



Original research article

Making laws, making waves: new oceanic legal spaces and conditions for conflict in Australia's offshore wind regulation

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ABSTRACT

Notwithstanding the substantial social science literature on energy transitions, little attention has been paid to the role of lawmaking and its spatial implications for governing how infrastructure lands in place. Adopting a legal geographic approach and engaging with Jessop's strategic relations theory, we address these gaps through a case study of Australia's offshore wind sector. Documentary analysis and statutory interpretation methods are used to: 1. trace the emergence of a national legislative framework derived from specific regional conditions and fuelled by developers seeking a spatial fix; and 2. identify how the legislation produces new oceanic legal spaces to develop infrastructure, in the form of zoning and private licences for capital accumulation. We document how institutionally entrenched strategic actors engaged and shaped the new sector through a multitude of forums, building consensus while attending to their overlapping interests. Such interests were embedded into the resulting shape of the legislative framework. While opening new spatial territories in the ocean for renewable energy production and rescaling centralist power in electricity markets, Australia's offshore wind laws replicated existing problematic nature-society-energy dynamics. When materialised in place, new legal spaces unfolded over and disrupted existing coastal relations, ecologies, and cultural practices. We thus show how new legal arrangements for oceanic energy spaces give rise to the possibility for place-based conflict. Attention to lawmaking and the legal production of space offers important insights into whose interests transition laws serve, along with why contestation erupts in place over energy infrastructure.

1. Introduction

The role of the state in energy transitions is the subject of considerable scholarly debate [1–4]. Across the social sciences, researchers examine the different roles of the state in facilitating renewable energy infrastructure, whether as underwriter of new projects, a derisker, investor, broker or facilitator [5–7]. As scholars have recognised, the conversion of nature into new markets (including green markets for renewable energy) requires expanded territorial spaces, boundary making and the creation of new legal rights [8,9]. These new markets are regulated by legislative frameworks that produce new spatial relations that interact with existing governance and socio-spatial relations [10–12]. Yet to date, research has not given sufficient attention to exactly *how* the regulatory mechanisms for derisking and governance of utility scale energy infrastructure *come into existence* to produce new legal-spatial relations. Equally, researchers examining place-based

conflict over renewable energy infrastructure have given insufficient attention to the legal-spatial arrangements governing how such infrastructure materialises in place. We address these gaps here. Adopting a legal geographic approach combined with Jessop's strategic relations theory [13,14], we foreground lawmaking and its spatial and political implications, through a case study of Australia's offshore wind sector.

Drawing from public documents and legal analysis, our analysis has two main parts. First, we trace the early evolution of Australia's offshore wind sector. We do so via Jessop's [13,14] notion of strategic selectivity that understands the state as a social relation. We document the efforts of elite and institutional actors to shape the sector to address their overlapping interests, while responding to place-based conditions. The result is a national legislative framework for licencing infrastructure enacted through the *Offshore Electricity Infrastructure Act 20221 (Cth)* (OEI Act). The legislation opens federal waters as a new spatial territory for renewable energy, rescaling state power over energy production in a

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federalist context. Yet, the *OEI Act*, being modelled on Australia's oil and gas regulation, replicates existing problematic nature-capital-society dynamics in Australia's energy markets. The second part of our analysis (see Discussion section), addresses how the legislation created new legal spaces to enable infrastructure in place, yet generated conditions for conflict with hosting communities. We find that the *OEI Act* produced two main new forms of legal space. The first was mapping and Ministerial zoning at the regional scale to determine the boundaries for where infrastructure could be hosted. The second was the granting of new legal rights in the form of exclusive licences to private capital to develop infrastructure within zoned regions, along with transmission rights to bring energy onshore. As the legislative framework materialised in practice, new legal spaces unfolded over existing ecologies, economic, cultural and legal relations of the ocean and coastal communities, giving rise to the potential for place-based conflict [15]. Recognising the depth of critical research on the spatio-political nature of energy transitions, we bring attention to the role of lawmaking and its spatial and political implications for understanding both state power and community responses to energy infrastructure in new spatial sites.

Our paper is informed by a geographical perspective, which recognises that “energy transition is a space-making process, but one also shaped by spatial contexts” ([16]:1027). More specifically, the concepts and analytical methods used in this paper derive from a legal-geographic approach. Legal geography shares an appreciation that law and space are coproduced and co-constitutive [17–20]. As our case study below demonstrates, place is generative of law, what Bartel [21] terms “place-law”. In turn, legal frameworks define the conditions for new sectors and construct new spatial legal rights that materialise in situ. In the Australian context, such legal geographic approaches have been applied to state involvement in energy markets [22,23], mining, and energy (particularly coal-fired power and coal seam gas) [15,24–26], alongside the impacts of renewable energy projects on Indigenous Australians' relationship to Country [27,28]. Here, we contribute to this body of work by extending it into oceanic renewable energy production, answering the call by Brickell et al. [29] to bring attention to those who shape and enact laws. We also respond to Rickards and Jolley's [30] invitation for more scrutiny of the elite decision-making spaces around significant environment and climate change decisions. In what follows, we describe the conceptual framework for our analysis, outline methods, followed by our case study of the evolution of the *OEI Act* through a strategic relations approach. We then examine what this means for socio-spatial relations when the legislation rolls out in place.

2. Theoretical framing: a strategic-relational and legal-geographic approach

The role of the state is central to understanding how new markets for renewable energy emerge. As Eckersley ([3]:248) notes, state regulatory capacity is unrivalled by other institutions and actors. Recent scholarship has sought to challenge the notion that transition policy and laws emerge from the state fully formed and without external influence, as if from a “black box” [31,32]. We add to this work, drawing upon Jessop's [13,14] strategic-relational approach that conceptualises the state as a social relation. Rather than a fixed entity with inherent institutional logic, Jessop defines the state as “a relatively unified ensemble of socially embedded, socially regularized, and strategically selective institutions and organizations” whose coherence stems from their connection to particular state projects and hegemonic visions ([14]:367). His concept of “strategic selectivity” recognises that state structures favour certain actors, strategies, and interests, while disadvantaging others [14]. Amidst contestation, the success of any state project hinges on coalition-building, achieving hegemonic consent, and working effectively within the constraints imposed by strategic selectivity [13]. This dynamic process, Jessop contends, produces political settlements that remain inherently unstable and open to challenge [14]. State power is therefore not a possession but an *effect* of ongoing

struggles among social forces.

Jessop et al. [33] warn against privileging one scale above another, inviting consideration of the interaction between territory, scale, place and networks. Adopting this approach in examining Australia's electricity market, Chandrashekeran ([34]: 40) emphasises “the inherently polymorphic, multidimensional character of socio-spatial relations”. She further notes that electricity is central to modern statecraft [35]. This framing is particularly significant in the context of Australia's federalist structure, with complex governance responsibilities for national and sub-national states addressing the environment, energy, electricity markets, infrastructure and ocean environments [22,36,37]. Our analysis focuses on the process of transition lawmaking and the spatialised implications, responding to Silvester & Fisker's [31] invitation to draw more attention to the multi-dimensionality of state power along with its interconnection to society and markets in the context of energy transitions.

In addition, we draw from legal geography to make sense of how law and space are co-constituted in Australia's new offshore wind sector. In the case below, we outline the legal production of space under the *OEI Act*: how the legislative framework rescales state power in the federalist context and creates new legal spaces in the form of declared areas and bounded private licences for exclusive capital accumulation. These new legal rights are subjected to multiscale governance arrangements, both existing and new. De Sousa Santos [38] coins the term “interlegality” to explain the overlapping scales of governance that exist across a spatial site. While convoluted and overlapping, these formal legal constructions may co-exist without considerable conflict, each with their own jurisdiction, scope and logic [39]. Legal geographers recognise the pluralism of law: formal laws interact with informal laws, including customary law and place-based practices (with their own interlegalities) [17,18,40–42]. Challenging the notion that law is imposed over space, Philippopoulos-Mihalopoulos [43] argues that law and space are always co-constitutive; an inseparable “lawscape” including silent boundaries and hierarchies. Viewed this way, the ocean is not a vast “empty” space over which new lines are drawn. Rather, the new legislative framework for offshore wind unfolds over existing and textured oceanic and coastal lawscapes, disrupting existing rights and giving rise to the possibility of conflict. In adopting this conceptual approach, we address a gap in the considerable body of literature that examines place-based responses to renewable energy infrastructure (cf. [44–46]) by centering lawmaking and its spatio-legal implications, especially in relation to oceans. While analysis of subsequent contestation of offshore wind in Australia is beyond the scope of this article (and is the focus of separate research), we contribute to the literature on legal geographies of energy transition by documenting the legal production of oceanic space and providing explanation for how conflict emerged in specific regional contexts due to the *OEI Act*'s assertion of hierarchy over the existing lawscape and its associated interlegalities.

3. Methods

This paper is an original research article deriving from a larger qualitative research study conducted on offshore wind, energy markets, and decarbonisation between 2021 and 2024 [47]. This paper's focus is on tracing the legislative framework for offshore wind, its spatial and political implications. Two methods were adopted: multiple source documentary analysis and legal statutory interpretation. To trace the evolution of the legislative framework, we started with the sources available on the *OEI Bill* from the Parliament of Australia's official records [48]. This material includes details of the consultation on the *OEI Bill*, Explanatory Memorandum, Second Reading speeches in both houses of federal Parliament, Senate Inquiry submissions on the proposed Bill and the associated Senate Committee report. Examining these materials unearthed the efforts, legal processes, forums, and publications of specific state and non-state actors related to attempts to develop an offshore wind sector in Australia. Such attempts preceded, and

eventually shaped, the legislative framework. The central actors concerned, whose efforts are detailed below, include a senior executive for the first prospective project in Australia, unions advocating for the industry, and the senior federal government executive who conducted a study on best practice for the legislative framework. Through online searches, we sought additional information and documentary material on these actors and their efforts. This produced additional documentary material, including media reports, campaign documents and grey and technical literature on offshore wind (cited below). Together this material was analysed to understand the various forums, interests, and agendas that actively shaped the legislative form. To examine the legislative shape of the *OEI Act*, we undertook statutory interpretation of its provisions, drawing on the formal legal skills of the first author. This analysis was supplemented by material on the Australian government's official website explaining the legislative framework [49]. Methodologically, this aligns with our intent to identify the select actors strategically engaging with state structures and the associated legal production of space emerging from the enacted legislation.

The analysis was informed by research conducted under two related projects with approval from the University of Wollongong's Human Research Ethics Committee (Approval numbers DE200100989 and DP200100633) concerned with regional implications of decarbonisation. As part of these projects, some 20 interviews with 17 key stakeholders were conducted from January 2021 to July 2024. Participants included prospective offshore wind developers; representatives of organised labour; a peak advocacy body for renewable energy; a prominent economist on climate change and energy; a state politician (now the Planning Minister for New South Wales); and representatives of a local activist group. A further 30 interviews were conducted with community members at public consultation events hosted by the Department of Climate Change, Environment, Energy and Water (DCCEE—*the federal government department responsible for developing the legislative regime for offshore wind in Australia*). The researchers also attended over 40 events related to regional decarbonisation (and offshore wind specifically). Where relevant to the evolution of the legislative framework, we draw on interview data from these wider research studies, to supplement the documentary and interpretive analysis, although we do not include lengthy quotes. Instead, textual analysis of interview data and ethnographic research on how offshore wind unfolded on the ground is the subject of separate analysis (for further detail on interview protocol, questions, and how they were conducted, see [47]).

4. Case study: Australia's emergent offshore wind sector

4.1. The context of Australia's emerging offshore wind sector

Emerging from Northern Europe over three decades ago, offshore wind has now expanded across the globe where local capacities interact with complex, shifting transnational value chains and labour dynamics [50,51]. China has become the leader in offshore wind installations (with just over half of the 80.2 gigawatt installed globally at the end of 2024) along with extensive supply chain capacity [52]. New markets, including Australia's, have also emerged as decarbonisation interacts with the drive for energy security and sovereignty in the aftermath of Covid-19 pandemic and more recent geopolitical uncertainty [52,53]. Australia's physical and geographical conditions as an island nation with strong wind resources entice investment in an offshore wind energy sector, via path importation of established technology from mature markets.

In Australia, decades of delayed climate action and mounting national and international pressure to decarbonise coincide with other domestic conditions: a failure to reconcile the ongoing effects of colonisation; ideological climate "wars" founded on the centrality of fossil fuels to Australia's export trade; climate-induced disasters and globally unprecedented species extinctions; and energy insecurity and high

energy prices [54–56]. Such conditions are to be understood in their historical context. The Australian colonial experience features a consistent pattern of developmentalist governance of territory and resources in a settler-colonial context: state and capital long joined at the hip, with mutually-beneficial relationships between extraction, minerals royalties, and legal frameworks presiding over land access and project approvals [57,58]. Governments continue to frame transitions in a manner that maintains rather than disrupts minerals production, in line with the long-run developmentalist narrative.

Another historical legacy is the complexity of Australia's scaled governance arrangements for climate change, energy and electricity. Whereas the federal government has responsibility for international obligations around climate change and the environment, sub-national states own the minerals on land and are primarily responsible for providing electricity within their boundaries [34,36]. This means the federal government has limited capacity to directly control land-based energy production and electricity markets without co-operative arrangements with the sub-national states and territories [37]. One exception is where infrastructure is located within federal waters (beyond the 3 nautical miles of state waters), giving it direct powers over offshore oil and gas and offshore wind infrastructure in Commonwealth waters to the limit of its exclusive economic zone (EEZ) [59].

Sub-national state-owned coal-fired power historically provided the base load power in Australia's three most populous states, New South Wales, Victoria and Queensland, with substantial mineral reserves in geographically distinct and politically sensitive regions [54]. Following decades of privatisation and liberalisation, coal-fired power is now mostly in the hands of private ownership. Over the past decade, coal-fired power stations have required unplanned maintenance and operators announced early retirement due to aging and costly infrastructure, amidst increasing competitiveness of renewable sources [56]. This has raised critical concerns at the national and state level around base load power in the National Electricity Market (NEM) and job losses for regional coal-fired power workers. As a result of privatised gas markets, linked mostly to global price-volatility, consumers drawing from the grid face high prices despite record volumes of domestic production and export [56]. In the face of global tensions, energy security, energy prices and job losses in carbon industries sit alongside emissions reduction as major political contestations for both national and sub-national governments. All the while, federal and sub-national policy has facilitated rapid uptake of rooftop solar and household batteries to distribute domestic generation, undermining the equilibrium implicit in the privatised electricity market calculus [60] while exports to energy markets around coal and gas persist [61]. Such a specific political-economic juncture sets the scene for the emergence of a federally-regulated offshore wind sector to respond to select crisis conditions without the need for subnational state co-operation.

In Australia, offshore wind energy generation became legal with the *OEI Act*, passed in November 2021, and operational on 2 June 2022. However, the offshore wind story in Australia begins well before this legislative framework was in place, as we trace here through document analysis using a strategic relations approach.

4.2. Developing a legislative framework through select strategic relations

This section of the paper traces the genesis and evolution of Australia's offshore wind laws. In 2018, then Federal Minister for Energy, Angus Taylor, received an unsolicited request by Australian company, Ocean Energy, to undertake preliminary exploration studies for its proposed Star of the South offshore wind project in the state of Victoria [62]. No legislative framework for offshore wind then existed. Promoted as a 2-gigawatt (GW) project, Star of the South was backed by Copenhagen Investment Partners, a Danish-based global investment fund with considerable offshore wind investments. Ocean Energy's CEO at the time, Andy Evans, explained the rationale for establishing the Star of the South project:

When we looked at our first project, the Star of the South... ten years ago it was very much based on the recognition that Latrobe Valley [coal-fired] generators, Hazelwood, would come off in 2020. It came off in in 2017 on five months' notice.

(quoted in [63])

He elaborated on its financial element:

People don't realise how much money is tied up in large superannuation funds and infrastructure funds that need to be employed and spent. And there aren't enough quality projects, particularly with a decarbonisation benefit. Shareholders, members of superannuation funds are starting to want to see their money in things that have an environmental and public good.

[63]

In the first quote, Evans' identified the place-based and temporally-focused opportunity for capital investment that aligned with nationally significant concerns – the need for energy security with the earlier than anticipated withdrawal by capital of the Hazelwood coal-fired power station in the Latrobe Valley, part of the Gippsland region in the state of Victoria. For decades, Hazelwood power station had provided Victoria with baseload power through brown coal [54]. Hazelwood's owners, Engie and Mitsui Co Ltd., made an unexpected announcement that they would close the station in March 2017, with only five months' notice, leaving workers and communities with little time and few employment alternatives. Despite ensuing federal and sub-national state structural adjustment packages, the ongoing impacts of the closure for workers and the wider community demonstrate how deeply disruptive unplanned transitions can be for regional communities [64–67]. In this context, the proposal to develop offshore wind in the region was seen as an alternative industry to engage industrially skilled workers, provide power into the grid, and address emissions reduction.

In the second quote, Evans positions offshore wind as a “fix” for over accumulation of substantial investment capital held in superannuation and infrastructure funds seeking decarbonisation projects in safe sovereign nations. Drawing on Marx, Harvey's spatial fix theory proposes that capital responds to crisis conditions, such as over-accumulation, by finding a fix, redirecting capital (capital switching) and shaping markets in new spatial locations [68–70]. Whereas the fix is often positioned as capitalism attempting to navigate its own internal contradictions to ensure its survival (see [71]), researchers have examined the possibilities of the fix and capital switching for addressing the ecological crisis [72–77]. As Harvey [69,70] recognised, capital switching is never purely economic and is often accompanied by an “extra economic” imperative. In this case, that imperative was what Evans called the “decarbonisation benefit” and the expectations of shareholders, along with the economic realities of obtaining finance more cheaply and smoothly. As would unveil over time, Star of the South was the most developed of a number of proposed projects across the nation that proceeded the legislative framework. These projects were sized to generate between 1.3 and 2.2 gigawatts (GW) of energy, costing up to AUD\$10 billion, and relying on global finance circuits, including oil and gas [78]. One interviewee, a senior executive working for a prospective developer, also noted the significance of risk appetite in funding offshore wind at the time:

Those balance sheets only come from the oil and gas giants who have insurable projects that underwriters understand the risk. Not only do they have the money, they also have the risk appetite.

(pers. com. May 2023)

More recently, the global offshore wind market has been strained by the Trump administration's anti-wind agenda, geopolitical conflict, and high reliance on debt financing [52,79,80]. Nevertheless, back in 2018, when offshore wind developers first showed interest in Australia, the outlook was more promising.

In the absence of a legislative approval framework for offshore wind at the time, the Star of the South project was granted approval for exploratory studies in March 2019 by Minister Taylor, through a Deed of Licence, approved through Cabinet [62]. Such a process reveals the Ministerial access prospective developers enjoyed, foreshadowing the state-capital strategic relations later embedded in the legislative framework. At the time, Minister Taylor was a member of the conservative Morrison government who built his political career on resisting onshore wind development in Australia and advocating for coal and gas, claiming onshore renewables were destabilising the grid and would lead to the “de-industrialisation” of Australia's economy [81]. In granting approval to Star of the South, Taylor demonstrated an openness to facilitate an offshore wind industry, through path importation of technology, without challenging his stance on either solar or onshore wind or disrupting existing arrangements with Australia's export focused coal and gas sectors.

For some in the Australian industrial union movement, the pace of change to establish the offshore wind industry was too slow, particularly for the Maritime Union of Australia (MUA) representing seafarers along with oil and gas workers. As part of a national campaign, MUA Deputy National Secretary, Will Tracey expressed the union's frustration with the federal government's inaction on offshore wind legislation:

We have a major wind project that would create thousands of jobs and provide clean, reliable energy for more than a million Australian households, but because of their ideological hatred of renewable energy the Morrison government appears to be actively stalling its development.

[82]

Australian researchers have identified different stances to climate policy and transitions adopted by organised labour, shaped by their embeddedness in social relations with fossil capital [83–86]. Here the MUA actively challenged the jobs-versus-environment binary that dominated national discourse at the time [87]. The MUA saw offshore wind as part of a longer term just transition strategy for workers in the oil and gas industry. This was particularly significant for Gippsland, where oil and gas production was winding down in the face of depleted reserves in Bass Strait. While the concept of a just transition remains highly contested in Australia [88–92] the union's support for the industry was founded on long-term job protection for its members in the face of the nation's unpredictable decarbonisation trajectory. So too, the Australian Council of Trade Unions (ACTU), the peak national organisation representing Australian unions, and the Electrical Trades Union (ETU), supported offshore wind as part of a broad just transition campaign for workers.

As part of a network of supporters, the MUA and ETU contributed to research conducted by the Blue Economy Cooperative Research Centre (CRC) along with representatives from industry, research (CSIRO) and government. Published in July 2021, their report *Offshore Wind Potential for Australia* [78] found that Australia's “technically accessible” wind resource was an estimated 2223GW, far more than any current or projected demand. To compare, the entire NEM (that supplies the east and south of Australia where most people live) has a current base load of approximately 6GW. The report further noted that industrial decarbonisation of difficult to abate sectors (e.g. steel, aluminium, minerals processing) would require a significant increase in renewable energy, particularly with a large-scale shift to electrification and plans for an export-orientated hydrogen market. This echoed earlier claims by prominent economic and climate policy advisers that Australia's abundant natural resources would allow it to become an “energy superpower” with significant export potential to transition from fossil fuel economic dependency [93,94]. These framings—that offshore wind would provide the scale of energy needed for industrial decarbonisation and an export green hydrogen industry—fitted the conservative Morrison government's technology and capital-driven ideology [95]. At the

national level, the drive to address industrial decarbonisation would later be pursued ambitiously by the Albanese Labor government, elected in May 2022 [47,96].

Observing that there were 10+ projects proposed at the time with a combined capacity of over 25GW of energy, the CRC Report also concluded that offshore wind could play a significant role in a just transition for Australian coal, oil and gas workers [78]. While offering hope in what was historically highly contested relations around labour and decarbonisation, the simplicity of the message overshadowed the complexity of dynamics on-the-ground. Such complexities included disruptive spatial and temporal dimensions of decarbonisation, the lack of planning for carbon workers, along with the concentration of renewable work in construction phases compared to ongoing production work in fossil fuel industries [97–99]. Such issues would become apparent as the federal government proposed hosting offshore wind infrastructure to regions facing vastly different decarbonisation trajectories [47]. Nevertheless, the framing of offshore wind as a just transition for regional carbon workers based on the experience of Gippsland was central to the widespread political support the legislation received when it reached the legislature, as outlined below.

4.3. Developing a legislative framework and locating global ‘best practice’ from overseas

Both the International Energy Agency and International Renewable Energy Agency, key advocates of energy transition, promoted offshore wind expansion globally to address climate change and emissions reductions. Following Star of the South, other projects sought permission to conduct feasibility studies in Australian waters, but were advised that government would first consider a regulatory process [62]. In this context, Stuart Smith, Chief Executive Officer of the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA), Australia's oil and gas regulator, was awarded a Winston Churchill Memorial Trust Fellowship to identify leading global practice for offshore wind regulation ([62]:1). Smith's [62] report, based on study in Europe in 2019, drew best practice principles from Denmark, the United Kingdom, France and Germany, along with insights from Belgium and the Netherlands. It recognised the need for considerable increase in renewable energy production, the substantial wind resources in Australia, and the high capacity factor of offshore wind compared to onshore wind and solar projects, along with Australia's track record of low sovereign risk for energy investment. Smith's [62] report made eight main recommendations on how to proceed with an Australian offshore wind regulatory framework, based on his best practice assessment. These recommendations were partially adopted in the eventual legislative framework. A thorough analysis of Smith's report is not possible here, but we draw attention to some important aspects that are significant for contestation over the legislative regime, along with governance arrangements [47].

One recommendation that was not adopted (1.1) identified the need for comprehensive marine spatial planning before identifying suitable offshore wind areas to understand existing and competing marine uses, as is the case in each of the comparison countries. While the report foreshadowed that competing interests would include commercial fishing, oil and gas, maritime, defence and recreational users, the report made no mention of Indigenous rights and ownership of water and land [100–102] impacted by offshore wind energy generation. That none of the six European nations that informed this early policy advice on best practice were settler-colonial nations with comparable Indigenous populations, revealed the limitations of turning to other contexts with vastly different histories to provide guidance on energy transitions.

Another recommendation (2.1) was only partially reflected in the legislation:

Potential offshore renewable zones should be subject to a transparent strategic assessment process, undertaken by a competent authority

with final determinations made by the Federal Minister for Environment.

([62]:15)

The *OEI Act* does outline transparent criteria for assessing suitable areas but does not, as Smith's report recommended, include the potential risk of development for flora and fauna and the cumulative risks of projects. Nor does it give the final power to decide on declaring a zone suitable to the Minister for the Environment. Rather, it leaves the final decision to the Minister for Climate Change and Energy, and environmental assessments to individual developers at the project level under the federal *Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)*. This is significant as the *EPBC Act* was earlier subject to an independent review by Professor Samuels who found it was inadequate in protecting Australia's environment, plagued by many issues including the inability to assess cumulative impacts of projects [103,104]. This feature of offshore wind governance would become relevant to conflict that would later unfold across regions adjacent to proposed offshore wind zones, where both supporters and opponents raised concerns around safeguarding local ecology [105]. A further recommendation of Smith's only partially reflected in the resulting legislative provisions (3.1) was that:

Sites within offshore renewable zones that meet the strategic assessment criteria may be released to market through a transparent and competitive bid round process that extracts a reasonable return to the community for the exclusive rights being offered.

([62]:15)

Although the resulting *OEI Act* contained an assessment process for private development, it adopted a “merit-based” administrative process for determining applications and not a “best price” model, such as the UK and Germany's competitive models. More significantly, the Australian model did not have clear guidelines on minimum “reasonable returns” to the community and, unlike Denmark (and later Belgium), did not allow for community co-ownership of offshore wind. This also would prove significant for how regional communities would respond to the proposal to host offshore wind, along with questions around who would ultimately benefit from the electricity and profits generated [105].

Smith also made specific recommendations on governance linked to existing oil and gas regulators that were adopted in the legislative form. He advocated for the role of the federal administrator of oil and gas, the National Offshore Petroleum Titles Administrator (NOPTA), in providing the administrative support for licences under the framework and for NOPSEMA, the statutory authority that regulates oil and gas (which Smith himself leads), be the independent regulator for offshore wind. Both these recommendations were taken up in the resulting offshore legislative framework. On the recommendation of an influential senior bureaucrat, fossil fuel administrative expertise was seen to provide the appropriate guardrails for governing an emergent oceanic renewables market.

4.4. Select strategic engagement in crafting the legislative framework

In January 2020 the Australian federal government undertook internal consultation within federal departments and agencies before releasing a discussion paper and process map on the proposed legislative framework [106]. Approximately 250 people attended the two public consultation sessions in Melbourne and Perth conducted by the then Australian Department of Industry, Science, Energy and Resources (DISER). Some 48 written submissions were received. DCCEE's website reported that the majority were in support of the proposed legislation [106] but actual submissions were not published. The temporal and spatial dimensions of this early consultation are relevant considering the conflict that later unfolded in hosting regions. Public consultation was open between 3 January and 28 February 2020—a short timeframe that

limited public debate, especially over the Australian long summer holiday and, as it transpired, the impending COVID-19 pandemic crisis. Not only was this a short period for such a significant shift in spatial use of the ocean and energy production, but both consultations were conducted in state capital cities. At this key juncture, when the very form of the regulatory regime was at stake, no consultation was conducted in places outside metropolitan centres that would later be declared hosting regions for offshore wind. This is one example of how the administrative process connected to legislative design invites select strategic actors to engage at the expense of other interests and perspectives.

4.5. Introducing the Bill to Parliament: widespread political support

On 2 September 2021, the *OEI Bill* and its associated *Offshore Electricity Infrastructure (Levies) Bill 2021* (Cth) were introduced into Parliament by Angus Taylor, then Minister for Energy and Emissions Reduction. The absence of any reference to renewable energy in the legislation's title reflected the Morrison government's reluctance to address climate change and ongoing politicalisation of renewables nationally. In his Second Reading Speech after introducing the legislation, Minister Taylor outlined the interest of developers that prompted the legislation:

Today the Morrison government is taking further steps to strengthen our economy, create jobs and opportunities for Australians, ensure the delivery of affordable and reliable power and contribute to drive down emissions... Leading developers have expressed a keen interest in investing in offshore electricity infrastructure projects in Australia, and this bill provides a licencing framework and regulatory certainty for those investments to occur.

([107]: 9211)

Although Minister Taylor's speech referred to affordable energy, neither the objects of the legislation nor its substantive provisions gave life to this purported pursuit. Rather, addressing the political crisis of energy affordability was framed ideologically as a trickle-down effect from facilitating capital:

Market competition from new electricity generation capacity will help put further downward pressure on wholesale electricity prices and ultimately lead to lower retail electricity prices as well.

([107]: 9211)

The key legitimisation strategy thence pursued by the government focused on addressing constraints in energy markets while promising job creation:

We can take advantage of evolving and emerging technologies to secure cost-effective electricity solutions for Australia. Thousands of skilled regional jobs can be created, providing both direct benefits and indirect opportunities for regional businesses.

([107]: 9211)

In an unprecedented situation, given the prior decade's bitter conflict over climate and energy policy, the Bills attracted broad political support. "The answer is blowing in the wind" declared then Leader of the Opposition, Anthony Albanese (later to become Prime Minister) expressing Labor's support based on emissions reduction and job creation. Leader of the Australian Greens at the time, Adam Bandt, spoke of offshore wind granting Australia a competitive advantage to attract "energy-hungry industry" with low-cost green energy, along with job creation ([107]:10254). Both Labor and the Greens suggested amending the Bill to include a merit criterion for licences and to add local content requirements into the scheme, but they did not push the issue. Along with emissions reduction, the narrative of offshore wind creating abundant regional jobs fitted with the Greens' and Labor's wider agendas to challenge the jobs-versus-climate conflict that had long characterised

Australia's climate policy landscape.

4.6. Parliamentary consultation on the OEI Bill

On 2 September 2021, the Bill moved to the Senate and was referred to the Environment and Communications Legislative Committee, for inquiry and reporting by 14 October 2021. Senators from different political parties could inquire into the Bill and public submissions were invited. This was the first of two instances where offshore wind would face scrutiny by a Parliamentary committee. In total, 37 submissions were received along with 100 form letters from Friends of the Earth. Several submissions referred to the rights of First Nations people under the legislation, the strongest from the Brotherhood of St Laurence, an Australian charity that seeks to address poverty, who stated that the legislation should include "acquiring their [First Nations'] consent for the project, sharing its benefits and providing employment activities" ([108] submission 24). No submissions were made directly by First Nations organisations (e.g. land councils, prescribed body corporate, or Indigenous-led not-for-profit organisations). Accordingly, it appears that First Nations people had no direct input into the legislation's design.

Another group sidelined in strategic relations that crafted the legislative framework were the general public. Their interests were represented by only a handful of politically engaged actors and organisations. The Brotherhood of St Laurence recommended that the Bill be amended to require developers to engage with local communities, along with opportunities for communities, such as providing local jobs, co-ownership and improvement of local services ([108] submission 24). Academics across law, climate policy and sustainable transitions disciplines contributed three separate submissions. Outside of academia, only one submission was from an individual member of the public, a Mr. Rocco Perna, indicating that the process of law-making had failed to mention local content or engage with the public when the legislative framework was being discussed and negotiated ([108] submission 15). Several submissions premised their support on regional-scale jobs and economic benefits. The joint ETU/MUA submission highlighted the industry's capacity to foster economic development, particularly in coal-fired power regions facing imminent decline ([108] submission 30). Demonstrating support for offshore wind, the Hunter Jobs Alliance—a community-union alliance in the Hunter NSW coal region—also emphasised proposed job opportunities ([108] submission 17:2–3).

Key stakeholders questioned the absence of baseline environmental assessments prior to an area being declared suitable for offshore wind development, including the Victorian state government, the Australian Marine Conservation Society and legal academics ([108]: for example submissions 10, 14 & 36). Concern was raised around the lack of transparency in relying on developer's assessments under the *EPBC Act* and the inability to assess cumulative impacts of projects. Despite considered proposals for amendment, the legislation was pursued in its original form and the 2021 Senate Inquiry report recommended proceeding with the legislation. In the report, Australian Greens Senator, Hanson-Young, revealed why a strong push for further amendments was absent:

While this Bill could, and should be improved, given the track record of the responsible Minister and this government to sabotage clean energy policies, the Australian Greens are concerned that forcing the government to make changes could be used as a reason to withdraw the entire legislation, putting Australia even further behind global progress and slowing our inevitable march to an economy where coal and gas remain in the ground.

([109]:46)

This brings attention to the significance of temporal pressures in consensus building around green markets and their associated legislative processes. After decades of climate inaction, progressive political actors saw any federal move on emissions reduction as heading in the

right direction. Alternatives were put on the table by state and non-state actors, but ultimately consensus was formed around the urgency to have something “workable” in place after decades of climate inaction. Senior industrial union executives interviewed for this research also noted that there was momentum to have the legislation passed before the government entered into pre-election caretaker mode, because the new Parliament would have different dynamics and consensus could not be guaranteed. So too, the government had its own temporal pressures. The *OEI Act* was passed a month before COP26 climate talks in Glasgow COP26 in November 2021, where Australia was facing mounting domestic and international pressure to address industrial decarbonisation. Multiscale configurations of social and political forces underpinned support for a specific form of policy direction through legislative means, with acute time constraints.

The final form of the legislation privileged the interests of capital and state actors committed to privatised energy markets. This in turn set the shape of the emergent market, including the direction for accumulation strategies and strategic coupling when legislative frameworks manifest in place, in hosting regions [96,110]. The legislation made no provision for co-ownership or co-benefits for hosting communities. As Australia continues to grapple with its colonial history, the *OEI Act* replicated colonialist dynamics around land and infrastructure (cf. [111,112]). Under the legislation, there was, and remains, no express right to First Nation co-design or co-ownership of assets or resources. Below we detail the limited and distinct opportunities for consultation for First Nations people and hosting communities.

The *OEI Bill* passed on 25 November 2021 along with the *OEI (Levies) Bill*, with support across the political spectrum, industrial unions and the renewable energy industry [48,113].

Across the institutional actors, the claim was that market solutions facilitated through state policy settings would be sufficient to address the ecological crisis. Timely passage of the legislation nevertheless came at the expense of broader equity objectives (cf. [114]). In the next section we unpack the legal production of space under the offshore wind legal framework: how the legislation created new legal spaces to enable infrastructure in place, yet generated conditions for conflict with hosting communities.

5. Discussion

Consistent with critical scholarship that demonstrates how market-based solutions to the ecological crisis require expanded territories [9,115], the *OEI Act* opens Commonwealth waters as a new spatial territory for renewable energy generation in Australia. Established international and constitutional arrangements define the limits of Commonwealth waters and its associated federal jurisdiction [59]. In so doing, the legislative framework enabled the rescaling of centralised power into problematic electricity markets dominated by sub-national state governance. Yet, the materiality of offshore wind, requiring transmission lines to extend into coastal waters and on to land into electricity grids governed by sub-national states, reveals the limits of territorial rescaling of ocean-based energy in a federalist context. As Bartel et al. [116] observe, legal systems are multiscale, particularly in federated contexts such as Australia. In the Gippsland region where offshore wind is most advanced, support for the industry also takes the form of sub-national policy development, including Victorian state specific targets for offshore wind, announcement of competitive auctions for transmission of projects within the Gippsland declared area and port development [117]. Temporal dynamics are also relevant, as regions declared earlier have a competitive advantage in supply chain development that can shape the regional futures of subsequent declared regions [96]. In this context, offshore wind might be understood as a multi-scale “state project” [13,14] that offers the possibility to substantially elevate Victoria's generation capacity and associated relative power to other NEM participating states.

Lawmaking is also fundamentally a “mapping exercise” [38]. The

mapping “work” of the *OEI Act* is in the production of a series of new spatio-legal relations produced through boundary making, parcellation and varying degrees of enclosure, nested within Commonwealth waters. The *OEI Act* produces two main new oceanic legal spaces. The first is the zoning of legal space that may host infrastructure at the regional scale. In the absence of marine spatial planning, this is effectively a planning decision. Establishing boundary marked zones for energy production in the ocean is not a novel relation under Australian law, used in regulating offshore oil and gas. Power is vested in the Minister to declare regions for development following consultation on a proposed footprint with hosting communities conducted by the Minister's department. The declaration is designed to signal certainty for developers, investment in port infrastructure (often undertaken by sub-national state governments), along with planning around land construction, local supply chain capacities and the need for skilled labour. There is no statutory spatial limit to this proposed area. In the first six regions proposed, the final declared size ranged from 1022 km² in the Illawarra (allowing up to 2.8 GW of production) to 15,000 km² (Gippsland with an estimated production of up to 25 GW of energy). The size of the declaration and its specific geographical coordinates have profound impacts for adjacent land-based activities and local communities [96].

The second main legal space produced by the *OEI Act* is the grant of private licences within and adjacent to the zoned area. The *OEI Act* vests power in the Minister to grant licences to private actors and networks at the individual project level. Four types of licences may be granted to private capital: feasibility; commercial; transmission; and research and development. Each has distinct spatial dimensions. Feasibility licences are bounded and parcelled (non-overlapping) areas within declared zones and provide the licence holder with the exclusive right to assess the feasibility of projects. The grant of a feasibility licence is a precondition for a commercial licence, which follows the same spatial boundaries, providing an exclusive right to build and operate infrastructure within the licence area. Transmission licences may traverse declared areas providing corridors for undersea cables. Because they cross jurisdictional boundaries from Commonwealth waters into coastal waters and connect with new and existing grid infrastructure, they engage planning and environment laws along with existing electricity market governance (i.e. Australian Energy Market Operator), itself established under co-operative federalism arrangements [37]. Research and development licences are also spatially different. They are not bounded by declared areas and are intended to authorise spatially experimental infrastructure within Commonwealth waters. Accordingly, they may be relatively small in footprint compared to the other three types of licences.

The *OEI Regulations*, instruments of delegated legislation and subject to Parliamentary scrutiny, establish much of the governance of licences, including the federal Labor's government's insertion of a “national interest” test for licence applications following its election in May 2022. It is within this test that the Minister may consider multi-scalar impacts, including place-based impacts of local job creation and competing marine interests. In accordance with the recommendations of the Smith report, the administrative arrangements for licences extend administrative powers over offshore wind to existing oil and gas governance agencies as both the Registrar and the Regulator for offshore wind. Feasibility licence holders must also undertake environmental assessments under the *EPBC Act*, assessed by the Minister for the Environment. A further feature of legal-spatial relations attached to licences, and inherited governance from oil and gas regulation, is the requirement that licence holders develop Management Plans, legally enforceable documents that establish the operational footprint of the project within the licence area. The scope and coverage of Management Plans are set out in the Regulations and are expanded on by guidelines issued by the Minister's department (i.e. Guidelines on consultation with First Nations people). Additional legal-spatial relations connected to licences under the *OEI Act* concern data management and information, along with financial security instruments, fees, and levies.

Both declared areas and licences co-exist with other marine uses, including the common law right to safe passage of shipping and First Nations native title rights under Australian law. In this sense, declared areas and licences enact partial enclosure of the ocean. Significantly, the *OEI Act* expressly contemplates that licence holders' rights will override (but not extinguish) native title, already a restricted non-allodial right constrained through statute and legal interpretation [118].

The Ministerial grant of a licence creates a new right of exclusive statutory permissions (rather than the creation of private alienable rights) over the ocean. The rights of licence holders are mapped over, and given legal priority over, other existing uses. The *OEI Act* also makes provision for two further spatial scales within a bounded licence area that represent more intensified enclosure that limit these existing rights: safety zones and protection zones. These are stacked socio-legal relations designed to prioritise offshore wind activities around infrastructure, effectively locking out competing marine users within these zones. Protection zones limit activities rather than access to the area and safety zones are a form of statutory enclosure without alienation. That is, new legal private licence rights under the *OEI Act* are subject to a network of new and existing governance arrangements. These rights also disrupt the legal ordering of existing formal legal relations in the ocean [47].

Table 1 summarises the three main stages of legal production of space for offshore wind in Australia.

This case study offers opportunities for comparative law analysis with offshore wind regulation in other nations: how legal frameworks produce oceanic space, their governance arrangements, and the specific legislative moments when place becomes “visible.”

Additionally, examining the legal production of space identifies the mechanisms of law-making, consultation (or lack thereof), and unfolding relations that precipitate conflict when infrastructure is planned in place. When law materialises in place, it unfolds over existing formal legal and economic rights (such as commercial fishing licence boundaries, native title rights) along with silent boundaries of existing ecologies, economic, legal and cultural practices. These can be understood as part of the existing “lawscape” [43] over which the offshore wind legal framework disrupts spatial rights. Extending “interlegality” to informal law [42], the accepted hierarchy is far from settled. The proposal to declare a region as suitable for offshore wind, the Ministerial decision to declare a region or issue licences along with the administrative decisions to accept Management Plans or declare protection or safety zones, all invite contestation in place. As Table 1 illustrates, across this framework, local hosting regions (including First Nations communities) are provided with limited and discrete legislative “moments” for direct engagement or visibility in decision making. As scholars have recognised, conflict may arise through these specific moments and engage with formal processes such as submissions in consultation processes, or leak out of these formal processes [119] into other forums, including court cases, public rallies and media advocacy. Offshore wind would eventually unfold through consultation processes that invited new networks of actors across scales, from grassroots activists to global fossil fuel interests, to form coalitions to challenge decisions across the governance network [47]. While the relative agency and capacities of these efforts amidst conflict are the subject of further research, the point here is to draw attention to how the co-production of law and space involves distinct spatial relations mapped over existing legal relations, triggering new networks of spatialised resistance.

Also beyond the scope of this paper are additional complexities in national and sub-national jurisdiction around environmental and planning regulation for offshore wind infrastructure (instead, see [47]). The differing approaches of sub-national states across offshore wind zones in fostering or hindering the development of an industry, including port development, transmission infrastructure and workforce development, offers opportunities for further research. Nor does this paper analyse the effectiveness and degree of community support (or lack thereof) for offshore wind, subsequent to the legislative framework's creation.

Future lines of inquiry include how the legislative framework manifested on the ground, and the different capacity of state and local actors to initiate transition pathways in hosting locations [120]. Drawing upon recent debates on regional agency [121,122], our forthcoming extension of this analysis focuses on variations in regional capacities and responses to offshore wind. Another limitation of this paper relates to the how strategic relations occur outside of documented processes. Here we relied heavily on publicly accessible records and desktop analysis. Integrating evidence from our interviews with additional key strategic actors was beyond scope here but would provide supplementary insights into the more informal aspects of strategic relations in law-making and market shaping.

6. Conclusion

At the intersection of legal geography and critical energy transitions research, we traced the genesis of Australia's emergent offshore wind sector enabled through a legislative framework. The material, socio-economic and biophysical conditions in one region, Gippsland, plus formative connections to new networks of capital, were generative of the new legislative regime. Place was generative of law [21]. Select strategic actors working through a multitude of administrative and legislative structures actively crafted the *OEI Act*. Within these strategic relations, consensus was built around a particular form for the new offshore wind sector—one that coordinated their overlapping interests and agendas. Strategic relations were constrained through temporal pressures and political processes which further excluded other actors and their interests. In consequence, law-making produced new oceanic legal spaces for capital accumulation, reshaping state powers to intervene in energy markets in a federalist context while replicating the hegemonic power of capital in Australia's already complicated and privatised energy markets. Of particular significance to the contestation that unfolded, the legislative framework did not provide for baseline assessments of environmental impacts, made no provision for public ownership nor did it provide for co-design or co-ownership with First Nations people. This is not to say that opportunities cannot arise for collaboration and co-ownership with First Nations people and hosting communities; indeed, some are unfolding in Gippsland, where offshore wind is most advanced [123]. Nevertheless, the federal legislative framework does not safeguard substantive rights of Indigenous or wider community ownership, replicating existing extractive relations in Australia's energy governance.

Our analysis examines how the legal frameworks produced new legal spaces through declared areas and private licences (including more enclosed protection and safety zones). These legal spaces are governed by a combination of existing and new arrangements across multiple agencies and scales that, at least with respect to licences, mirror oil and gas regulation in Australia. While the interlegality [38] of these governance arrangements may operate across agencies and scales with relatively little conflict, the possibility for conflict arises when law materialises in place. New legal spaces produced through legislative powers unfold over and disrupt the textured lawscape of the ocean, disrupting existing socio-legal relations. This invites conflict in place where publics hold not only a multitude of different relations to the ocean, but have varying degrees of energy literacy and lived experiences of change regionally because of capital-development.

Notwithstanding limitations and the need for further research, there are several implications of this study. We draw attention to the political process of lawmaking, borne from place-based conditions and crafted through strategic relations. The resultant legislative framework defines the shape of the new sector in the interests of its architects. We also invite greater attention to the spatialised impacts of transition lawmaking and how they materialise in place where infrastructure is hosted. In this case, lawmaking marked new oceanic territories for energy production and profit, albeit in a problematic fashion that reproduced unequal power relations. Legislative frameworks can enable

Table 1
Stages of legal production of space for offshore wind in Australia.

Stage	Key mechanism	Process	Governance	Place visibility	Sites of contestation	Legal-socio effect
1. Territorialise new spatial sites for offshore wind in federal waters	Legislation providing for a licencing framework - <i>OEI Act</i> and associated subordinate legislation	Institutional state and non-state actors engage in a multitude of forums (including, administrative and legislative processes) to determine the shape of the legislation	Passed by federal legislature	Shaped by place-based conditions in Gippsland. Opportunities for consultation on Bill with other hosting regions not pursued.	Possibility of state/federal conflict. Opportunities for contestation over shape of the legislation through legislative development process... Provisions in the Bill subject to Parliamentary scrutiny	Elite and institutional actors shape legislation within their overlapping interests. Advocacy for more equitable framework overlooked for political expediency. Reshapes state power through expanding federal control over energy production.
2. Mapping and zoning enclosed areas for offshore wind production under legislative regime	Minister declares areas suitable for offshore wind.	Federal department identifies proposed area through cartographic mapping. Minister makes final decision on zone.	Minister must give notice of proposed area, consult with other specified ministers and the public (s18,19) before making final decision.	Public consultation not less than 60-day. Minister must consider public submissions before making a decision (ss 17 & 18 <i>OEI Act</i>).	Contestation at local level due to competing use, place-attachment, contested values and visions for the region. Contestation may be expressed through formal legislative process (e.g. public submissions) or spill out into non-formal spaces. Contestation may enrol and become entangled with other political agendas across scales. Key actors (i.e. subnational states and local governments, First Nations people) may or may not engage.	Mapping is a political tool of spatial production for offshore wind. Offshore wind zones are mapped over existing social, legal and economic relations in the ocean and adjacent areas.
3, Grant of private legal rights and interests for offshore wind within and adjacent to declared areas	Licences issued to private developers. Feasibility and commercial licences contained to declared areas. Spatially bounded and parcelled and non-overlapping. Transmission along with research and development licences are not bounded by declared areas	Minister invites applications for licences and makes final decision.	<i>OEI Act</i> and Regulations set out 4 criteria for Minister to consider when assessing applications. Registrar considers applications (staffed through NOPTA) and advises Minister, who makes final decision. Feasibility licence holders must obtain approval under <i>EPBC Act</i> (Federal Environment Minister) and have approved Management Plans (OEI Registrar) before applying for commercial licence. Register administers the licence. Transmission licences engage sub-national state planning and environment laws, along with electricity governance (AEMO). Licence subject to management plan must provide financial security to the Cth (Chapter 4, Div 4 <i>OEI Act</i>)	No public right to consult on licence decision or standing to challenge decision through judicial review. National interest test for licence includes range of factors that Minister may consider (discretionary). factors including impacts on local jobs and supply chains in hosting region, along with competing marine uses (<i>OEI Regs</i> ss 25, 26(4)). Management Plans require consultation with specified people and organisations, including First Nations people with rights over licence area or adjoining land (Part 3, <i>OEI Reg</i>). Consultation is ongoing.	Potential for competition between developers over spatial sites for projects. Unveiling of project proposals under feasibility licences may give rise to conflict at local level by local communities impacted by projects. Navigated through Management Plans and <i>EPBC Act</i> applications.	Grant of legal rights over ocean space asserts hierarchy over existing legal rights, economic and social relations within licence area.

massive green infrastructure in new territories, reconfiguring labour and capital, land and ocean. Yet if the power relations embedded in these structures replicate existing capital-state-nature dynamics, opportunities evaporate for transformative change, inviting conflict as law materialises on the ground.

CRedit authorship contribution statement

Natasha Larkin: Writing – original draft, Formal analysis, Conceptualization. **Chris Gibson:** Writing – original draft, Supervision, Formal analysis, Conceptualization. **Chantel Carr:** Writing – review & editing, Supervision, Funding acquisition. **Natascha Klocker:** Writing – review & editing, Supervision.

Declaration of competing interest

The authors declare that they have no known competing financial interests or personal relationships that could have appeared to influence the work reported in this paper.

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Data availability

The data that has been used is confidential.

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