex if the construction of an OWE facility were to interfere with fishing rights in Commonwealth waters.
 - Commonwealth Constitution s 51(xxxi): Cth Parliament has power to make laws for the acquisition of property on just terms.
 - The case law on s 51(xxxi) is very complex, and it is difficult to state with certainty the outcome in any case.
 - Statutory fishing rights such as licences and permits would have to be 'property' for the purpose of the Commonwealth Constitution, and there must be an 'acquisition' of that property.
 - Even if found to be 'property', it will be very difficult to argue that the approval of an offshore wind farm (presumably pursuant to enabling Commonwealth legislation) leading to reduced catch or access to fishing grounds is an 'acquisition' of property

Fisheries law

- The South Australian and federal Parliaments have legislative power to enact statutory provisions for the payment of compensation for the deprivation or acquisition of fishing rights.
- The *Fisheries Management Act 1991* (Cth) expressly provides that fishing rights and permits are granted subject to the condition that no compensation is payable because a fishing right or permit is cancelled, ceases to have effect or ceases to apply to a fishery.
- Under the *Fisheries Management Act 2007* (SA), the SA Parliament has legislated for the payment of compensation for the compulsory acquisition of licences, but only in the context of readjusting allocations between different sectors, for example, between commercial and recreational fishing.
- Existing provisions do not cover payment of compensation for interference in fishing activities by offshore wind energy facilities.

Lessons from the UK

- **Consultation and communication**
 - engage in consultation and communication with fishing interests from earliest possible opportunity
 - ongoing and regular communication throughout life of project
 - Fishing Liaison with Offshore Wind and Wet Renewables Group (FLOWW)
 - *FLOWW Best Practice Guidance for Offshore Renewables Developments: Recommendations for Fisheries Liaison (2014)*
- **Mitigation**
 - *Options and Opportunities for Marine Fisheries Mitigation Associated with Windfarms (2010)*
 - careful siting of turbines
 - options to enhance stocks of targeted species and associated habitats
 - options to support existing fishing activities
 - options to develop new fisheries or other non-fisheries opportunities

- **Compensation**
 - Consider industry scheme for voluntary payment of compensation to individuals and/or communities for loss that is suffered
 - Seafish/UK Fisheries Economics Network *Best Practice Guidance for Fishing Industry Financial and Economic Impact Assessments (2012)*
 - *FLOWW Best Practice Guidance for Offshore Renewables Developments: Recommendations for Fisheries Disruption Settlements and Community Funds (2015)* identifies some key principles regarding payment of compensation eg
 - claims must be evidence-based
 - the assessment approach must be agreed and transparent;
 - compensation agreements must be clearly defined & understood by all parties;
 - compensation agreements should be enduring, and transferable with fishing entitlements; and
 - settlements should be clearly placed within a wider framework of co-existence and mitigation
 - Other recommendations to consider from the US:
 - consistent process for submitting and processing claims
 - contingency fund

- **Baseline environmental and fishing studies/data**
 - environmental baseline studies and datasets, and data on fishing activities are required before construction begins
 - allows for the monitoring and evaluation of impacts on fish species, and of OWE on fishing activities

Conclusion

- Australia is yet to develop an offshore wind energy industry
- Potential conflict with other users of the sea, including the commercial fishing industry
- Current Australian state planning processes such the *Development Act* (SA) allow for consultation with the commercial fishing industry, although there is a gap in federal law regarding planning and tenure for offshore developments in Commonwealth waters
- Unlikely OWE developers would have to pay compensation to developers by law
- Opportunity to learn from the experience in the UK, Europe and the US regarding best practices for consultation/communication, mitigation and compensation



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