

Submission to the Senate Environment and Communications Legislation Committee

INQUIRY INTO THE PROTECTING THE SPIRIT OF SEA COUNTRY
BILL 2023
NOPSEMA

NOPSEMA's Submission to the Senate Inquiry into the Protecting the Spirit of Sea Country Bill 2023

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1. Introduction

The National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA) provides this Submission to the Senate Environment and Communications Committee (the Committee) in consideration of NOPSEMA's functions and regulatory roles as Australia's offshore energy regulator.

NOPSEMA notes that on 19 October 2023, the Senate referred the Protecting the Spirit of Sea Country Bill 2023 (the Bill) to the Environment and Communications Legislation Committee for report by 28 June 2024. The explanatory memorandum to the Bill outlines that the core purpose 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).

2. Scope of the submission

The following comments address how NOPSEMA undertakes its regulatory functions with a focus on environmental management, including consideration of Sea Country, to provide context to inform the Committee's inquiry into the Bill.

This submission does not canvass any constitutional, international treaty, legal or policy issues. Policy responsibility for the Bills's proposed amendments to the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (OPGGs Act), its Offshore Petroleum and Greenhouse Gas Storage (Environment Regulations) 2023 (the Environment Regulations) and the Offshore Petroleum and Greenhouse Gas Storage (Resource Management and Administration) Regulations 2011, rests with the Commonwealth Department of Industry, Science and Resources (DISR).

This submission does not offer any opinion on the Bill or the Committee's inquiry into the Bill. It informs the Committee of NOPSEMA's role within our jurisdiction, legislative remit and recent case law established by the Federal Court.

3. Our role

NOPSEMA is Australia's independent regulator for the offshore energy industry.

NOPSEMA's regulated community is broad and includes all parties involved in the exploration and recovery of petroleum and greenhouse gas activities. We are also the regulator for offshore renewables, as the Offshore Infrastructure Regulator (OIR).

Our regulatory role includes oversight of occupational health and safety, structural and well integrity, and environmental management for all offshore energy operations and greenhouse gas storage activities in Commonwealth waters (and in coastal waters where regulatory powers and functions have been conferred). To date, only Victoria has conferred the regulation of health and safety, structural and well integrity of petroleum and greenhouse gas storage activities to NOPSEMA in their coastal waters.

4. NOPSEMA's Legislative Framework

NOPSEMA is an independent statutory authority established under the OPGGS Act. NOPSEMA's functions are detailed in section 646 of the OPGGS Act and are summarised as follows:

- to promote the occupational health and safety of persons engaged in offshore petroleum and greenhouse gas storage operations

- to develop and implement effective monitoring and enforcement strategies to secure compliance by persons with their obligations under the OPGGS Act and regulations, structural integrity law and environmental management law
- to investigate accidents, occurrences and circumstances that affect, or have the potential to affect, occupational health and safety and involve, or may involve, deficiencies in structural integrity or deficiencies in environmental management
- to report on investigations, as appropriate, to the responsible Commonwealth Minister, and to State and Northern Territory petroleum ministers
- to advise persons, either on its own initiative or on request, on matters relating to occupational health and safety, structural integrity, and environmental management
- to make reports, including recommendations, to the responsible Commonwealth Minister, and to State and Northern Territory petroleum ministers on issues relating to Occupational Health and Safety, structural integrity, and environmental management
- to provide information, assessments, analysis, reports, advice and recommendations when requested by the responsible Commonwealth Minister in relation to the Minister performing functions or exercising powers in relation to offshore greenhouse gas storage operations
- to cooperate with the Titles Administrator in relation to the administration and enforcement of the OPGGS Act and regulations and with other Commonwealth, State and Northern Territory agencies and authorities with functions relating to regulated operations.

On 2 June 2022, the *Offshore Electricity Infrastructure Act 2021* (OEI Act) entered into force. The OEI Act establishes the OIR to regulate the offshore renewables sector.

The functions of the OIR are set out under section 177 of the OEI Act and include regulation of work health and safety, infrastructure integrity and environmental management for offshore infrastructure activities. The functions of the OIR are administered by NOPSEMA.

Further details on the legislative regimes are available at [nopsema.gov.au](https://www.nopsema.gov.au) and [oir.gov.au](https://www.oir.gov.au).

5. Environmental management

NOPSEMA is responsible for ensuring all offshore petroleum and greenhouse gas activities in Commonwealth waters are undertaken in accordance with the Environment Regulations.

To meet these regulations, all offshore activities including exploration, development, production and decommissioning must:

- be consistent with the principles of ecologically sustainable development
- reduce risk to the environment to as low as reasonably practicable (ALARP).¹

Before an activity takes place, the titleholder must demonstrate to NOPSEMA that they have:

¹ NOPSEMA Factsheet: ALARP and Acceptable: <https://www.nopsema.gov.au/sites/default/files/documents/2021-04/A739345.pdf>

- correctly identified the environmental risks and impacts of the activity
- developed an appropriate environment plan to ensure those risks will be acceptable and reduced to ALARP.

6. Environment Plans under the Environment Regulations

For all petroleum activities in Commonwealth waters, titleholders are required to submit an environment plan (EP) to NOPSEMA, under the Environment Regulations. It is an offence to undertake an offshore petroleum activity without an accepted EP for that activity.

The EP must demonstrate that the environmental impacts and risks of the activity will be reduced to an acceptable level (amongst other criteria) before the EP can be accepted.

An EP that includes an activity that has potential to cause long-term impacts to the environment (including social, economic and cultural features of the environment) without appropriate mechanisms to manage or mitigate those impacts would not be acceptable nor would it be consistent with the principles of Ecologically Sustainable Development.

‘Environment’ is defined in the Environment Regulations and means (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 includes the social, economic and cultural features of these matters (a to d).

For the EP to be accepted it must meet the requirements of the Environment Regulations and the OPGGS Act – including whether cultural features of the environment are managed to ALARP and acceptable levels, among other considerations. NOPSEMA also assesses whether the EP has appropriate environmental performance outcomes, standards and control measures to reduce the impacts and risks to an acceptable level.

The EP acceptance process is often iterative, with NOPSEMA requesting additional information or clarifications on a case-by-case basis. In rare circumstances, NOPSEMA will accept an EP in part or apply conditions to an EP allowing it to proceed under specific circumstances, such as not allowing a part of a proposed survey plan that carries unacceptable levels of environmental risk. Following the Federal Court decision in *Cooper v NOPSEMA* (No 2) [2023] FCA 1158, NOPSEMA no longer accept EPs with conditions relating to relevant persons consultation requirements.

If NOPSEMA is reasonably satisfied that the environment plan meets the acceptance criteria set out in the regulations, the EP must be accepted. NOPSEMA will also publish the accepted EP on the NOPSEMA website.

An accepted EP provides the environmental management requirements that must be met by the titleholder against which NOPSEMA can secure compliance. Failure to comply with an accepted EP is an offence, as well as grounds for NOPSEMA to withdraw its acceptance of the EP.

6.1. NOPSEMA EPBC Act Program

On 28 February 2014, the process for streamlined environmental approvals for offshore petroleum and greenhouse gas storage activities in Commonwealth waters came into effect under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act).

The Federal Minister for the Environment endorsed NOPSEMA’s assessment process as a Program (the Program) that meets the requirements of Part 10 of the EPBC Act and approved a class of actions which, if

undertaken in accordance with the endorsed Program, do not require separate referral, assessment and approval under the EPBC Act.

The key regulatory elements of the endorsed Program consist of the assessment process under the Environment Regulations together with NOPSEMA's Program commitments in the *Program Report - Streamlining Offshore Petroleum Environmental Approvals, Program Report February 2014*.

All petroleum and greenhouse gas storage activities undertaken in Commonwealth waters in accordance with the endorsed Program are considered "approved classes of action", with the exception of those that:

- have, will have or are likely to have a significant impact on the environment on Commonwealth land.
- are taken in any area of the sea or seabed that is declared to be part of the Great Barrier Reef Marine Park under the Great Barrier Reef Marine Park Act 1975 (Cth).
- have, will have or are likely to have a significant impact on the world heritage values of the Great Barrier Reef World Heritage property or on the national heritage values of the Great Barrier Reef National Heritage place.
- are taken in the Antarctic.
- are injection and / or storage of greenhouse gas.

The Program provides for NOPSEMA to assess and make approval decisions for new offshore petroleum development projects and shorter-term activities.

New projects are assessed under the Offshore Project Proposal (OPP) process in the Environment Regulations which delivers outcomes similar to the environmental impact statement assessment process under the EPBC Act.

An activity covered by the Program is not allowed to commence unless an EP for the activity has been accepted by NOPSEMA.

NOPSEMA's environmental assessment processes consider all project- and activity-specific environmental impacts and risks, including but not limited to those relevant to matters protected under Part 3 of the EPBC Act. Decision-making under the Program ensures that environmental impacts and risks, including to matters protected under Part 3 of the EPBC Act, will be of an acceptable level and reduced to ALARP. The object of the Environment Regulations includes to ensure that any petroleum activity or greenhouse gas storage activity is carried out in a manner consistent with the principles of ecologically sustainable development as set out in section 3A of the EPBC Act.

Key steps taken by NOPSEMA to deliver the strong environmental safeguards expected include applying and complying with NOPSEMA's Program commitments through assessments and decision-making. Many of these commitments closely mirror legislative requirements for decision-making under the EPBC Act.

The broader nature of criteria for acceptance of EPs under the Environment Regulations means that the 'cultural features' of the environment are in scope for every EP assessment, and must be considered in decision-making by NOPSEMA. In contrast, EPBC Act approval mechanisms are limited to matters of National Environmental Significance.

6.2. Environment Plan Content Requirements

Division 2 of the Environment Regulations requires an EP to contain a description of the activity, a description of the environment, an evaluation of environmental impacts and risks and environmental

performance outcomes and standards among other things. Other requirements relate to EP implementation strategies, monitoring and reporting, control measures, employee and contractor responsibilities and a range of other details and obligations.

The titleholder must include in the EP a report on all relevant persons consultations including the titleholder's assessment and response to the merits of any objection or claim by a relevant person about the adverse impact of each activity to which the EP relates and a copy of the full text of any response by a relevant person.

NOPSEMA encourages the Committee when deliberating this Bill, to consider the full suite of the existing Environment Regulations including the EP content requirements and how they are applied in NOPSEMA's assessments including in relation to Sea Country.

A key part of the EP content requirements is at s21 of the Environment Regulations which provides that:

(5) The environment plan must include:

(a) details of the environmental impacts and risks of the activity; and

(b) an evaluation of all the environmental impacts and risks, appropriate to the nature and scale of each impact or risk; and

(c) details of the control measures that will be used to reduce the impacts and risks of the activity to as low as reasonably practicable and an acceptable level.

(6) To avoid doubt, the evaluation mentioned in paragraph (5)(b) must evaluate all of the environmental impacts and risks arising directly or indirectly from:

(a) all operations of the activity; and

(b) any potential emergency conditions, whether resulting from an accident or any other cause

Additionally, s21(4) requires titleholders to consider any other legislative requirements that are applicable and relevant to environmental management of the activity and how those requirements will be met.

7. NOPSEMA's observations on applying consultation requirements

Recent court decisions² have clarified the consultation requirements contained in the Environment Regulations in relation to how titleholders should consult with relevant persons, including with First Nations peoples.

A key observation was that Sea Country is not defined in any Commonwealth legislation. However, in *Santos v Tipakalippa* the Court of Appeal clarified that titleholders need to consider impacts to 'cultural features'³ (including cultural features of people and communities), when it found that First Nations people with a traditional connection to the sea and marine resources must be consulted where their interests may

² Full Federal Court of Australia in *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193, and *Cooper v National Offshore Petroleum Safety and Environmental Management Authority* (No 2) [2023] FCA 1158

³ The term is utilised here to include the broader construction that encompasses heritage values etc as per the definition of environment, noted under section 6 of this paper.

be affected by an activity proposed by the titleholder. Heritage values, as a defined cultural feature of the environment, may include a connection to Sea Country through histories, practices, and belief systems.

Although the requirement to consult and to address potential impacts of activities on cultural features are interconnected issues, they are treated separately in the Environment Regulations. When considering who is a 'relevant person' for the purposes of consultation in the Environment Regulations, titleholders must consider the potential impacts of their proposed activities on First Nations peoples who may have connections to Sea Country and marine resources which constitute an interest that may be affected by the activity. In this respect we refer the Committee to NOPSEMA's guideline⁴ on consultation in the course of preparing an environment plan for further detail and clarity on consulting 'relevant persons'.

To accept an EP, NOPSEMA must be reasonably satisfied the titleholder has described the existing environment that may be impacted by the activity and identified the relevant environmental values and sensitivities (including the social, economic and cultural features of the heritage value of places), evaluated the risks and impacts, and demonstrated that those risks and impacts will be acceptable and reduced to ALARP.

The Environment Regulations contain provisions to ensure impacts will be managed throughout the life of the offshore petroleum activity which must reflect contemporary policy, new scientific and other authoritative information, and improved levels of understanding of impacts.

8. Consultation with First Nations regarding Sea Country

Case law has provided clarity around the breadth and extent of consultation required by the Environment Regulations, and NOPSEMA has noted the significant effort that is required from titleholders to comply in practise. Titleholders must consult with potentially very large class of relevant persons and include content in their EP that reflects all their consultations for NOPSEMA's decision-making.

Even when substantial consultation has been undertaken, there remains a risk that not all relevant persons have been identified and consulted and that the requirements may not have been met. Challenges raised by First Nations representative bodies and communities, as a result of titleholders' efforts in these consultations, include the limited capability, capacity and time they have to properly participate.

NOPSEMA provides the following observations based on our engagement and experience in working within our legislative framework and the interpretation of it by the courts. Ultimately, it is Parliament that provides the legislative framework in which we undertake our regulatory functions.

8.1. NOPSEMA engagement with First Nations peoples and representatives

NOPSEMA has had significant engagement with First Nations communities over several years⁵ to support NOPSEMA's key function in environmental management to assess whether the requirements, including for consultation, have been met by a titleholder as demonstrated in their EP. Since *Santos v Tipakalippa* NOPSEMA has increased engagement to improve our cultural awareness and to enhance our promotion

⁴ Guideline available at [Guideline: Consultation in the course of preparing an environment plan \(nopsema.gov.au\)](https://www.nopsema.gov.au/guideline-consultation-in-the-course-of-preparing-an-environment-plan)

⁵ See Question on Notice SI-13, 2023-24 Supplementary Budget Estimates, Economics Committee

and advice functions.⁶ A key aim of our engagement has been to enhance an understanding of the regulatory requirements and obligations on titleholders to consult appropriately.

NOPSEMA has developed a scope of work aiming to ensure consultation with First Nations peoples and the protection of heritage values is appropriate and effective. This scope of work includes:

- direct engagement with First Nations people, groups, and representatives
- ensuring regulatory staff have sufficient understanding of cultural heritage values through targeted training and engagement with First Nations people, groups, and representatives
- building capacity to assess the adequacy of consultation and impacts on cultural heritage
- providing information and advice to ensure all stakeholders understand their rights and responsibilities under the Environment Regulations
- engaging with other regulators and government departments on best practice for both consultation and management of impacts on heritage values.

NOPSEMA continues to encourage industry to consider how to minimise the consultation burden on First Nations people. First Nations people have been consistent in their call for care in relation to these issues – including of who can speak for country, balancing individual versus collective interests and ensuring consultation is tailored, culturally appropriate and provides time for meaningful engagement and feedback.

Our observations from First Nations people are also reflected in part in the Bill's second reading speech, with regard to providing easy to understand information, highlighting the range of impacts, timelines for the proposed activities as well as the timing and method of consultation.

8.2. Speaking for Country

NOPSEMA recognises that the matter of who can speak for country is a critical issue for First Nations communities. This has been communicated to NOPSEMA consistently across a range of engagements. A broad issue that underpins speaking for country on proposed petroleum and carbon, capture and storage (CCS) activities is how individual views versus collective rights and communally held interests are reflected, expressed and resolved.

While interests often align, NOPSEMA has observed that there can be a range of contrasting perspectives on these activities. Further, NOPSEMA has observed that relative support or opposition to these petroleum or CCS activities can shift, depending on how a proponent has undertaken consultation with First Nations communities – and the level of advocacy being undertaken in local communities by conservation, environmental, and legal organisations and representatives.

For example, strong support for development activities have been observed where local First Nations communities are engaged early with sufficient time and information for representative bodies to facilitate consultation with relevant authorities and community members. This can include helping to guide environmental management outcomes, opportunities to be involved in the management of the project and

⁶ See our Advice and promotion policy at [Advice and promotion policy \(A493963\).pdf \(nopsema.gov.au\)](#) on our website

firm commitments to potential economic opportunities for community and/or improvements in infrastructure and services. In contrast, strong opposition to these activities has also been observed.

These contrasting perspectives are often reflected as a spectrum in First Nations communities, as observed in the broader community. Ultimately, while opposition to activity within Sea Country is also observed, NOPSEMA's legislative remit is limited by the legislation to considering environmental management matters and not whether an activity should proceed or not as a matter of principle. NOPSEMA has observed that the way titleholders engage First Nations communities, on Sea Country or other EP-related activity more broadly, is often a critical determinant of community support.

Finally, NOPSEMA notes that in the recent decision of *Munkara v Santos NA Barossa Pty Ltd* (No 3) [2024] FCA 9 the Court found that the phrase "cultural features" which is part of the definition of environment in the Environment Regulations, has a communal or collective aspect. To be accepted as cultural, any individual's beliefs must be broadly representative of the beliefs of other members of the group.

8.3. Genuine two-way dialogue

Consultation is an iterative process involving a "genuine" two-way dialogue where information is provided over a reasonable period and in suitable language, forms, formats and a level of detail to ensure relevant persons have sufficient information to:

- adequately understand the nature of a proposed activity and its associated environmental impacts and risks;
- be able to advise on what potentially impacted features/values of the environment they have an interest in;
- be in a position to provide views on how features/values of the environment may be impacted; and
- be able to help inform the management of an activity to avoid/minimise those impacts.

The consultation process should provide a mechanism that enables concerns, opinions, claims and objections of relevant persons to be heard, evaluated, and addressed.

Relevant persons may have information about, or understanding of, the environment that titleholders may not be aware of except through an appropriate consultation process. For example, First Nations people with connections to Sea Country will likely have their own understanding of the environment in which an activity is proposed to be undertaken and how the activity might impact it.

NOPSEMA has observed that successful consultations, including with First Nations communities regarding Sea Country, aim to:

- draw out information on the features or values of the environment that may be affected;
- verify the titleholder's understanding of the environment that may be affected; and
- ensure that potentially affected people and communities are able to inform the management of the activity.

Ultimately, consultation helps titleholders to formulate better EPs and is critical to achieve outcomes that are consistent with the principles of ecologically sustainable development (ESD) and ensuring environmental impacts and risks of the activity are reduced to ALARP and acceptable levels.

9. Conclusion

In conclusion, this submission provides an overview of our role and jurisdiction, information on how NOPSEMA regulates under the Environment Regulations and an overview of NOPSEMA's EPBC Act Program. It highlights our feedback from First Nations people and communities, reflecting their experiences in dealing with titleholders and consultation processes.

This paper also notes NOPSEMA's views on how Sea Country and cultural feature issues and impacts are managed in terms of consultation. We have also highlighted some best practice approaches in consulting First Nations people and communities, on these issues.

NOPSEMA works within the legislative and regulatory framework provided by Parliament. We support policy agencies in identifying opportunities for improvement, and we welcome engagement in the review of the environmental management regime, led by the Department of Industry, Science and Resources.

We trust that this submission provides useful and practical context to inform the Committee's inquiry into the Bill.