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Spirit of Sea Country Bill 2023

This submission responds to the Committee's invitation to comment on the *Protecting the Spirit of Sea Country Bill 2023*. In summary, the Bill presents a range of concerns alongside useful features.

Basis

The submission reflects research and teaching on law relevant to Traditional Knowledge (TK), Traditional Cultural Expression (TCE) and confidentiality, including the development and implementation of Intangible Cultural Heritage (ICH) regimes.

That research has appeared in a range of peer reviewed Australian and international scholarly publications.

The submission does not represent what would be reasonably construed as a conflict of interest.

The Bill

Consultation Principle

The Bill is characterised as seeking to amend the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) so that First Nations peoples are adequately consulted on the preparation of environment plans for proposed offshore energy projects.

Timely, consistent and transparent consultation with Australia's First Nations peoples and with other stakeholders regarding both onshore and offshore energy projects – including fracking in locations such the Hunter Valley region – is commendable.

It is consistent with recommendations in the Independent Review of the *Environment Protection & Biodiversity Conservation Act 1999* (Cth) and *Aboriginal & Torres Strait Islander Heritage Protection Act 1984* (Cth). It is also consistent with the United Nations 2007 *Declaration on the Rights of Indigenous Peoples* (UNDRIP) and the United Nations 2003 *Convention for the Safeguarding of the Intangible Cultural Heritage*, noting that Australia has not signed up to the latter Convention. The National Native Title Council, reflecting UNDRIP and the 1992 *Convention on Biological Diversity* (CBD), has emphasised that Australia's national, state and territory governments must seek 'true Free, Prior and Informed Consent (FPIC) in all dealings with Aboriginal and Torres Strait Islander peoples' as a basis for self-determination.

Substantive community consultation should more broadly be a standard practice, irrespective of jurisdiction, irrespective of identity and irrespective of whether the projects are 'carbon based', involve nuclear energy or 'green technologies'. Such consultation is an expectation in a liberal democratic state and offsets the disengagement found in a range of independent

studies, such as the ANU Federal Election Study reporting fewer than 26% of Australians believe people in government can be trusted, with 56% believing government is run for 'a few big interests' and only 12% believing government is run for 'all the people'.

Consultation Mechanism

The proposed new subsection 782(4) commendably encompass ministerial consultation *about* the consultation regime.

Such consultation has the potential to reduce 'tick box' mechanisms: what is sometimes dubbed non-substantive 'consultation theatre'. It can draw on the extensive literature regarding deliberative democracy mechanisms that minimise capture by particular stakeholders.

Determination

The Bill can be read as going beyond consultation and instead being determinative, in other words precluding offshore development on the basis of ICH that is –

- confidential (an understanding that is not shared to a specific community as a whole and is instead restricted to particular traditional knowledge holders),
- potentially malleable, given that neither the knowledge nor its holders are static,
- and ultimately independently unverifiable.

ICH has very broad scope, potentially founded on oral tradition that is susceptible to change over time and often relying on a cosmology or ontology – a way of understanding the world – that is fundamentally different to that in dominant Australian law. Neither legislation nor case law for example recognise the agency of metaphysical entities such as Ampiji the rainbow serpent referred to in recent litigation about energy development in the Tiwi Islands region. Recognition that intangible cultural heritage – in terms of interpretation and transmission – is not static is salient in addressing questions about authority, authenticity and avoidance of paternalism.

The settler state law noted above, inherited from the United Kingdom, has increasingly and necessarily sought to respect Indigenous people as part of a liberal democratic state. The law however struggles with the implications of Indigenous relationships to land and waters deriving from belief systems about "the absolute integration of all living things, the inseparability of people from the land and non linear concepts of time" and the agency of metaphysical entities, belief systems integral to ICH in Australia.

Item 8 of the Bill means that a development proposal will not be capable of being accepted if an activity (or part of an activity) will be undertaken in an area containing underwater cultural heritage. Item 12 sets out that the National Offshore Petroleum Safety & Environmental Management Authority (NOPSEMA) cannot accept an environment plan unless the plan demonstrates that the activity (or any part of the activity) is not being undertaken in an area that contains underwater cultural heritage.

Underwater cultural heritage is defined as 'any trace of human existence that:

(a) has a cultural, historical or archaeological character; and

(b) is located under water'.

A 'trace of human existence' need not be extensive. Importantly, the Bill appears to interpret that trace as encompassing 'intangible cultural heritage associated with First Nations archaeological sites and artefacts'. Is the intention that an artefact that is claimed by an

informant to represent an aspect of ICH regarding beliefs about the offshore environment will preclude authorisation for development in that environment?

Is the existence of an onshore site that is interpreted by an informant as a manifestation of ICH regarding beliefs that are specific to offshore waters, reefs and land or beliefs in which waters and land are seamless sufficient to exclude development? Note that 'cultural character' can be read as encompassing ICH, with that specific reference later in the definition to ICH.

Recent judicial cautions

The Explanatory Memorandum for the Bill refers to the Full Federal Court's decision in *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193.

In making sense of potential difficulties with offshore ICH it is useful, however to look beyond that judgment and consider the more recent *Munkara v Santos NA Barossa Pty Ltd (No 3)* [2024] FCA 9 judgment.

In that judgment Charlesworth J offered cautions about the potential for misinterpretation or even the inadvertent "confection" of evidence regarding what are 'essentially spiritual and mythical concerns', where there are disagreements with an Indigenous community (and indeed within a particular family), and where information may not be readily shared beyond Elders or other authorities.

An inappropriate model

The Bill addresses energy development offshore. It is of concern as a potential model for precluding development onshore, irrespective of consultation, and offshore locations remote from the Tiwi Islands.

The Explanatory Memorandum expressly states that Bill seeks to legislate a number of the rights of First Nations people as contained in the UNDRIP. The rights in that Declaration are likely to be asserted in other instances, with reference to an amended Act.

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