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Submission - "Protecting the Spirit of Sea Country Bill 2023"

Thank you for the opportunity to provide input into this committee inquiry. We write as a group of Indigenous and non-Indigenous researchers with lengthy experience working closely with First Nations on Sea Country issues, and particularly in fisheries.

Firstly, we note, show respect to and value highly the presence of submissions from ANTAR, NNTC, National Sea Country Alliance and the Kimberley Land Council, who each represent in different ways the rights, responsibilities and interests of Traditional Owners of Sea Country.

In this submission we highlight two brief points which we believe are of value to the considerations of the Committee, and which are based on our knowledge and efforts as researchers on First Nations led fisheries and Sea Country governance. Our aim is to augment the inputs of representative First Nations organisations by providing information that may prove relevant to both the Standing Committee and Traditional Owners of Sea Country.

- Publicly available statements since the 1980s relating to First Nations rights, responsibilities and interests in Sea Country.
- Legal aspects of the Tipakalippa case of value to considering the PSSC Bill.

[First Nations rights, responsibilities and interests offshore fisheries and Sea Country managed by the Commonwealth](#)

As part of our ongoing research interests we have collated 151 documents of relevance to considering the rights, responsibilities and interests First Nations hold in Sea Country, with a particular emphasis on offshore jurisdictions and the fisheries sector. From this 151 we have selected 51 for through review, covering a range of jurisdictions and types of documents, to generate the initial findings we share below. A list of these documents is provided as an appendix to our submission.

Documents included in our review to date cover public inquiries and policy initiatives since the mid-1980s, and Indigenous led Sea Country and Indigenous Protected Area planning documents produced since c.2000. Our focus in reviewing these has been to highlight those publicly available statements that have been made by First Nations related to Sea Country over a very long period of time, that are readily available, make consistent points, and that have been brought to the attention of governments on a number of occasions.

We highlight here 6 broadly held positions of First Nations with respect to their rights, responsibilities and interests in Sea Country, with a particular emphasis on fisheries and the offshore zone. In this regard we note that many of the key themes mentioned below will be equally applicable to oil and gas industries as to fisheries, and that some fisheries specific issues will be relevant to regulatory regimes in the oil and gas industry.



These 6 themes are:

- Recognise connections to Country and the primacy of Indigenous people, including protection of fishing and Sea Country rights. Key aspects of this theme include the holistic and integrated nature of Country, and the consistent identification of offshore areas as a part of Country among coastal First Nations.
- Recognise responsibilities for governance and custodianship that First Nations hold in Sea Country, including implementing shared decision-making on priority issues.
- Share in the economic benefits of commercial industries operating on Sea Country.
- Protect and maintain First Nations fishing practices, and associated knowledge.
- Protect and maintain species of significance to First Nations, and associated knowledge.
- Reduce the impacts of non-Indigenous fisheries and other industries operating on Sea Country.

Each of these themes have considerable detail associated which we intend to elaborate on and publish at a later date.

[Legal aspects of the Tipakalippa case, and its implications for offshore industries](#)

We would like to draw the Committee's attention to two aspects of the Tipakalippa case which represent an advance in considering First nations rights, responsibilities and interests in Australian law.

Firstly, that the Tipakalippa judgement rested on the application of Ecologically Sustainable Development Principles under the Environmental Protection and Biodiversity Conservation (EPBC) Act 1999. In the EPBC Act the term 'environment' is defined broadly to include:

- (a) ecosystems and their constituent parts, including people and communities; and
- (b) natural and physical resources; and
- (c) the qualities and characteristics of locations, places and areas; and
- (d) heritage values of places; and
- (e) **the social, economic and cultural aspects of a thing mentioned in paragraph (a), (b), (c) or (d).**

In *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193 the Full Federal Court had to interpret the phrase "functions, interests or activities" in relation to a regulation pertaining to consultation. The consultation was concerned with the carrying out of offshore petroleum or greenhouse gas storage activity consistent with, inter alia, the ESD principles. The Court considered what "interests" meant in that context. Drawing on the *Cultural Heritage Act* and the definition of "environment" in the EPBC Act, the Court held that the "interests" of Mr Tipakalippa's and the Munupi clan in the EMBA and the marine resources closer to the Tiwi Islands which arose from traditional cultural connection with the sea and without any proprietary overlay were "immediate and direct" and were "interests of a kind well known to contemporary Australian law". The Court held at [74];

“the law recognises the kind of interests that Mr Tipakalippa contends required Santos to consult with him and the Munupi clan. Reference to the Heritage Protection Act demonstrates that by this Act the federal Parliament has expressly contemplated the protection of areas of the sea from activities harmful to the preservation of Aboriginal tradition. The Parliament has done so without requiring the existence of particular proprietary interests; rather requiring only the existence of a connection by Aboriginal tradition”.

It is our understanding then that the Tipakalippa judgement represents the first instance in which a court has:

- Considered the application of ESD principles in terms of those aspects of the definition of ‘environment’ which cover social, economic or cultural dimensions of the environment, and particularly those that relate to First Nations interests in Sea Country.
- Confirmed that Australian law, in applying ESD principles, clearly recognises interests in marine resources arising from cultural connection as capable of falling within the legal definition of “interests” for the purposes of interpreting legislative regimes for the regulation of social interests (such as licencing and permit systems).¹

This judgement therefore confirms the broad relevance of Indigenous social, economic and cultural interests to regulatory approvals processes under the EPBC Act. This is likely to have broad implications for environmental approvals across sectors. We note this is consistent with recent interpretations of related provisions in similar jurisdictions internationally.²

Our view on the proposed bill

On the basis of these inputs we wish to highlight the following.

1. Protecting the Spirit of Sea Country (PSSC) Bill, if designed appropriately, provides an opportunity to develop a coherent response to Tipakalippa that supports the long-stated wishes of Traditional Owners of Sea Country, and can provide certainty to industries operating in the offshore zone.
2. Adding Traditional Owners as relevant persons, and establishing clear consultation standards, would support positive outcomes under point 1.
3. Based on the available historical information about First Nations interests in Sea Country, and the inclusion of **social, economic and cultural aspects** of the environment as included in ESD principles under the EPBC Act, identification of these interests under the offshore regulatory regime should not be restricted to cultural heritage (whether underwater or intangible). First Nations interests in the offshore zone include responsibilities of custodianship to Sea Country *as a whole*. They are not restricted to those aspects that may be considered a part of their cultural heritage. These interests also extend to the maintenance of a viable Indigenous economy, such as through continuation of Indigenous fishing practices, or participation in economic development opportunities on Sea Country. To fully meet the publicly stated aspirations of Traditional Owners over many years, impacts on these and other interests should be

¹ *Santos v Tipakalippa* [2022] FCAFC 193 and *Kia v West* [1985] HCA 81.

² See for example, recent comments by the NZ Supreme Court, where the Court was considering the application of the principles of tikanga Māori in relation to standing and the rule of ‘special damage’ in the tort of public nuisance (*Michael John Smith v Fonterra Co-Operative Group Limited* [2024] NZSC 5, [182] onwards).



considered in regulatory processes, and not be restricted to what may be included within a narrow definition of interests focused only on underwater and/or intangible cultural heritage.

We would be pleased to provide the Committee with further information on these issues, especially as our research and review work progresses.

Sincerely

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List of documents comprehensively reviewed: Indigenous led planning initiatives and Commonwealth inquiries with relevance to Indigenous fisheries and Sea Country

Document type	Document name	Organisation	Year	Region	State/Territory
Healthy Country/Sea Country/Whole-of-Country Plan	Barni-Wardimantha Awara Yanyuwa Sea Country Plan	Mabunji Aboriginal Resource Association on behalf of Yanyuwa Traditional Owners	2007	Gulf of Carpentaria	Northern Territory
	Kurtjar Land and Saltwater Country Plan	Kurtjar People and the Carpentaria Land Council Aboriginal Corporation	2014	Gulf of Carpentaria	Queensland
	Balanggarra Healthy Country Plan 2012 - 2022: One mob together for Country	Balanggarra Aboriginal Corporation/Kimberley Land Council	2011	Kimberley	Western Australia
	Dambimangari Healthy Country Plan 2012 – 2022	Dambimangari Aboriginal Corporation	2012	Kimberley	Western Australia
	Djelk Healthy Country Plan 2015 – 2025	Djelk Rangers	2015	Central Arnhem Land	Northern Territory
	Gunaikurnai Whole-of-Country Plan	Gunaikurnai Land and Waters Aboriginal Corporation	2015	Gippsland	Victoria
	Karajarri Healthy Country Plan 2013 - 2023: Palanapayana Tukjana Ngurra 'Everybody looking after country properly'	Karajarri Traditional Lands Association	2014	Kimberley	Western Australia
	Kooyang Sea Country Plan	Framlingham Aboriginal Trust and Winda Mara Aboriginal Corporation	2004	South-West Victoria	Victoria
	Malaya Country Plan 2019 – 2029	Mayala Inninalang Aboriginal Corporation RNTBC	2019	Kimberley	Western Australia
	Preminghana Healthy Country Plan 2015	Tasmanian Aboriginal Centre	2015	takayna (North-West Tasmania)	Tasmania
	tayaritja Healthy Country Plan	Tasmanian Aboriginal Centre	2020	tayaritja/Furmeaux Islands	Tasmania
	putalina Management Plan 2020	Tasmanian Aboriginal Centre	2020	Huon Valley	Tasmania
	Ngarrindjeri Nation Yarlular-Ruwe (Sea Country) Plan: Caring for Ngarrindjeri Sea Country and Culture	Ngarrindjeri Tendi, Ngarrindjeri Heritage Committee, Ngarrindjeri Native Title Management Committee	2006	Southern Central South Australia	South Australia
IPA Management Plan, proposal or reporting	Thuwathu/Bujimulla Indigenous Protected Area Management Plan	Carpentaria Land Council on behalf of Traditional Owners of the Wellesley Islands	2016	Gulf of Carpentaria	Queensland
	Nijinda Durlga (Gangalidda) Indigenous Protected Area Management Plan	Carpentaria Land Council Aboriginal Corporation on behalf of the Gangalidda People	2015	Gulf of Carpentaria	Queensland
	Dhimurru Indigenous Protected Area Management Plan 2015 – 2022	Dhimurru Aboriginal Corporation	2015	Northeast Arnhem Land	Northern Territory
	Girringun Indigenous Protected Area Management Plan 2013 - 2023	Girringun Aboriginal Corporation, Bandjin, Djiru, Girramay, Gugu Badhun, Gulnay, Nywaigi, Warrgamay and Warungnu Traditional Owners	2013	Cassowary Coast/Far North Queensland	Queensland

	South East Arnhem Land Indigenous Protected Area Plan of Management 2016 – 2021	Northern Land Council	2015	South East Arnhem Land	Northern Territory
	Uunguu Indigenous Protected Area: Wundaagu (Saltwater) Plan of Management 2016 – 2020	Wunambal Gaambera Aboriginal Corporation	2017	Kimberley	Western Australia
	Pulu Indigenous Protected Area Plan of Management	Pulu IPA Committee	2009	Torres Strait	Queensland
	Warraberalgal and Porumalgal Indigenous Protected Area Plan of Management 2018 - 2028	Warraberalgal (Torres Strait Islanders) Registered Native Title Body Corporate and Proumalgal (Torres Strait Islanders) Registered Native Title Body Corporate. Torres Strait Regional Authority	2018	Torres Strait	Queensland
	Yawuru Indigenous Protected Area Plan of Management 2016 – 2026	Yawuru RNTBC	2014	Kimberley	Western Australia
	Anindilyakwa Indigenous Protected Area Plan of Management 2016	Anindilyakwa Land Council	2016	Northwest Gulf of Carpentaria/East Arnhem Land	Northern Territory
	Bardi Jawi Indigenous Protected Area Management Plan 2013 – 2023	Bardi Jawi Niimidiman Aboriginal Corporation RNTBC	2013	Kimberley	Western Australia

	Nyangumarta Warran Indigenous Protected Area Management Plan, 2022 – 2032	Nyangumarta Warran Aboriginal Corporation and Yamatji Marlpa Aboriginal Corporation	2022	Northwest Pilbara and southwest Kimberley	Western Australia
	Ugul Malu Kawal Indigenous Protected Area Plan of Management 2018 - 2028	Maluilgal (Torres Strait Islander) Corporation RNTBC on behalf of Koey Mabaygal and Badulgal, Boigulgal, Dauanalgal, Goemulgal and Saibailgal Traditional Property Owners of Warul Kawa / Leberen, Awaial Kawa / Kiss Ilan and NorWes Sandbank / Turu Cay, in association with Torres Strait Regional Authority Land & Sea Management Unit	2017	Torres Strait	Queensland
	Arafura Swamp Indigenous Protected Area: A proposal for a new Northern Territory IPA	Arafura Swamp Rangers Aboriginal Corporation	2018	Northeast Arnhem Land	Northern Territory
	Tiwi Islands Sea Country: An information booklet supporting Tiwi people's aspirations for a Marine Indigenous Protected Area	Tiwi Land Council	2021	Tiwi Islands	Northern Territory
	lungtalanana/Clarke Island Land Management Update May 2022	Tasmanian Aboriginal Centre	2022	Furneaux Islands	Tasmania

Indigenous corporate, business strategic or research plan	Northern Land Council Corporate Plan 2023-24	Northern Land Council	2023	Top end, Northern Territory	Northern Territory
	Butchulla Aboriginal Corporation Strategic Business Plan 2020 – 2030	Butchulla Aboriginal Corporation	2020	K'gari (Fraser Island), South-East Queensland	Queensland
	Mandingalbay Yidinji Aboriginal Corporation Strategic Business Plan 2013 – 2018	Mandingalbay Yidinji Aboriginal Corporation	2013	Far North Queensland	Queensland
	Yirralka Rangers Business Plan 2013 – 2016	Yirralka Rangers	2013	Yolgnu Country, Northeast Arnhem Land	Northern Territory
	Corporate Plan 2017 - 2030: Investing in our Shared Future United in Focus, Spirit, Culture and Identity	Port Curtis Coral Coast Trust Limited	2017	Central Queensland	Queensland
	Tiwi Land Council Corporate Plan 2022 – 2026	Tiwi Land Council	2022	Tiwi Islands	Northern Territory
	Wreck Bay Aboriginal Community Council Corporate Plan 2023 – 2024	Wreck Bay Aboriginal Community Council	2023	South Coast NSW	New South Wales
	Anindilyakwa Land Council 15 Year Strategic Plan (2012 - 2017)	Anindilyakwa Land Council	2012	Northwest Gulf of Carpentaria/East Arnhem Land	Northern Territory
	Jabalbina Strategic Plan 2017 - 2022	Jabalbina Yalanji Aboriginal Corporation	2017	Far North Queensland	Queensland
	Strategic Plan (2021 - 2026)	Ngiyambandigay Wajaarr Aboriginal Corporation	2021	North Coast NSW	New South Wales
	Gunditj Mirring Traditional Owner Aboriginal Corporation (GMTOAC) Research Principles and Guidelines	Gunditj Mirring Traditional Owner Aboriginal Corporation	2022	Far south-western Victoria and south-east South Australia	Victoria, South Australia
Species-specific plan or strategy	Cape York Turtle and Dugong Regional Plan	Traditional Owners of Cape York with support from Balkanu Cape York Development Corporation	2013	Cape York, Far North Queensland	Queensland
	Dugong and Marine Turtle Handbook: Indigenous and scientific knowledge of dugong and marine turtles in northern Australia	North Australian Indigenous Land and Sea Management Alliance (NAISMA)	2006	North Australia	Western Australia, Northern Territory, Queensland
Commonwealth Inquiry or government supported initiative	Marine Fisheries and Aquaculture: Productivity Commission Inquiry Report	Commonwealth of Australia	2016	Australia	Australia
	Sea Country - an Indigenous perspective: The South-east Regional Marine Plan Assessment Reports	National Oceans Office: Commonwealth Government of Australia	2002	South-East Australia	Victoria, South Australia, Tasmania, New South Wales

	Living on Saltwater Country: Review of literature about Aboriginal Rights, use, management and interests in northern Australian marine environments	National Oceans Office: Commonwealth Government of Australia	2004	Australia	Australia
	Coastal Zone Inquiry: final report. Chapter 10	Productivity Commission: Australian Government	1993	Australia	Australia
	A Voice in All Places: Aboriginal and Torres Strait Islander interests in Australia's Coastal Zone	Resource Assessment Commission for the Coastal Zone Inquiry.	1993	Australia	Australia
	Saltwater Country Aboriginal and Torres Strait Islander Interest in Ocean Policy Development and Implementation: Socio-cultural Considerations - Issues Paper 6	Department of Primary Industries and Energy, Australia. Environment Australia	1997	Australia	Australia
	Livelihood values of Indigenous customary fishing: Final report to the Fisheries Research and Development Corporation.	Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS)	2018	Australia	Asustralia
	National Workshop on Indigenous Engagement in Fisheries: Summary Proceedings and Development Corporation.	Indigenous participants from around Australia under UTS-FRDC funded project "Development of an engagement strategy for Indigenous fishing interests with a focus on the Commonwealth"	2023	Australia	Australia
	National Workshop on Indigenous Engagement in Fisheries: Summary Proceedings	Indigenous participants from around Australia under UTS-FRDC funded project "Development of an engagement strategy for Indigenous fishing interests with a focus on the Commonwealth"	2023	Australia	Australia
	Pathway to Truth-Telling and Treaty: Report to Premier Peter Gutwein	Tasmanian Government Inquiry	2021	Tasmania	Tasmania