

KIMBERLEY LAND COUNCIL

ABN 96 724 252 047 ICN 21



19 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

To whom it may concern,

Kimberley Land Council submission on the Protecting the Spirit of Sea Country Bill 2023

1. The Kimberley Land Council (**KLC**) welcomes the opportunity to provide a submission to the Environment and Communications Legislation Committee (**Committee**) inquiry into the *Protecting the Spirit of Sea Country Bill 2023 (Bill)*.

Who we are

2. The KLC is an Aboriginal organisation established in 1978 for the purpose of working for and with Traditional Owners to get back country, care for country and get control of the future. As the native title representative body for the region, the KLC has achieved native title determinations across 97 per cent of the Kimberley, and there are currently 31 prescribed bodies corporate (**PBCs**) in the Kimberley holding and managing native title rights and interests. The KLC works with PBCs to expand capacity and capability, as well as economic development opportunities and activities. The KLC also supports 18 Aboriginal ranger groups through the Kimberley Ranger Network, and conducts a range of land and sea management activities. In its representative capacity, the KLC plays a leading role amplifying the views and voices of Kimberley Aboriginal people locally, nationally and internationally.

Protecting the Spirit of Sea Country Bill

3. The KLC supports the intent of the Bill to legislate the key principles of the Federal Court's decision in *Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority (No 2)* [2022] FCA 1121 and the Full Federal Court's appeal decision in *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193 (**Tipakalippa**). The *Tipakalippa* case highlighted significant shortcomings in the current offshore consultation regime and provided guidance on the consultation requirements for offshore projects with respect to Traditional Owners.
4. Since the Bill was introduced, the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* have been repealed and replaced by the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2023 (regulations)*. While there appear to be no substantive changes in policy between the 2009 and the 2023 regulations, the KLC notes that if the Bill progresses, it should be reintroduced with amendments referring to the new regulations.

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Part 1 – Minimum requirements for consultation with traditional owners and knowledge holders

5. The Bill requires that regulations “must provide for the free, prior and informed consent of traditional owners consistent with the United Nations Declaration on the Rights of Indigenous Peoples as a condition for acceptance of an environment plan”.
6. As recognised through the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**), free, prior and informed consent (**FPIC**) is a key principle underpinning the fundamental human rights of Indigenous people. UNDRIP requires FPIC to be realised in a number of circumstances, including prior to the approval of any project affecting Indigenous peoples’ lands or territories and other resources, “particularly in connection with the development, utilization or exploitation of mineral, water or other resources”.¹
7. The KLC submits that FPIC requires consent to be given without force, manipulation or coercion, based on adequate and relevant information, and with ample time to consider and provide the consent, taking into account the cultural protocols and practical requirements of the relevant Traditional Owner community, acting through their representative body.
8. In line with UNDRIP, the KLC submits that Traditional Owners have the right to determine and implement strategies for the development of their own resources and lands and that any activities done by governments or lawfully by third parties – including offshore petroleum projects – may only be done with the FPIC of Traditional Owners. If development occurs without the FPIC of Traditional Owners, governments must provide effective mechanisms of redress and appropriate measures to mitigate adverse environmental, economic, social, cultural or spiritual impacts.
9. Accordingly, the KLC strongly supports the Bill’s inclusion of FPIC as a precondition for the acceptance of environment plans for offshore petroleum projects.
10. The KLC does not support the view that FPIC is too complex or costly to operationalise. The principle of FPIC is not currently reflected to its full extent in any Australian laws and regulations. However, FPIC can be realised in practice without jeopardising regional or national economies, as demonstrated by both legislation and private contractual measures already in place and well established in the Australian industrial landscape. Section 24OA of the *Native Title Act 1993* effectively creates a de facto right of FPIC for native title parties in relation to any future acts which do not fall under another future act provision,² redirecting proponents to the agreement-making arrangements in the ILUA provisions of the *Native Title Act*. Outside the scope of legislative requirements, the KLC’s standard heritage protection agreement (**HPA**) is an example of a contract which provides native title parties with FPIC in relation to activities which may harm cultural heritage. As noted in the KLC’s submission to the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs into the application of UNDRIP in Australia,

¹ United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), Article 32.

² This does not diminish the inequalities with the future act provisions of the *Native Title Act* as described in the KLC’s submission to the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs into the application of UNDRIP in Australia. In relation to future acts which attract the right to negotiate, the significant disparity in outcomes for native title parties who do not agree to the grant of an interest that impairs or extinguishes their rights in Country creates a form of coercion on native title parties to reach agreement with proponents because of the very high likelihood that, if they do not consent to the future act determination application, the National Native Title Tribunal will almost certainly find against them in any event. This legislative arrangement and administrative outcome is significantly below the FPIC standards set by the UNDRIP, in particular Articles 11, 12, 31 and 32.

the HPA enshrines the principles of self-determination and FPIC for native title parties to any activities which impact on, damage or destroy cultural heritage. Hundreds of such HPAs exist in the Kimberley. These HPAs do not prevent development, stifle economic activity, or act as a device for false claims of significance. Rather, they are a strong foundation for respectful co-existence between native title holders and third parties and they confirm that implementation of UNDRIP in relation to protection of Indigenous cultural heritage is not a threat to economics or sovereignty.

11. In the Kimberley, neither the statutory nor the contractual mechanisms by which FPIC is operationalised have detrimentally impacted industry or economic development in the region. These mechanisms work effectively to internalise development costs to private proponents and ensure that the social, economic and cultural impacts of development are better identified, managed, mitigated and, where possible, avoided.³
12. The Bill itself does not provide detail on how the regulations should “provide for” FPIC. The KLC notes that the Department of Industry, Science and Research is currently running a public consultation process about the consultation requirements for offshore petroleum projects, with a view to updating the consultation requirements in the regulations and feeding into the broader review announced in May 2023 of the offshore environmental management framework. The KLC intends to provide a submission to the department and considers that this consultation process, along with the broader review of the offshore environmental management framework, provides opportunities to explore how FPIC can be incorporated practically into offshore approvals processes.
13. The KLC also supports the Bill’s requirement for Traditional Owners and knowledge holders to be consulted before government makes regulations about consultation requirements in the preparation of an environment plan. Again, this is consistent with FPIC and UNDRIP, particularly Article 19.⁴

Part 2 – Meaning of relevant person

14. The KLC supports the Bill’s explicit inclusion of Traditional Owners and knowledge holders as ‘relevant persons’ for the purpose of consultation in the preparation of an environment plan for offshore petroleum projects.
15. Given their traditional connections to and responsibilities for Sea Country, Traditional Owners should always be considered ‘relevant persons’ in relation to offshore petroleum projects. Embedding this explicitly in the regulations is appropriate and instructive for industry and Traditional Owners alike.
16. The KLC also notes that, in line with the *Tipakalippa* appeal decision, ‘interests’ as referred to in section 25(1)(d) of the regulations include cultural and spiritual interests, not just legal interests. This further supports the explicit inclusion of Traditional Owners and knowledge holders as relevant persons

³ As the KLC noted in its submission to the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs into the application of UNDRIP in Australia, the significant disparity in outcomes for native title parties who do not agree to the grant of an interest that impairs or extinguishes their rights in Country creates a form of coercion on native title parties to reach agreement with proponents because of the very high likelihood that, if they do not consent to the future act determination application, the National Native Title Tribunal will almost certainly find against them in any event. This legislative arrangement and administrative outcome is significantly below the FPIC standards set by the UNDRIP, in particular Articles 11, 12, 31 and 32.

⁴ Article 19 of UNDRIP states: “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.”

in consultation processes for offshore projects.

17. The regulations should provide definitional certainty on who a “Traditional Owner and knowledge holder” is for any part of an ‘environment that may be affected’ (**EMBA**) which does not intersect with a native title determination or registered claim. For those parts of an EMBA that do intersect with determinations and registered claims, the persons entitled to FPIC are the native title party.

Part 3 – Protection of cultural heritage

18. The KLC supports the inclusion in the regulations of the Bill’s definition of ‘intangible cultural heritage’, which is based on the definition contained in the UNESCO *International Convention for the Safeguarding of the Intangible Cultural Heritage*.
19. Intangible cultural heritage is an internationally recognised legal standard and forms an important part of Traditional Owners’ conceptions of their living cultural heritage. The final report of the Joint Standing Committee on Northern Australia into the destruction of Aboriginal cultural heritage sites at Juukan Gorge recommended that definitions of cultural heritage should recognise both tangible and intangible heritage.⁵ Intangible cultural heritage is already recognised in cultural heritage laws in Australia, such as the Victorian *Aboriginal Heritage Act 2006*.⁶
20. The KLC also supports the inclusion in the regulations of the Bill’s definition of ‘underwater cultural heritage’. The KLC notes that the definition is based on the definition of underwater cultural heritage in section 15 of the *Underwater Cultural Heritage Act 2018* (Cth), but that the definition in the Bill includes reference to First Nations’ cultural heritage in proposed regulation 4A(2)(a) and (b):
 - (a) *First Nations archaeological sites and artefacts, together with their natural context;*
 - (b) *intangible cultural heritage associated with First Nations archaeological sites and artefacts.*
21. The KLC submits that the Bill should include provisions to amend section 15 of the *Underwater Cultural Heritage Act 2018* (Cth) to include subclauses (a) and (b) above into the definition of ‘underwater cultural heritage’ in that Act.

Concluding statements

22. Ultimately, FPIC should be a cornerstone principle underpinning Traditional Owner engagement and participation in offshore petroleum and other resource projects. The Bill’s focus on incorporating FPIC into the offshore environmental management framework is to be welcomed. Further work will be required – including through the Department of Industry, Science and Research’s current consultation process – to determine how FPIC should be operationalised in the regulations, including what practical steps are required in consultation on environmental plans for offshore projects.
23. The KLC notes that the Committee has scheduled public hearings on the Bill in Darwin, Karratha and Perth in April and May 2024. The KLC urges the Committee to hold an additional public hearing in the Kimberley – ideally in Broome. This is appropriate given the volume of existing and prospective offshore

⁵ Joint Standing Committee on Northern Australia. *A Way Forward: final report into the destruction of Indigenous heritage sites at Juukan Gorge*. October 2021. Pages 187-191.

⁶ See section 79B of the *Aboriginal Heritage Act 2006* (Vic) for the definition of ‘Aboriginal intangible heritage’.


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petroleum projects off the Kimberley coast.

24. The KLC appreciates the opportunity to provide this submission on the Bill and trusts that this submission will help inform the Committee's report.

Yours sincerely

Tyronne Garstone
Chief Executive Officer