



Australian Government
Indigenous Land and Sea Corporation



The ILSC GROUP

PEOPLE. COUNTRY. OPPORTUNITY.

23 February 2024

Committee Secretary
Senate Standing Committees on Environment and Communications
PO Box 6100
Parliament House
Canberra ACT 2600

Via email ec.sen@aph.gov.au

Dear Committee

Re: Protecting the Spirit of Sea Country Bill 2023

Thank you for the opportunity to provide a submission on behalf of the Indigenous Land and Sea Corporation (ILSC).

The Protecting the Spirit of Sea Country Bill 2023 (the Bill) seeks to amend the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) so that First Nations people are adequately consulted on the preparation of environment plans for proposed offshore energy projects. The Senate referred the Bill to the Environment and Communications Legislation Committee for report by 28 June 2024.

The Explanatory Memorandum for the Bill sets out that the core purpose of the Bill is to legislate the principles of *Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority (No 2)* [2022] FCA 1121 and the appeal heard by the Full Court of the Federal Court (*Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193). These are:

- Including Traditional Owners and knowledge holders in First Nations communities in the definition of 'Relevant Person'.
- The requirement for standards of consultation to be created; and
- Ensuring that underwater and intangible cultural heritage is identified in offshore project proposals and environment plans, alongside an evaluation of the impacts and risks that this project might pose and any potential alternative options.

Our feedback addresses those three objectives.

1. The Indigenous Land and Sea Corporation

The ILSC is a corporate Commonwealth entity under the *Public Governance, Performance and Accountability Act 2013* (Cth), first commencing as the Indigenous Land Corporation on 1 June 1995. It was established by the *Aboriginal and Torres Strait Islander Act 2005* (Cth) in response to the Mabo judgement (1992) and as such complements the *Native Title Act 1993* (Cth) in recognition of common law native title rights to land.

The ILSC acts as a strategic funder and facilitator, supporting First Nations people to access, use, and Care for Country on their own terms to achieve their aspirations; supports First Nations people to leverage, and continue to grow their assets and rights to land and water, extend beyond grant-making and enable First Nations groups to take advantage of opportunities that optimise the use and Care of Country now and into the future; and improve our service to First Nations people and continue our efforts to return power and control to First Nations communities by divesting our operating businesses and landholdings.

The ILSC works in partnership with First Nations corporations and peoples towards the generation of positive outcomes with and for First Nations peoples through the use, management, care and improvement of Country.

In doing so, the ILSC realises its vision for First Nations Australians to enjoy the rightful entitlements, opportunities and benefits that the return of Country and its management brings.

2. The ILSC's National Indigenous Land and Sea Strategy

Under the current (2023-2028) iteration of our key statutory planning document, the National Indigenous Land and Sea Strategy (NILSS), the ILSC commits to grow the resources and power of First Nations people. Our goal is to advance a First Nations economy that is grounded in self-determination, Country, and culture. We are doing this because we have heard First Nations people loud and clear, and we have also observed First Nations-led movements towards self-determination.

In 2022, we embarked on our largest ever effort to listen to Aboriginal and Torres Strait Islander people's aspirations for Country and thoughts on the current and future role of the ILSC. Everything in the NILSS comes from what First Nations people told us they needed.

Country represents the lands, waterways, seas, skies to which First Nations people are connected. It is so much more than a physical place, containing complex ideas and meaning about lore, place, custom, language, economy, spiritual belief, cultural practice, wellbeing, family, and identity. It is inseparable from people, community, and self, and cannot be separated into land, water and sea – it is all one.

The NILSS is underpinned by three guiding principles – Caring for Country, self-determination, and partnership. These principles reflect First Nations culture and the aspirations we heard through our national consultation and reinforce one other.

What we heard, and these three guiding principles inform our response below.

3. ILSC comments on the proposed amendments

The ILSC supports in principle amendments which are consistent with Free, Prior and Informed Consent (FPIC) principles, as established by the Declaration on the Right of Indigenous Peoples (UNDRIP). The Bill's Statement of Compatibility with Human Rights identifies that the Bill strengthens rights contained in Articles 11 and 12 of UNDRIP outlining rights for First Nations peoples to practice their cultural traditions and customs, and the right to protect cultural sites.

The ILSC supports reforms that contribute towards the realisation of outcomes that further First Nations Communities' ability to Care for Country, remove barriers to self-determination, and provide autonomy of

choice in how they work in partnership to advance their land and sea interests including the ability to engage in economic development and financial empowerment.

A federal review of Indigenous Cultural Heritage Protections is currently underway,¹ meaning interactions between amended Acts and changes to the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) as proposed in this Bill are unclear. The federal review provides opportunity for developing and implementing overarching First Nations Cultural Heritage Protections that could provide guidance beyond the scope of this Bill and prioritise engagement with First Nations communities where their Cultural Heritage may be impacted. Further, it should require First Nations voices to be heard above other competing values and interests.

As has been the case with Land Rights and Native Title, First Nations people have proven to be appreciative of the need to equitably share in natural resources. The need for this more equitable arrangement in the management of our nation's resources is upon us now.

Including Traditional Owners and knowledge holders in First Nations communities in the definition of 'Relevant Person'

The ILSC considers this amendment to be necessary to ensure First Nations peoples are engaged as part of preparing environment plans to be submitted to the National Offshore Petroleum Safety and Environmental Management Authority.

Where Traditional Owners and knowledge holders are not defined by a statutory regime, the ILSC recommends proponents seek advice of the Native Title Representative Body or Service Provider with jurisdiction in the relevant area as to the appropriate party/parties from whom to seek informed active consent or authorisation.

The requirement for standards of consultation to be created

The ILSC recognises the rights of First Nations peoples to self-determination and to freely pursue their economic, social, and cultural development. In doing so, the ILSC also recognises the right of First Nations peoples to give or deny their FPIC for projects that materially affect their land and their natural resources (as protected in UNDRIP).

The ILSC submits that a meaningful engagement process should be undertaken which:

- takes place over a timeframe of at least eight weeks;
- includes face to face meetings in locations convenient to First Nations peoples;
- includes communication material that can be understood by those who do not speak English as a first language;
- is structured so as to allow the participation of as many Native Title bodies, common law holders, land holders and Traditional Owners as possible;
- provides support for First Nations people to attend and participate, including through providing adequate resourcing;

¹ See for example, First Nations Heritage Protection Alliance, '*Cultural Heritage Reform*', <https://culturalheritage.org.au/cultural-heritage-reform/> and Dr Evan Hamman, Law and Bills Digest, Parliamentary Library Briefing Book, '*Protecting Indigenous cultural heritage*' https://www.aph.gov.au/About_Parliament/Parliamentary_departments/Parliamentary_Library/pubs/BriefingBook47p/ProtectingIndigenousCulturalHeritage

- is undertaken in a culturally safe way for all peoples; and
- includes direct consultation with First Nations organisations that may not be land holders but who have a direct interest in the proponent's proposed activities.

Proponents should be required to undertake consultation being open, transparent, accountable and respectful, and provide autonomy of choice to First Nations peoples in how they may wish to work together. The onus should be placed on proponents to meet cultural competency standards prior to undertaking First Nations engagements, which would also improve cultural competency across the sector.

In carrying out consultation, proponents should consider barriers to self-determination and actively seek to remove them, support opportunities for First Nations people to move towards self-determination, and to influence others to uphold and maximise self-determination. Representative institutional arrangements for First Nations voices as they relate to Sea Country are in their infancy, with (in some cases) limited experience in articulating rights and interests in cultural heritage, as until now, the focus has been on land-based interests. Building this capacity should be supported to better enable meaningful consultation and protection of cultural heritage.

In considering standards for consultation, proponents should prioritise efforts to uphold the principles of FPIC per the scope of the environmental assessment. Where Traditional Owners and First Nations knowledge holders' consent to an activity, the proponent should undertake to, to the extent practicable:

- maximise the extent to which Traditional Owners rights to determine the use, care and management of their Country are maintained;
- maximise the benefit to Traditional Owners from the activity;
- ensure that the activity is conducted to minimise any effect of reducing the enjoyment of rights and interests existing on behalf of Traditional Owners (through a Statutory regime); and
- ensure that the activity promotes the aspirations of Traditional Owners for Country.

Where Traditional Ownership is contested, equitable engagement should be prioritised across all parties and have regard to the potential to impede the enjoyment of Native Title rights in the case of a future determination over the project area.

The process for seeking consent, outcomes and rationale for decision-making must be documented as a part of the decision recommendation provided under the environmental assessment.

Ensuring that underwater and intangible cultural heritage is identified in offshore project proposals and environment plans, alongside an evaluation of the impacts and risks that this project might pose and any potential alternative options.

The ILSC is supportive of the insertion of a definition of 'intangible cultural heritage' into the Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009 which is based on the definition contained within the UNESCO *International Convention for the Safeguarding of the Intangible Cultural Heritage*. The ILSC is also supportive of the insertion of a definition of 'underwater cultural heritage', which is based on the definition contained in the *Underwater Cultural Heritage Act 2018* but has been amended slightly to include specific references to First Nations underwater cultural heritage.

It is important however to identify that First Nations people's definition of 'Country' does not separate land from water but recognises the living connection between them. References to 'underwater cultural heritage' include a connection between intangible cultural heritage and physical archaeological sites and artefacts. The definition for 'intangible cultural heritage' does not appear to extend to recognising the tangible materials associated with cultural practice, thus separating the practical relationship between 'tangible' and 'intangible' in land and sea heritage protection.

It is our submission that the amendments proposed in the Protecting the Spirit of Sea Country Bill 2023 should require proponents to undertake the necessary due diligence, and support First Nations people to look after Country their way. It should also strengthen the ability of proponents to recognise the custodianship of past generations, and act with future generations in mind.

Should you or your department require any further information or detail on the proposals raised in this submission please contact my office directly via Rebecca Hayden, General Manager Policy, Strategy and Performance

Yours sincerely

Joe Morrison
Group Chief Executive Officer