OFFSHORE WIND TENURE IN AUSTRALIA: RESOLVING OVERLAPPING APPLICATIONS

A broad cross section of stakeholders in the nascent Australian offshore wind industry are eagerly awaiting a response from the Commonwealth Minister for Climate Change and Energy (the **Minister**) and the Offshore Infrastructure Registrar (the **Registrar**) in respect of 37 applications submitted earlier this year for the award of licences to assess the feasibility of offshore wind projects proposed to be carried out within an area of approximately 15,000km^2 off Gippsland, Victoria (the **Declared Gippsland Region**). The Declared Gippsland Region is the first declared area for offshore wind development in Australia.

In anticipation of the Minister and Registrar's response, and ultimately their licence grant offers, global law firm, **DLA Piper**, and project and infrastructure specialist advisory firm, **Create Advisory**, have teamed up to provide their views on an important imminent consideration for applicants, namely preparing for and addressing the prospect of overlapping feasibility licence applications and how the process is likely to play out for the first time in Australia.

1 PROGRESS TO DATE

1.1 Declared and proposed regions

Applications to develop Australia's first offshore wind projects in the Declared Gippsland Region closed on 27 April 2023.

A second application round to develop offshore wind projects in a declared area of approximately 1,850km^2 off the Hunter Region, New South Wales (the **Declared Hunter Region**) is currently open and closes on 14 November 2023.

The Registrar, which administers licences for offshore renewable energy and transmission projects, is currently assessing 37 applications made for the Declared Gippsland Region against the merit criteria set out in the *Offshore Energy Infrastructure Act 2021* (Cth) (the **OEI Act**) and the *Offshore Electricity Infrastructure Regulations 2022* (Cth) (the **OEI Regulations**). The matters under review by the Registrar include technical and financial capability, project viability and sustainability.

Once the Registrar's assessment is complete, it will submit a recommendation to the Minister who will decide on feasibility licence offers for the most promising projects in the Declared Gippsland Region.

As at the date of this article, the Australian Government (the **Government**) has also issued notices proposing to declare other areas in Australia as suitable for offshore renewable energy development:

Region	Proposed Area	Consultation Closure
Proposed Southern Ocean Region	Offshore area of approximately 5,150 km^2 from Warrnambool, Victoria, to Port MacDonnell, South Australia.	31 August 2023
Proposed Illawarra Region	Offshore area of approximately 1,450km^2 from Illawarra, New South Wales.	15 November 2023
Proposed Bass Strait Region	Offshore area of approximately 10,150km^2 Burnie to Bridport, Tasmania.	31 January 2024

1.2 Industry reaction

Interest in the Australian offshore wind sector is booming. The application round for the Declared Hunter Region is also attracting significant interest, although given the geography (which will mean that generally floating, rather than fixed-bottom, turbines must be used) and the smaller declared area, we are expecting that the Declared Hunter Region may ultimately attract fewer applications than the Declared Gippsland Region.

1.3 Comparison to other jurisdictions

Unlike in some other overseas jurisdictions (including, for example, Germany, the UK and the U.S.), the Government has not taken the approach of 'drawing lines on a map' and seeking bids from developers for pre-defined licence areas. Instead, the Government has invited developers to submit applications for feasibility licences which can cover a maximum licence area of 700km^2 anywhere within a declared area.

In these circumstances, given the high number of applications and, in some cases, the small declared area sizes (such as the Declared Hunter Region and the Proposed Illawarra Region), there is obviously a very high probability that some (if not, many) developers have or will submit overlapping applications.

2 POTENTIAL FOR OVERLAPPING APPLICATIONS

To demonstrate the likelihood of overlapping applications, we have developed two indicative scenarios, to outline the possible extent of overlaps based on the Declared Gippsland Region.

We have assumed that the 37 feasibility licence applications submitted for this region are randomly located and range in size from ~150km^2 to ~700km^2 in the scenarios as follows:

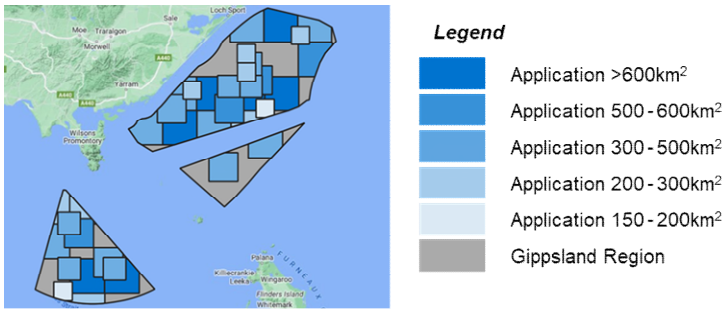
- **Scenario 1 - Wide Distribution:** assumes that all ~15,000km^2 of the Declared Gippsland Region is considered suitable for development, and applications are equally distributed across the area.

- **Scenario 2 - Concentrated Distribution:** assumes that only ~5,500 km^2 is considered suitable for development (e.g. this could be due to water depth, proximity to transmission infrastructure, wind and marine conditions) resulting in the applications being concentrated in smaller areas.

2.1 Scenario One – Wide Distribution[1]

Figure 1[2] below shows an example distribution of applications under the 'Wide Distribution' scenario.

Figure 1: Licence distribution under 'Wide Distribution' scenario

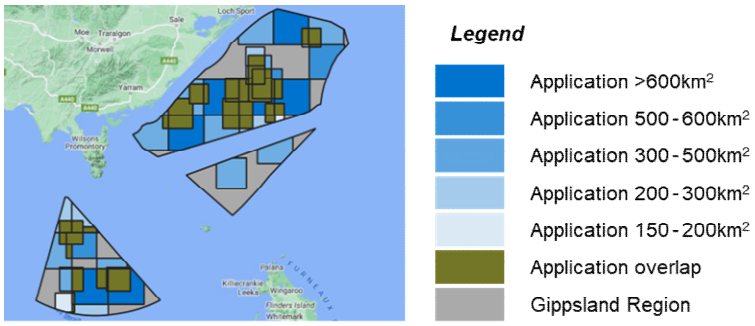


[1] This analysis has been conducted for indicative purposes only. A range of simple Geospatial Information Systems (GIS) methodologies have been adopted to develop the maps and the associated measurements and calculations. The quoted figures and measurements should be considered indicative only. They have not been subject to any formal technical assessment and pay no regard to a range of geographic and engineering nuance that would be required to develop definitive measurements and calculations.

[2] All figures Create Advisory analysis, base shapefile taken from Department of Climate Change, Energy, the Environment and Water. Available: https://www.dcceew.gov.au/energy/renewable/establishing-offshore-infrastructure/gippsland

Under this scenario there are 94 overlaps between the applications. This is approximately 3,300km^2 in overlaps. These overlaps are outlined in green in Figure 2.

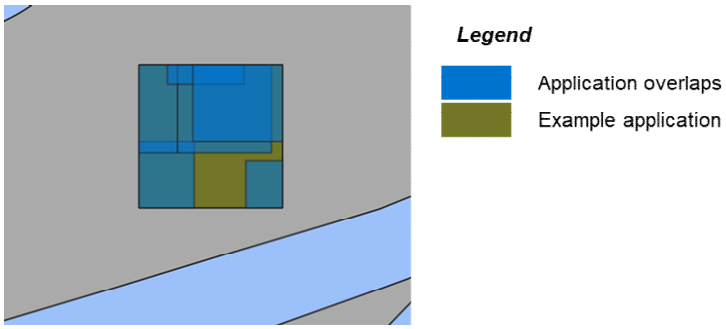
Figure 2: Application overlaps under 'Wide Distribution' scenario



To make this more tangible, we have selected an example application to demonstrate how overlaps might impact a specific application.

Figure 3 shows that the example application would be subject to six overlaps, which would represent over ~80% of the total area of the application.

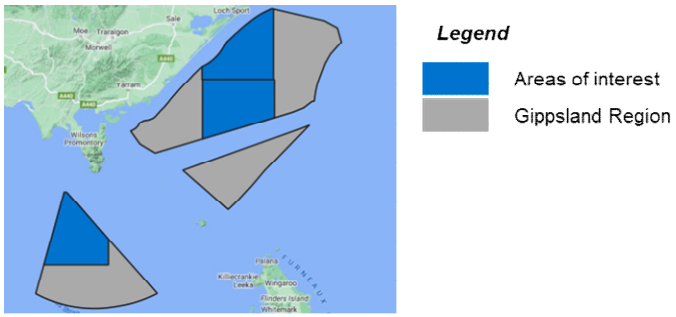
Figure 3: Example application 'Wide Distribution' scenario



2.2 Scenario Two – Concentrated Distribution[3]

The 'Concentrated Distribution' scenario examines what happens if, for example, only three sub-regions totalling ~5,500km^2 are subject to all 37 applications, as illustrated in Figure 4.

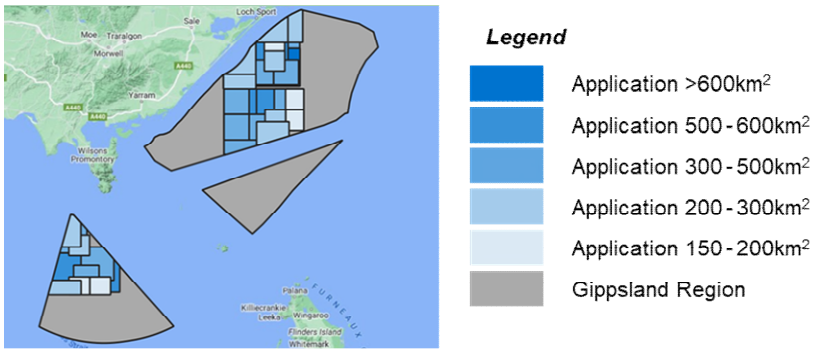
Figure 4: Areas of interest under 'Concentrated Distribution' scenario



[3] This analysis has been conducted for indicative purposes only. A range of simple Geospatial Information Systems (GIS) methodologies have been adopted to develop the maps and the associated measurements and calculations. The quote figures and measurements should be considered indicative only. They have not been subject to any formal technical assessment and pay no regard to a range of geographic and engineering nuance that would be required to developer definitive measurements and calculations.

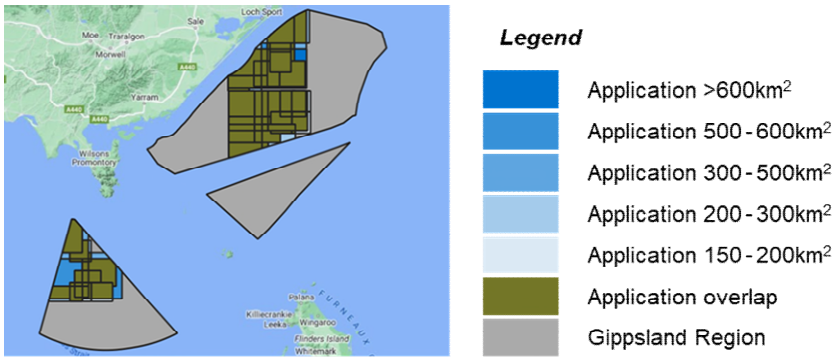
Under the ‘Concentrated Distribution’ scenario the location of applications is far more concentrated as shown by Figure 5.

Figure 5: Licence allocation under ‘Concentrated Distribution’ scenario



Under this scenario there are 164 overlaps between the applications. This is approximately 4,600km^2 in overlaps. These overlaps are outlined in green in Figure 6.

Figure 6: Application overlaps under ‘Concentrated Distribution’ scenario



Again, to make this more tangible, we have selected an example application to demonstrate how overlaps might impact a specific application.

Figure 7: Example application under ‘Concentrated Distribution’ scenario

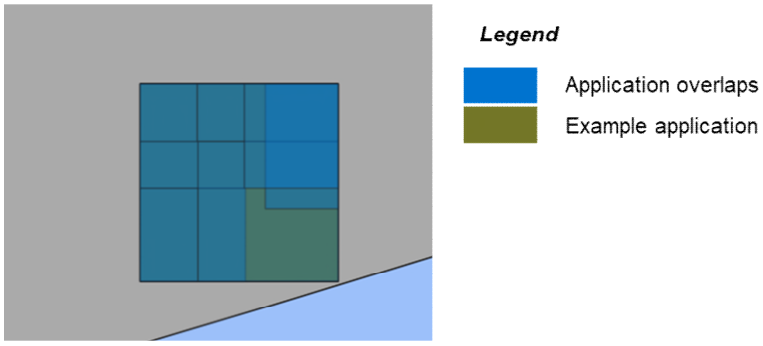


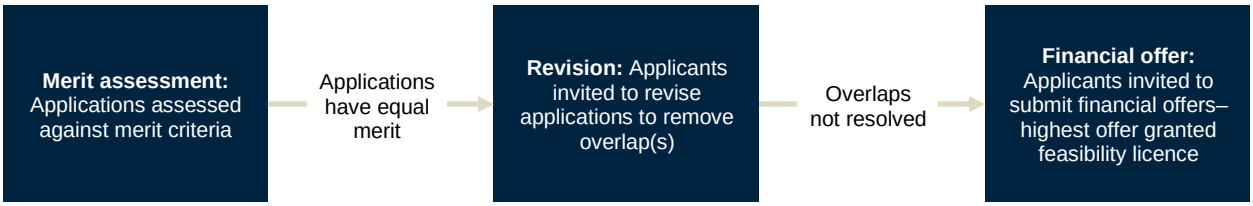
Figure 7 shows that the example application would be subject to nine overlaps. These overlaps represent the entirety of the application, suggesting that the entire application could potentially be subject to an overlap.

While these scenarios are randomised and have no regard to the technical and geographical characteristics of the regions under consideration, the scenarios start to illustrate the potential complexity that will be inherent in resolving overlapping applications.

3 RESOLVING OVERLAPPING APPLICATIONS

A three step process is set out in the OEI Act for resolution of overlapping applications. An overview of this process, as described in the following sections, is illustrated below in Figure 8.

Figure 8: Overview of process



4 MERIT ASSESSMENT

In the first instance, the Minister may resolve the issue of overlapping applications by refusing applications of lesser merit by reference to the merit criteria set out in the OEI Act and OEI Regulations.

We expect that this will be the initial focus of the Registrar, and that the Registrar will be quite unforgiving of any weaknesses or errors in applications, to facilitate a 'first cull' of applications and reduce the number of overlapping applications.

The merit criteria set out in the OEI Act and OEI Regulations are somewhat vague and, while the Government has provided additional guidance on what will be assessed under each merit criterion, the Minister has wide discretion to decide on the grant of a feasibility licence based on whatever matters the Minister considers relevant. The Minister will do so having regard to information, assessments, analysis, reports, advice and recommendations provided by the Registrar.

Interestingly, the OEI Regulations provide an avenue of procedural fairness by requiring the Minister (or the Registrar) to provide certain applicants with written reasons for declining an application. However, under the OEI Regulations, a decision not to offer to grant a feasibility licence is expressly excluded from this requirement to provide reasons – so we expect that unsuccessful applicants will likely not know specifically why their application was culled at the initial merit assessment stage.

5 REVISION

If the Minister (having regard to the advice of the Registrar) is satisfied that there are overlapping applications that are of equal merit and that, if not for the overlap, a feasibility licence could be offered for each of the applications, the Minister may determine that the applications form an "overlapping application group."

The Registrar will notify applicants who fall within an "overlapping application group" and invite them to revise and resubmit their applications to remove the overlap.

There are several questions about how this revision stage will unfold, some of which can be answered (at least to an extent) by reviewing the OEI Act, OEI Regulations and accompanying guidance, and others for which the answers can only be speculated upon at this point.

5.1 How will you know if you fall within an "overlapping application group"?

As mentioned above, the Registrar will notify applicants who fall within an "overlapping application group" and invite them to revise and resubmit their applications.

The notice and invitation given to an applicant must set out:

- the area(s) of overlap;

- the name of the other applicant(s) whose application(s) overlaps with the applicant's application; and

- the kind of project(s) that such other applicant(s) propose to carry out.

We note that each individual applicant of an "overlapping application group" does not need to overlap each other applicant of the "overlapping application group". For example, if Applicant A overlaps Applicant B, and Applicant B overlaps Applicant C, but Applicant A and C do not overlap each other, nevertheless Applicants A, B and C are all part of the same "overlapping application group".

The notice and invitation from the Registrar may also include such other information as the Registrar considers reasonable about the overlapping applications, and other applications that cover areas adjacent to, or nearby, the area covered by the applicant's application.

This latter point is important because an applicant in the "overlapping application group" will be entitled to revise its application so that the licence area to which the revised application relates is not limited by reference to that in the original application (see '*How much can a project change?*' section below). In doing so, an applicant may create new overlaps with adjacent or nearby licence areas proposed in other applications, and those new overlaps will then also need to be reviewed and avoided.

5.2 How much can a project change?

A revised application must, to use the language in the OEI Regulations, "remove the overlap". This means that, at the very least, the proposed licence area specified in the revised application must have changed so as to remove the spatial overlap with the proposed licence area of any other application.

Otherwise, the OEI Regulations provide that a revised application must, so far as is reasonably possible, remain "substantially similar" to the original application.

In assessing what "substantially similar" means, 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.

The Registrar has released a guideline on the feasibility licence process,[4] where it states by way of example that:

"A proposed 1 GW wind project with a licence area of 500 km^2 should remain substantially a 1 GW wind project with a licence area of 500 km^2 after any application revisions, and any proposed relocation should be for the minimum distance necessary to resolve any overlaps with other applications."

5.3 What about competition laws?

While not expressly contemplated by the OEI Act or the OEI Regulations, the need for revision of applications creates incentives for applicants in an "overlapping application group" to coordinate in preparing their revised applications and remove the overlap in their proposed licence areas. There is otherwise the potential for the revised applications of group applicants to create new overlaps in the proposed licence areas they specify.

However, such coordination will give rise to competition law risks under Part IV of the *Competition and Consumer Act 2010* (Cth) (the **CC Act**), including in particular a risk of breach of the criminal and civil prohibitions against cartel conduct.

The Registrar has released a FAQs document on the feasibility licence process,[5] where it states that:

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[4] Available: Guideline_OEI_Licence_Administration_Feasibility_Licences_August_2023.pdf (nopta.gov.au)

[5] Available: Feasibility-Licence-FAQ.pdf (nopta.gov.au)

"Applicants must comply with all relevant legal obligations, including those set out in Part IV of the CC Act, whether for the purposes of collaboration to resolve a feasibility licence application area overlap or any other purpose."

The CC Act prohibits corporations from making or giving effect to a cartel arrangement – that is, an arrangement between competitors that has (among other things) the purpose of:

- "bid rigging", that is, in the event of a request for bids for the supply or acquisition of services, competitors agreeing among themselves who should win the bid and the winning price;
- allocating between such competitors the geographical areas in which services are acquired, or likely to be acquired, in competition with one another; or
- preventing, restricting or limiting the acquisition, or likely acquisition, of services from persons by any or all of them in competition with one another.

'Services' is relevantly defined by the CC Act to include (subject to certain specified exceptions) any rights, benefits or privileges that are provided in trade or commerce.

Accordingly, an arrangement between applicants competing to acquire a feasibility licence in a declared area that agree the licence areas to be proposed in their respective revised applications may constitute a cartel arrangement.

Cartel conduct is 'per se' illegal, that is, the conduct is outright illegal, regardless of whether or not it has the purpose or likely effect of substantially lessening competition. A breach of the cartel prohibitions is considered an egregious breach of the CC Act, attracting the most punitive of enforcement consequences including significant civil and criminal penalties and, for individuals knowingly concerned in the breach, prison terms.

Expert competition law advice should be obtained by an applicant before participating in any coordination or cooperation with other applicants in the revision stage.

5.4 How long will the revision stage run for?

The Registrar's notice and invitation will specify the date on or before which revised applications must be resubmitted.

There is no maximum or minimum timeframe set by the OEI Act or the OEI Regulations for the revision period, and no guidance issued by the Government to date has definitively indicated what the possible timing allowed for the revision period will be.

It is noted in the Registrar's FAQs document that:

"The time period for the revision will take into consideration the need for applicants to consider their options and seek internal approvals."

We envisage that at least one month will be necessary given the potential number of overlaps to be resolved, the complex technical and commercial issues that will need to be considered in order to resolve those overlaps, and the fact that once appropriate revisions have been determined (if indeed they can be determined), new corporate and board approvals will need to be obtained by developers (including, where the developer is an SPV, potentially by each joint venture party within that SPV) and potentially their funders before any revised applications can be submitted.

Realistically, without a Government imposed time limit, the revision period could go on for several months. However, we do not expect a long period to be allowed by the Registrar, having regard to the time that will have already elapsed during the Government's assessment period, and the Government's desire to issue licences and allow industry to get work started as soon as possible in order to meet emissions reduction targets.

6 FINANCIAL OFFER

If overlapping applications are not resolved by revision within the Government's allowed revision period, the process moves to a final 'tie-break' financial offer stage, whereby the Minister may determine that the applications form a "financial offer group."

If the Minister determines that a "financial offer group" exists, the Minister may invite applicants to submit financial offers in relation to their respective applications.

The Minister's invitation must:

- include information on how the offers are to be made;
- specify the day on or before which the offers must be made;
- require applicants to substantiate their ability to pay the amount offered; and
- set out the effect of section 16 of the OEI Regulations (in relation to how the Minister will deal with financial offers).

The Minister may only then grant a feasibility licence to the highest financial offer. If, in the unlikely event that two financial offers are tied for the highest financial offer, those applications will be invited to submit a second offer.

The Minister may only grant the feasibility licence once the amount of the financial offer has been paid to the Commonwealth. The financial offer must be paid even if it subsequently becomes clear that there are no overlapping applications (because all other applicants withdrew their overlapping applications).

Again, like for the revision stage, there are several questions about how this financial offer stage will unfold, some of which can be answered (at least to an extent) by reviewing the OEI Act, OEI Regulations and accompanying guidance, and others for which the answers can only be speculated upon at this point.

6.1 How much to offer?

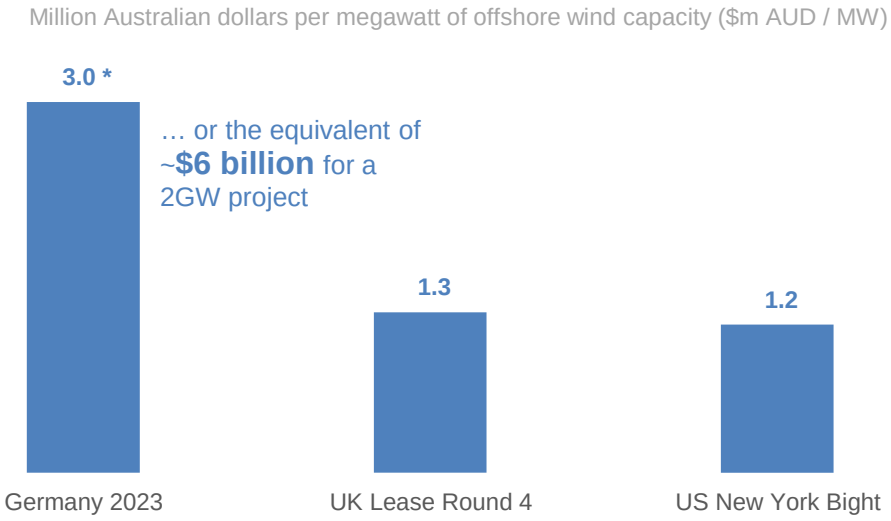
Determining an appropriate amount for financial offer is expected to be difficult and complex. Developers will need to look to global precedent, formulate their own commercial strategies, as well as strategise what their competitors are willing and likely to offer. However, one principle that should be maintained is that developers need to be careful to not overpay in an offer, and render the wider project economically unviable.

(a) Global precedent

As noted above, some other overseas jurisdictions (including, for example, Germany, the UK and the U.S.) have implemented a different market design for the offshore wind industry and take the approach of 'drawing lines on a map' and conducting auctions where developers competitively bid financial offers to develop offshore wind projects in pre-defined, discrete licence areas.

In these overseas jurisdictions, costs associated with the financial offer are often a significant portion of overall development capital expenditure. Recent bids have seen figures of upwards of 2 million AUD per megawatt (MW) of capacity, or 4 million AUD per square kilometre of developable lease area (UK and U.S.), see Figure 9.

Figure 9: Recent example seabed lease costs from the U.S., UK, and Germany[6]



Source: Create Advisory analysis, Crown Estate UK, U.S. BOEM, Bundesnetzagentur.
*Note: Lease costs are typically 'upfront' in the U.S. and U.K. compared to Germany where costs are recovered over a longer period during the operations of the asset. The present value of these costs may be similar to that of the U.S. and UK on a per MW basis.

If overlaps exist and progress to a financial offer stage, those developers with the largest balance sheets and most significant global presences will be in a favourable position to offer high amounts and substantiate their ability to pay those amounts – as seen in Germany's recent record-setting lease auction earlier this year.

(b) Commercial strategies

Create Advisory has contemplated some example approaches to the financial offer stage that might help developers come to a sensible offer range, while also maintaining the overall economics of the project. Each example approach comes with discrete sets of complexities, merits and commercial risks.

The example approaches are:

- **Overall project feasibility back solve:** Back solving the additional costs that a developer can incur while maintaining their assumed hurdle rates of return.
- **Overlap area yield:** Assessing the value of the overlap area based on the yield of that area.
- **Proxy price per MW:** Developing a proxy for overlap value per megawatt produced within the overlap.
- **Competitor shadow pricing:** Attempting to develop "shadow prices" for contiguous competitors.

Table 1 outlines the characteristics, merits and risks of each of these approaches.

[6] Sources for figure are available at: UK LR4: www.thecrownestate.co.uk; US NYB: www.boem.gov; Germany: www.bundesnetzagentur.de.

Table 1: Potential approaches to financial offer

Approach	***Description***	***Merits***	***Risks***	***Likely scenario***
Overall project feasibility back solve	Most, if not all projects will have been appraised for detailed financial feasibility. Typically, developers would be expected to have a hurdle internal rate of return at which point a project is considered economically viable or not. The absolute maximum price that any developer would assumedly be willing to pay for the overlaps would be the differential between their existing costs within their financial feasibility and the total costs they can incur while maintaining the economic viability of their project. This approach would be agnostic of the revenues and costs of the specific overlap region, but would allocate the total funds that could be deployed to overlaps while maintaining the project's overall economics.	Allows developers to determine the maximum sum of money that can be spent on overlaps while maintaining project feasibility. Likely defines the upper bound of what a developer should pay.	Using only this figure lends itself to a risk of overpaying. Given construction cost and pricing risks pushing projects to the edge of their financial feasibility, risks downstream complications rendering projects unviable.	This would likely define the upper bound of what a developer might be willing to pay for overlaps and would be expected to apply where an overlap area covers a substantial share of a developer's feasibility application.
Overlap area yield	Within each overlap area developers would be able to estimate the costs, revenues and returns that are expected to be achieved, or the overall yield of this sub-region. This would require a range of assumptions regarding the allocation of fixed operating and capital costs while variable costs and revenues could be estimated by the generation capacity of the overlap area. Given this, developers could again look to back solve the additional overlap cost that could be bid while still maintaining the economic viability of this sub-region, assumedly at the same hurdle rate of return applied to the overall project. This would provide a specific price for the overlap area.	Allows developers to understand the price that can be offered for overlaps that maintains the economic feasibility of the sub-region. Potentially provides a very specific price point for each overlap where an application is subject to multiple overlaps.	The price determined through sub-region yields likely does not reflect the upper bound of what a developer could pay in the event that an overlap is small but highly strategically significant to a project. Potentially risks overpaying if regard is not given to the willingness to pay of contiguous developers.	This approach would likely provide a benchmark that could be compared to the maximum price determined above. Additionally, this approach would suit well where there are multiple small overlaps within an application.

Proxy price per MW	An additional approach that developers could adopt is to develop a proxy price that they are willing to pay for the overlap region based on the MW units that the region produces. This would again require the calculation of fixed, variable and capital costs per unit, along with and estimate of the revenue generated. Again, an additional overlap cost could be back solved based on the minimum net income per MW that would be required to maintain the projects economic viability. It should noted that this approach may contemplate a similar set of inputs to the above approaches and could yield similar answers.	Provides developers with a simple benchmark for the value of an overlap region. Sufficiently flexible to address a range of overlap scenarios (i.e. one large overlap and multiple smaller overlaps).	Likely to require a range of simplifying assumptions and as a result may not yield a figure nuanced to operational realities. Where an overlap region is strategically significant, but not high yield, this approach will likely undervalue the overlap.	Most useful as a sense check against the above approaches. In particular where the overall project feasibility back solve approach is adopted the proxy price can be used as a sense check of the value being put forward.
Competitor shadow pricing	Finally, developers could seek to replicate the above processes for projects that are contiguous or overlapping. This would require a range of assumptions and estimations regarding cost, revenue and operational inputs of contiguous projects, which will be inherently uncertain. However, it would allow developers to gain an understanding of the potential prices that their competitors might be willing to pay to sense check the price ranges they derive by looking at their own project inputs.	Potentially function as a sense check of the prices derived by the above approaches. If it is determined that a contiguous developer cannot pay anywhere near the figure identified above this approach may ensure that developers do not overpay for overlaps.	Any estimates of competitor willingness to pay will be subject to a range of simplifying assumptions to overcome imperfect information about competitor projects. The shadow prices will be highly sensitive to these assumptions and as a result can likely only be used to inform a range of potential outcomes rather than a specific price estimate.	Where sufficient information is available about contiguous applications. Can be used under most scenarios as a sense check against the price ranges determined based on approaches above using the developer's costs and revenues.

Ultimately the adoption of these approaches is likely to give developers a range of values that they could use to determine their financial offer. On the lower end would be the figures that are derived of the targeted sub-region yields, and the higher end the total additional costs that are available to the project while maintaining its overall feasibility.

While the figures provide a financial benchmark, it will be up to developers to determine the right financial offer qualitatively. This may require a purpose-built framework to determine the strategic significance of the overlap area, the overlap share of the total project, and the likely approach of contiguous developers, among other considerations. Combining this more nuanced strategic decision-making overlay with the project's wider economics will ensure developers are making informed assessments during the overlap revision and financial offer process.

(c) Impacts of price and volume risks on offers

Of course, all the above approaches are reliant on certainty of a range of inputs. The Australian offshore wind market is nascent and developers are under pressure to price-in significant uncertainty when considering the upper bounds of their financial offers, including:

- Limited publicly available detailed **site information**, such as wind or marine conditions. In other jurisdictions, such as Germany, many sites are centrally pre-investigated and this data is freely available to enable more robust feasibility assessments and reduce barriers to entry.

- Uncertainty regarding Government's approach to **offtake and support** mechanism, and the capacity and availability of critical port and transmission infrastructure. Certainty in relation to offtake, port and transmission are prerequisites to final investment decision (**FID**) and any risk will be considered in financial offers or priced into auction bids.

- Rapidly **evolving and scaling global market**, coupled with inflation and general increases in supply chain costs, are impacting the feasibility of projects and risk premiums demanded by investors. Even in more mature markets, developers are reviewing the feasibility of their projects and in some cases are avoiding new commitments and suspending developments (for example, the failure to secure any offshore wind bidders for the UK's recent CfD auction, or the halting of all work on the ~2GW Norfolk Boreas Project).[7]

- Offshore wind farm development and construction can be a **decade long process**, and in the race to develop projects by the 2030s, 2023 decisions are ultimately 2030+ decisions. Developers are being asked to price in significant cost uncertainty several years before FID is made, and many more before the commercial operations date of the wind farm.

- Obtaining a feasibility licence is **no guarantee** that ultimately commercial operations will be permitted and revenue will flow. Even with a feasibility licence, developers must still subsequently secure a commercial licence (which may be denied) and support / offtake agreements (which may not be forthcoming on commercially favourable terms).

These risks would be expected to materially influence the financial offer that any developer is willing to make. These should be quantified as scenarios and sensitivities when looking at the approaches above to understand the offer ranges that should be considered.

(d) What about competition laws?

Any discussions between applicants during the financial offer stage will give rise to a risk of breach of the CC Act's cartel prohibitions.

In particular, in addition to the cartel conduct discussed above, the CC Act also prohibits corporations from making or giving effect to an arrangement between competitors that has the purpose or likely

[7] Vattenfall (2023) *Vattenfall in Norfolk*. Available: group.vattenfall.com. UK Department for Energy Security and Net Zero (2023) *Contracts for Difference Allocation Round 5 results*. Available: gov.uk.

effect of fixing, controlling or maintaining the price of the services acquired, or likely to be acquired, by any or all of them in competition with one another.

Again, expert competition law advice should be obtained by an applicant before engaging in discussions with any other applicant during the financial offer stage.

(e) Consortium considerations

A number of the 37 applications submitted for an award of a feasibility licence in the Declared Gippsland Region were submitted by a project vehicle which is ultimately owned and funded by a consortium of parties. In our experience, consortia have been formed to maximise the potential for the underlying project sponsors to collectively satisfy the merit criteria assessment by the Minister – with each consortium participant bringing specific skills or attributes to the consortium (for example, technical expertise, overseas offshore wind development experience, financial capability, local stakeholder connections etc.).

However, to the extent not agreed during initial consortium formation, the financial offer process and other contractual commitments between consortium members with respect to a project the subject of a feasibility licence application may need to be revisited to address the agreed amount, and associated funding of, any proposed financial offer.

7 NEXT STEPS

In preparing for and addressing the prospect of overlapping feasibility licence applications, we recommend that developers consider the following:

(a) **Application documentation:** Ensure that each feasibility licence application is as strong as possible, so as to be able to beat each competitor's application at the merit assessment stage. The Registrar's application documentation[8] and the feasibility licence guideline and FAQs document (previously referred to) are essential references to ensure that an application meets all of the requirements of the OEI Act and OEI Regulations, and can be assessed as high merit.

(b) **Multiple applications:** Consider the possibility of submitting multiple feasibility licence applications (which is not prohibited by the OEI Act or OEI Regulations), so that in the event that one application is unsuccessful or is dragged into an overlapping applications process and is ultimately unsuccessful, the developer still has other applications which may be successful. However, it is worth noting that in determining whether an application meets the merit criteria, the Registrar will have regard to all of the applicant's current and proposed projects. Therefore, if multiple applications are made by a developer, the developer should ensure that it can adequately evidence financial and technical capability to deliver all projects, and that making the multiple applications will not prejudice the merits assessment of each application.

(c) **Preparing appropriate revisions:** Plan in advance what revisions might feasibly be made to an application, if that becomes necessary. This should include understanding the conditions and feasibility of adjacent and nearby areas to allow for adjustment in the event of an overlap (where this is possible or feasible within existing constraints). Particularly where projects are required to remain 'substantially similar', developers may be able to consider a relatively small adjustment of the original application boundary into a surrounding area – where it doesn't then overlap with another application.

(d) **Preparing for financial offer:** If it becomes clear that a financial offer may become necessary (because notification of an "overlapping application group" has been made, for example), consider preparing in advance the frameworks and tools to be used to determine book ends

[8] Available: Applying for an Offshore Electricity Infrastructure Feasibility Licence | NOPTA

for the financial offer range, and ultimately to determine the financial offer itself. This would include:

(i) **Feasibility –** Ensuring the inputs around price, value, costs and demand for the financial offer frameworks are up to date and as precise as possible, and ensuring that there is firm view of the minimum rates of return that the project needs to achieve to remain economically viable. Likely this will require an assessment of financial market conditions to ensure rates of return are aligned to cost of capital.

(ii) **Financial analysis –** Proactively developing the financial analysis framework and modelling tools to be used to determine a financial offer range.

(iii) **Qualitative framework –** Proactively developing a qualitative commercial decision-making framework to support decisions regarding the financial offer. The financial analysis exercise is likely to provide bookends on the offer that could be made. However, decision makers will need to determine where to land within the modelled range. This framework will therefore need to contemplate a range of additional issues, such as strategic significance of the overlap area, technical / physical characteristics of the overlap area, developer appetite for taking on additional financial risk, financing implications of increased licence costs and a range of other considerations.

(iv) **Likely overlaps and competitor analysis –** Noting that developers may already be aware (through public announcements and media) of potential overlapping applications, working to understand the background and details of those overlapping applications, to support the development of potential shadow pricing parameters.

(v) **Consortium alignment** – If an applicant comprises a consortium, early engagement and alignment between consortium partners as to the potential maximum amount to be submitted as part of a financial offer.

(e) **Funding the financial offer:** Again, if it becomes clear that a financial offer may become necessary (because notification of an "overlapping application group" has been made, for example), consider preparing in advance for approval and funding of the ultimate financial offer (including, relevant funding contributions by consortium partners). This may take some time given that the amount of the offer could be significant, the making and funding of the offer may require approval from overseas headquarters and (where relevant) consortium partners, and funding of the financial offer may come from disparate sources.

In the longer term, it will be interesting to see to what extent the Government's current market design and approach to grant of feasibility licences is maintained. The approach taken by the Government is quite novel. In particular, in other jurisdictions where exclusive seabed rights are granted based on financial bids or offers, this is done in circumstances where, if the developer's offer is successful, government effectively guarantees offtake and a strike price, the developer can (if desired) progress quickly to construction (i.e. feasibility information has already been gathered and is provided by government as part of the tender pre-offer information, and there is no 'interim' feasibility licence as a prerequisite to commercial licence authorising construction activities) and therefore the timeframe to FID and commercial operations can be shorter. While this market design has also not always been successful, it does have the benefit of being well understood by developers and financiers.

We wait to see how successful the novel Australian approach will be, and whether it will incentivise investment and assist to reduce the costs and delays that have affected projects in some other jurisdictions.

HOW CAN WE HELP?

This article was prepared as a collaboration between global law firm, DLA Piper, and specialist advisory firm, Create Advisory.

DLA Piper

DLA Piper is a global law firm, with cross-border reach and local presence in Australia. The firm has unparalleled experience in providing legal advice on development, construction, financing and M&A in renewables, including offshore and floating wind technologies, having advised on more renewable energy deals and projects than any other global law firm, representing developers, sponsors, equity investors, offtakers, lenders, multilateral institutions and government bodies.

Our Australian team was fortunate to participate in the early stages of the formation of the Australian offshore wind sector, including pre-legislation discussions regarding regulatory frameworks and licensing possibilities, and some of the earliest corporate transactions in the market. More recently the team has been advising international and local developers on corporate structures, foreign investment regulation, contracting, approvals and general project development matters for proposed projects in the Gippsland and Hunter regions, and other areas.

Our local team is integrated into our global offshore wind team, which is recognised as a market leader in both established and developing offshore wind markets, including by *Wind Investment Awards* and *Financing Wind Awards*. We use our leading international offshore wind knowhow for the benefit of our Australian clients.

Create Advisory

Create Advisory is a female led boutique advisory firm focused on providing strategic and commercial advice to clients in the Infrastructure and Major projects sector. Our team is composed of some of Australia most experienced infrastructure and commercial leaders with over 200 years of lived experience delivering some of the most iconic projects in the nation. These leaders are supported by a team of highly experienced professionals and we provide clients with low leverage teams to solve complex issues.

Our service offering spans strategic advice, commercial and regulatory advice and stakeholder engagement with a particular focus on transport and major projects, precincts and renewable energy. We have helped our clients originate and deliver some of Australia's most significant private infrastructure assets.

We support clients to navigate the interface between private and public sector in complex transactions and projects. More specifically, we can support offshore wind developers and Government with:

- Strategic advice regarding approach to negotiations, commercial frameworks, project development and stakeholder engagement
- Project origination and feasibility assessments
- Financial, economic, and commercial appraisals and modelling.

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