

National Sea Country Alliance

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

Via email: ec.sen@aph.gov.au

Dear Committee Secretariat,

Protecting the Spirit of Sea Country Bill 2023 seeking to amend the *Offshore Petroleum and Greenhouse Gas Storage Act 2006 and Regulations*

On behalf of the National Sea Country Alliance (**NSCA**), we are pleased to put forward the following submission. The NSCA is an alliance between Australia's Traditional Owners with responsibility for Sea Country that have come together to speak in unison. The formation of the National Sea Country Alliance, following a national meeting of Traditional Owners in Darwin in November 2023, represents a step forward in realising our rights and responsibilities offshore.

All coastal state and territories of Australia are represented on the 55 member Alliance, ensuring that the complexity of our diverse seas, oceans and coastal areas is recognised. The Alliance has 45 Traditional Owner member corporations with statutory recognised responsibilities for Sea Country and 10 associate members which are Traditional Owner organisations with an interest in Sea Country issues.

Our submission supports the proposed *Protecting the Spirit of Sea Country Bill 2023*, which seeks to amend the *Offshore Petroleum and Greenhouse Gas Storage Act 2006 and Regulations*, in so far as it demonstrates the commitment to recognise to enact the principles contained in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and other relevant international law.

In line with UNDRIP, the meaning of 'relevant person' under the regulation 11A(1) of the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (Cth) must refer to "Traditional Owners". Where the Traditional Owners are not known, a mechanism must be developed to identify the correct Traditional Owners who have the relevant authority to "speak for country". Work around Traditional Owner Representative Institutions (TORIs) is being undertaken under the *Environment Protection and*



Biodiversity Act 1999 (Cth) (EPBC) and *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (ATSIHPA) review processes.

The Bill uses the problematic term “knowledge holders”. We note this term is often used to undermine Traditional Owners authority. The term “knowledge holder” can, and is, used to justify a refusal by proponents to engage with legitimate Traditional owner groups. We submit that the term “Traditional Owners” is the correct term and the term “knowledge holders” should not be used in this context. Recognition of, and use of the term, “Traditional Owners” is essential to uphold and maintain Indigenous culture.

The Federal Court decision of the Full Court of the Federal Court of Australia in *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193 creates challenges for Traditional Owners and industry to ensure necessary consultation and decision-making are established, resourced and effective. It also creates several opportunities. It creates the opportunity for Traditional Owners to be heard and understood when it comes to their obligations to their sea and coastal country, and it creates the opportunity for industry to genuinely engage with Traditional Owners and further develop their procedures informed by this engagement.

It is estimated that there are at least 147 Traditional Owner groups, represented by 90 corporations, with direct Sea Country responsibilities. These responsibilities stem from inherent rights acknowledged under the UNDRIP.

Traditional Owners have the right to participate in decision-making in matters affecting our rights, through our own representatives in accordance with our own procedures. Those governance processes and structures have been developed by each group and, in many instances, have been in accordance with native title or similar statutory environments. The recognition of these structures must be supported in the regulatory structures on Sea Country.

We consider appropriate regulatory and policy reforms will:

- Achieve practical streamlined processes;
- Provide parties with certainty and confidence;
- Ensure appropriate recognition of Traditional Owner Representative Institutions (TORIs); and
- Recognise as legitimate the aspirations of Traditional Owners regarding Sea Country resources.

The Bill represents a positive starting point for developing an appropriate regulatory and policy reform proposal that achieves these outcomes.

However, we propose a slightly different approach be adopted with respect to:

- A. Traditional Owners whose Sea Country may be *directly affected* by proposed offshore energy projects, and

B. Traditional Owners whose Sea Country lies in the *broader Environment that May be Affected (EMBA)*.

This distinction suggests a difference in approach is necessary.

Our proposal is based on a recognition that the context of many offshore energy projects (particularly gas) requires a distinction to be recognised between Traditional Owner communities *directly affected* by a proposal and those that lie within the *broader EMBA*. The distinction is based not on the physical fact of geographic proximity to the project activities but rather upon the question of the distinction between an *actual* and a *possible* impact on the rights and interests of Traditional Owners.

In the case of a directly affected community, the activity of the proponent *will* have an impact upon the Sea Country of Traditional Owners. In the case of a Traditional Owner community within the broader EMBA, the impact of the activity of the proponent upon Sea Country rights is only *possible*, albeit that possibility is a real one.

Certain principles are common to both situations:

- Reforms need to confirm the appropriate Traditional Owner negotiation party is the relevant TORI, giving both effect to UNDRIP principles and providing negotiation certainty.
- The point of negotiation should be at consideration of the grant of title not at the point of individual operational approvals; and
- Resources to support Traditional Owner engagement in the negotiation process should be provided by both government (to ensure 'standing capacity') and proponents (in respect of particular negotiations).

DIRECTLY AFFECTED COMMUNITY

In the case of a directly affected community there is a known certainty of an impact (at least to some extent) on the Sea Country of relevant Traditional Owners and therefore their rights and interests. There is also a known certainty that the proponent and the government will, as a result of this impact on Traditional Owners rights and interests, derive an economic return. These facts give rise to the necessary application of the fundamental expectations derived from international law and the principles underlying Australian law.

Relevantly these demand that the project proceed only on terms agreed with Traditional Owners following their Free, Prior and Informed Consent (FPIC). They also demand that these terms can legitimately include a requirement for commercial and other benefits to be received by Traditional Owners.

Where Traditional Owners are directly affected by a project proposal, project approvals should be on the basis of the proponent concluding an agreement with Traditional Owners following FPIC. In the absence of an agreement with Traditional Owners, a decision maker would only proceed with the grant of title if satisfied that the circumstances of that case warranted that action.

ENGAGEMENT WITH TRADITIONAL OWNER COMMUNITIES WITHIN THE EMBA

The fact that Traditional Owners within the EMBA may only be *possibly* impacted by the activities of the proponent does not in any way lessen their legitimate role. In the process of consideration and approval of the grant of statutory rights, that may lead to such an outcome, this role must be recognised. However, it does suggest though that the involvement of these Traditional Owners in this process should be concomitant to the potential impacts they may experience.

The contingent nature of the impacts upon these Traditional Owners rights and interests suggest that the main focus of their involvement is in the area of the management of these contingencies. That identified, it may also extend to involvement in the development of the regular operational procedures that give rise to these contingencies.

At a practical level, these considerations would suggest that the involvement of these Traditional Owners would be in the form of a 'right to comment' on the proposals contained within the project. To give real effect to such a procedural right, it is important that the elements of prior consultation (that is early in the decision-making process), and the provision of full information are satisfied. To be meaningful it is necessary that the ultimate decision maker has full oversight of the process. In a manner not dissimilar to the current regulatory arrangements, this would require a proponent to detail:

- with whom consultation had occurred (and the evidence based upon which this selection was made),
- the structure and content of the consultations,
- the outcomes of those consultations and how those outcomes had been incorporated into the proposal, and
- if they had not, the basis upon why this was not the case.

Unlike the current arrangements, the consultation would be conducted through the relevant TORI. Both a proponent and ultimate decision-maker will therefore have confidence of the comprehensiveness and accuracy of the outcomes of the process. In many respects then, this process reflects that for consultation described in the *Native Title Act 1993* (Cth), s 24HA(7) (or s 42(2)(b) of *ALRA*).

Where Traditional Owners Sea Country is in the EMBA area, we propose a process of consultation around preventing and responding to contingent events.

As noted above, where the Traditional Owners are unknown, a mechanism should be developed to identify them.

PROTECTION OF CULTURAL HERITAGE

With specific reference to the definitions in the Regulations, our submission is that the definitions in the Bill are a good starting point but require some re-working to ensure the protection of cultural heritage.

DEFINITIONS IN THE REGULATIONS

The proposed definitions of “intangible cultural heritage” and “underwater cultural heritage” that the Bill applies to the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009*, must include contemporary cultural heritage knowledge and practices. Indigenous cultural heritage is derived from contemporary living, and evolving cultures and need to be recognised as such.

The risk with the proposed definition of underwater cultural heritage in the Bill at 4A(1) is that the meaning of “underwater cultural heritage” excludes contemporary cultural objects, sites, and practices. While the definition of “cultural heritage” is essentially a concept which is a link to the past, it also “offers a bridge between the past and the future with the application of particular approaches in the present”.¹ The definition of underwater cultural heritage must include contemporary cultural knowledge, practices, and sites.

For example, there should be an exception made to the exclusions at s 4A(4). It is necessary to exclude (a) pipelines or cables on the seabed; (b) installations (other than pipelines or cables that are: (i) placed on the seabed; and (ii) still in use, but there should be an exception made where those items are part of contemporary cultural practises.

In addition, the definition of “intangible cultural heritage” should not be limited to “knowledge and practices concerning nature and the universe” and must at a minimum, refer to “contemporary cultural knowledge and practices” on a standalone basis.

The National Sea Country Alliance would be happy to discuss this submission further with you or your officers in the event you think this desirable.

Yours sincerely,

Heron Loban

and

Gareth Ogilvie

Co-Chairs

National Sea Country Alliance

¹ <https://culturalheritagestudies.ceu.edu/concept-and-history-cultural-heritage>, viewed on 07/02/2024 on The Central European University webpage for Cultural Heritage Studies entitled “The Concept and History of Cultural Heritage”.