



Environmental  
Defenders Office

**Submission on draft guidelines to protect underwater cultural heritage**

**12 May 2023**

## About EDO

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

**Successful environmental outcomes using the law.** With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

**Broad environmental expertise.** EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

**Independent and accessible services.** As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

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### Submitted to:

Underwater Cultural Heritage Section  
Department of Climate Change, Energy, the Environment and Water  
Submitted via: [DCCEEW Consultation Hub](#)

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### A Note on Language

We acknowledge that there is a legacy of writing about First Nations Peoples without seeking guidance about terminology. We also acknowledge that where possible, specificity is more respectful. For the purpose of this submission, we have chosen to use the term First Nations. We acknowledge that not all First Nations Peoples will identify with that term and that they may instead identify using other terms or with their immediate community or language group.

### Acknowledgement of Country

The EDO recognises First Nations Peoples as the Custodians of the land, seas, and rivers of Australia. We pay our respects to Aboriginal and Torres Strait Islander Elders past, present, and emerging, and aspire to learn from traditional knowledge and customs so that, together, we can protect our environment and cultural heritage through both Western and First Laws. In providing submissions, we pay our respects to First Nations across Australia and recognise that their Countries were never ceded and express our remorse for the deep suffering that has been endured by the First Nations of this country since colonisation.

## Executive Summary

### Consultation on draft guidelines to protect underwater cultural heritage

The purpose of the guidelines is to provide guidance to proponents proposing to undertake activities in Australian waters which may affect underwater cultural heritage (**UCH**). The draft guidelines reflect the legal framework created by the *Underwater Cultural Heritage Act 2018 (Cth)* (**UCH Act**) and advise proponents on their obligations created under that Act.

The UCH Act has a relatively narrow objective to protect post-colonial history, whereas the *UNESCO 2001 Convention on the Protection of the Underwater Cultural Heritage* (**UNESCO 2001 Convention**), which the government has committed to through its UCH Intergovernmental Agreement, has a wider scope for the protection of First Nations UCH. EDO sees the need for wholesale reform of how First Nations UCH is identified, defined, and protected, in line with best practice and Australia's international obligations.

However, where First Nations UCH may be identified under the UCH Act scheme, it is critical that the guidelines provide clear and culturally appropriate advice to proponents undertaking activities which may affect First Nations UCH. The draft guidelines are clearly insufficient, and further consultation should be undertaken with First Nations groups and affected communities before they are adopted. However, this submission makes **8 recommendations** to improve on the draft guidelines in relation to several matters which need to be addressed in further consultation.

The guidelines also appear to be intended to assist proponents who are required to consider compliance with the UCH Act in relation to other approval processes, such as under the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* (**EPBC Act**) and the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009 (Cth)* and the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)*. Assessment processes and obligations under these regimes are not as limited in scope as the UCH Act and may take into account a broader range of potential impacts to First Nations cultural heritage, cultural values and spiritual and cultural connections to areas at sea and under the water. Accordingly, the guidelines must make it clear that compliance with the UCH guidelines may not be sufficient to discharge obligations concerning First Nations cultural heritage under other regimes.

### List of recommendations

- 1. The draft guidelines are clearly insufficient in relation to First Nations UCH, and further consultation should be undertaken with First Nations groups and affected communities before they are adopted.**
- 2. Cultural heritage legislative reform must include identification, management and protection of First Nations underwater cultural heritage.**
- 3. The guidelines must make clear their application is limited to heritage identified under the UCH Act.**
- 4. The guidelines should reflect international obligations relating to community consultation, including FPIC.**

- 5. Methods to identify, record and assess UCH in the marine environment must include principles of best practice information-gathering.**
- 6. Consultation and engagement with First Nations Peoples must be mandatory and required at each assessment stage.**
- 7. The guidelines should ensure that intangible UCH is protected, and account for cultural and spiritual adverse impacts (not only physical adverse impacts) on both tangible and intangible UCH.**
- 8. No derogation from the principle of in situ preservation be allowed for First Nations UCH, except with free, prior and informed consent of relevant First Nations Communities.**

## Introduction

Environmental Defenders Office (**EDO**) welcomes the opportunity to make a submission in response to the UCH *Guidelines for working in the near and offshore environment to protect Underwater Cultural Heritage* (the **draft guidelines**) to protect UCH.

EDO's recommendations to improve the draft guidelines are focused on interaction with First Nations UCH. EDO is a non-Indigenous community legal centre, which works alongside First Nations around Australia and the Torres Strait Islands in their efforts to protect their Countries and cultural heritage from damage and destruction. EDO has and continues to work with First Nations clients who have interacted with Western laws, including Western cultural heritage laws in many ways, including litigation and engaging in Western law reform processes.

In EDO's respect for First Nations self-determination, EDO has provided high level key recommendations for Western law reform to empower First Nations to protect their Countries and cultural heritage. The high-level recommendations set out in this submission aim to ensure that the UCH guidelines comply with Australia's obligations under international law and provide respectful and effective protection of First Nations' Countries and cultural heritage.

### **First Nations cultural heritage reform is urgently needed**

First Nations UCH is increasingly being recognised and studied, with a growing understanding in Western law and science that land which is now submerged previously formed an integral part of the Australian mainland, and was occupied by over a thousand generations of people.<sup>1</sup> Despite changes in sea levels, this Country may still form the basis of a deep, ongoing, cultural connection, which remains under threat from activities including dredging, offshore cables and pipelines, and fossil fuel exploration.<sup>2</sup> Research indicates that the scale of UCH off the coast of Australia is vast, and that Australia has fallen behind international best practice in locating, recording and protecting submerged cultural places which are of importance to First Nations Communities.<sup>3</sup>

First Nations UCH is not being adequately protected by Commonwealth legislation, and it is clear the objective of the UCH Act is not the protection of First Nations UCH. The Act defines "underwater cultural heritage" broadly as any trace of human existence that has cultural, historical, or archaeological character, and is located under water.<sup>4</sup> However, the legislation only

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<sup>1</sup> See e.g. J McCarthy et al, 'Beneath the Top End: A regional assessment of submerged archaeological potential in the Northern Territory' (2022) *Australian Archaeology* 88(1); Ward I, Elliott M and Guilfoyle D, 'Out of sight, out of mind' - towards a greater acknowledgment of submerged prehistoric resources in Australian science-policy as part of a common heritage' (2022) *Frontiers in Marine Science*; Benjamin J et al., 'Aboriginal artefacts on the continental shelf reveal ancient drowned cultural landscapes in northwest Australia' (2020) *PLoS ONE* 15(7).

<sup>2</sup> Jonathan Benjamin et al, 'Australia's coastal waters are rich in Indigenous cultural heritage, but it remains hidden and under threat' (The Conversation, 31 August 2021), available at: <https://theconversation.com/australias-coastal-waters-are-rich-in-indigenous-cultural-heritage-but-it-remains-hidden-and-under-threat-166564>, AAP, 'Aboriginal artefacts found off WA coast prompt calls for stronger heritage laws' (The Guardian, 2 July 2020), available at <https://www.theguardian.com/australia-news/2020/jul/02/aboriginal-artefacts-found-off-wa-coast-prompt-calls-for-stronger-heritage-laws>.

<sup>3</sup> Benjamin, above n 2.

<sup>4</sup> *Underwater Cultural Heritage Act 2018 (Cth)* s 15. Cf the UNESCO (2001) Convention defines Underwater Cultural Heritage as 'all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years ...'

provides for “automatic” protection of vessels and aircraft and their remains, which have been in Australian or Commonwealth waters for at least 75 years.<sup>5</sup> Protection applies where existence or location of the article has not been confirmed, and creates obligations on proponents seeking to undertake activities where these articles may be present or affected.

The Minister also has the power to declare other individual UCH sites or articles as protected.<sup>6</sup> First Nations UCH may be protected through such a declaration, after the Minister has considered a range of additional criteria prescribed by the regulations.<sup>7</sup> In contrast to the protection granted for vessel and aircraft remains, this declaration is not automatic, relies on initial discovery, and the Minister must be satisfied of the article’s heritage significance. Clearly, the current terms of the Act are insufficient to protect First Nations UCH, and the draft guidelines must be amended to mitigate these deficiencies.

For example, there has been recent recognition by the Full Federal Court that proponents intending to conduct projects in the marine environment are required under other approval processes to consider the cultural connection of First Nations communities with the sea,<sup>8</sup> whether or not these interests are recognised as rights under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) or subject to a claim or determination under the *Native Title Act 1993* (Cth).<sup>9</sup> In *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193 (the **Tipakalippa Appeal Decision**), the Full Court found that interests including cultural and spiritual connections to the sea were interests of a kind “well known to contemporary Australian law”.<sup>10</sup>

Other applicable legislative frameworks, including the EPBC Act and *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (**ATSIHP Act**) have serious and well documented deficiencies in their protection of First Nations cultural heritage, and do little to address UCH.<sup>11</sup> EDO acknowledges the Federal Government has committed to an overhaul of Australia’s cultural heritage laws, and is currently consulting on three preferred models of reform:<sup>12</sup>

1. Overarching federal standalone legislation and repeal of the ATSIHP Act;
2. Federal accreditation of state and territory legislation where mandatory national standards are met, and repeal of the ATSIHP Act;
3. ‘Model’ legislation, and exemption from the operation of the ATSIHP Act once enacted.

These reforms will also interact with upcoming changes to the EPBC Act, including the development of a National Environmental Standard for First Nations engagement and

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<sup>5</sup> *Underwater Cultural Heritage Act 2018* (Cth) s 16

<sup>6</sup> *Underwater Cultural Heritage Act 2018* (Cth) (Cth) s 17, s 19. We note the guidelines only address provisional declarations made under section 19 of the UCH Act, rather than the Minister’s declaratory power under section 17. The guidelines should be amended to reflect long term protection granted to First Nations UCH under section 17.

<sup>7</sup> *Underwater Cultural Heritage Rules 2018* s 5.

<sup>8</sup> The regime concerned in that proceeding being the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (Cth).

<sup>9</sup> *Tipakalippa appeal*, [36] (Kenny and Mortimer JJ).

<sup>10</sup> *Tipakalippa appeal* [68],[80].

<sup>11</sup> See: Joint Standing Committee on Northern Australia, *A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge* (Report, 2021) chapters 6 and 7.

<sup>12</sup> DCCEEW, *First Nations cultural heritage protection reform* (Options Paper, 2022).

participation in decision making. EDO supports these developments, and in particular the implementation of the recommendations for cultural heritage reform outlined in the *Final report into the destruction of Indigenous heritage sites at Juukan Gorge*.<sup>13</sup> Australia’s cultural heritage laws need significant reform, and that includes greater identification, recognition, and protection of First Nations UCH under national legislation.

In the interim, the EDO recommends significant further consultation be undertaken with First Nations Communities, and the guidelines be redrafted to reflect best practice engagement and consultation with First Nations Communities, including to reflect our international obligations. The recommendations set out below have been drafted in this context.

Further, it is important that the limitations of the UCH Act with respect to First Nations UCH are acknowledged, and that the operation of the guidelines is acknowledged to be limited to fulfilling obligations under the UCH Act. The guidelines should not be put forward as comprehensive of the requirements on proponents, or as a “best practice” standard for the protection of First Nations UCH, and intangible cultural heritage in the sea, where assessment of impacts on cultural heritage is required under other approval processes, or obligations exist to protect First Nations cultural heritage. EDO is concerned that the guidelines, as narrowly drafted for application of the UCH Act, are seriously inadequate for this purpose.

**Recommendation 1: The draft guidelines are clearly insufficient in relation to First Nations UCH, and further consultation should be undertaken with First Nations groups and affected communities before they are adopted.**

**Recommendation 2: Cultural heritage legislative reform must include identification, management and protection of First Nations underwater cultural heritage.**

**Recommendation 3: The guidelines must make clear their application is limited to heritage identified under the UCH Act.**

### **Community consultation and participation is essential**

The draft guidelines suggest proponents are encouraged to engage “early and ongoingly with First Nations groups and individuals who may have an interest in a proposal in the near and offshore environments”,<sup>14</sup> but that stakeholder consultation is “not a legislative requirement” as part of the method for identification and assessment of UCH prior to commencing work. EDO is of the view that community consultation and participation requirements are essential, and particularly so for any First Nations UCH identified under the Act and should be mandated in the guidelines.

In granting a permit under the UCH Act, the Minister is required to have regard to specified matters, including, *inter alia*, whether appropriate consultation has been undertaken with relevant stakeholders relating to: shared heritage interests, issues of ownership or sovereignty, and obligations under any relevant international conventions, agreements or treaties (which

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<sup>13</sup> Joint Standing Committee on Northern Australia, above n 11.

<sup>14</sup> DCCEEW, Guidelines for working in the near and offshore environment to protect Underwater Cultural Heritage (**Draft guidelines**, 2023), 10.

would include the UNESCO 2001 Convention and UNDRIP, as set out below).<sup>15</sup> Given this requirement, it's clear that proponents should be aware of best practice consultation guidance for identifying and engaging with relevant stakeholders, as well as requirements under international law.

In relation to offshore projects, the draft guidelines should clarify that there may be additional consultation obligations under the OPGGS regime. In cases where potential impacts on UCH are identified in relation to offshore activities under the OPGGS regime, consultation of all relevant, affected persons is a legislative requirement under reg 11A of the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (Cth). The standard for consultations in such cases was affirmed in the recent court judgment concerning the Barossa gas field in the *Tipakalippa v NOPSEMA* case<sup>16</sup> and the subsequent update to NOPSEMA's consultation guidance. NOPSEMA's Direction No. 1898 to the Barossa project proponent indicates that where inadequate consultation and investigation of First Nations UCH occurs, specific obligations may be imposed by the regulator in relation to UCH matters; in that case, the proponent was explicitly required to obtain information from Traditional Owners on UCH.

In all cases, the draft guidelines should be consistent with Australia's obligations under international law to consult all First Nations people who may be affected by an activity.<sup>17</sup> The rights of First Nations Peoples have been internationally recognised, with the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**) being adopted by the United Nations General Assembly on 13 September 2007 and endorsed by Australia on 3 April 2009.<sup>18</sup> Protection of UCH must be consistent with the range of relevant rights identified in UNDRIP.

The principles of free, prior, and informed consent (**FPIC**) underpin the international obligation to consult First Nations peoples,<sup>19</sup> enshrined in articles 19 and 32 of UNDRIP. FPIC is the right of First Nations Peoples to give or withhold consent to any project that may affect them or their lands, and to negotiate conditions for the design, implementation and monitoring of projects.<sup>20</sup> In practice, this means the guidelines should include requirements that proponents ensure First Nations Peoples have information on the full range of potential impacts of an activity, including cumulative impacts, to be in a position to give "informed consent."<sup>21</sup> Implementation of FPIC is critical and must apply in relation to the operation of the UCH protection scheme. Whilst consultation with the Traditional Owners of the lands on which the project may directly affect is required, there may be requirements to consult with Traditional Owners of other Countries which

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<sup>15</sup> *Underwater Cultural Heritage Rules 2018* s 6.

<sup>16</sup> See *Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority (No 2)* [2022] FCA 1121; *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193.

<sup>17</sup> UN Human Rights Council, "Free, prior and informed consent: a human rights-based approach, Study of the Expert Mechanism on the Rights of Indigenous Peoples," A/HRC/39/62, Annex para. 11 (10 Aug. 2018).

<sup>18</sup> United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UN Doc A/Res/61/295 (2 October 2007, adopted 13 September 2007).

<sup>19</sup> UN Human Rights Council, A/HRC/39/62, [3].

<sup>20</sup> Joint Standing Committee on Northern Australia, above n 11, 178-179.

<sup>21</sup> United Nations, Department of Economic and Social Affairs, "State of the World's Indigenous Peoples," 53-54 (2021) <https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2021/03/State-of-Worlds-Indigenous-Peoples-Vol-V-Final.pdf> (describing need for information on cumulative impacts in order for free, prior and informed consent to be effective).



may be indirectly impacted by the project. These may include lands, waters, resources and cultural values held beyond a project's immediate footprint.<sup>22</sup>

Consultation is particularly important in relation to First Nations UCH due to the deficiencies of the current UCH regime, particularly the fact that protection of First Nations UCH relies on initial discovery and then obtaining a Ministerial declaration. This increases the likelihood that First Nations UCH may not be identified prior to works or activities commencing, increasing the risk that it will be harmed. The fact that First Nations UCH is not automatically protected has the capacity to create significant disincentives for industry to adequately research its existence or report it if it is found. Requiring best practice consultation in relation to First Nations UCH is one way that the guidelines could assist to remedy some of the deficiencies of the current UCH regime pending reform of the UCH Act and Australia's cultural heritage laws.

#### **Recommendation 4: The guidelines should reflect international obligations relating to community consultation, including FPIC.**

##### **Best practice information-gathering must be adopted**

Information-gathering is crucial for the identification of First Nations UCH, as under the UCH Act protection is not granted automatically, or in the absence of evidence, as it is for aircraft or vessel remains. Further, the guidelines place emphasis on desktop analysis as a "minimum" standard for assessing UCH.<sup>23</sup> In contrast to sunken vessels, First Nations UCH may not be as comprehensively recorded in databases due to the impact of colonisation and the prominence of oral history in First Nations knowledge systems. As a result, additional steps should be required for information gathering with respect to the existence of First Nations UCH.

Development of advice for information gathering has occurred in other jurisdictions and may guide development of the guidelines to ensure that culturally safe practice is followed to prevent unanticipated harm to undiscovered First Nations UCH.

1. *Reconstruct the boundaries of ancient shorelines and submerged terrestrial landscapes to understand whether currently submerged areas may contain sites of prior human habitation.*<sup>24</sup> This increases the likelihood that the study understands where sensitive landscapes or sites may be located.<sup>25</sup> Terrestrial landscape reconstructions must be combined with Traditional Owners' knowledge to create more robust understanding of where sensitive landscapes may be located.<sup>26</sup>

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<sup>22</sup> UN Human Rights Commission, A/HRC/39/62, supra n. 2, [32].

<sup>23</sup> See Draft guidelines, above n 14, 28.

<sup>24</sup> United States Department of the Interior (US DOI), Bureau of Ocean Energy Management (BOEM), Office of Renewable Energy Programs, "Developing Protocols for Reconstructing Submerged Paleocultural Landscapes and Identifying Native American Archaeological Sites in Submerged Environments: Best Practices," BOEM 2018-055 (Sept. 2018), [https://espis.boem.gov/final%20reports/BOEM\\_2018-055.pdf](https://espis.boem.gov/final%20reports/BOEM_2018-055.pdf) (**Best Practices Report**) 34.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*, 30, 32.

2. *Reconstruct the physical and geological configuration of ancient land surfaces that were once exposed and available for human habitation, but are now submerged and potentially buried.*<sup>27</sup> This should be done by conducting both remote sensing and analysing sediment samples.<sup>28</sup> Similarly, reconstruct the local and regional ecological and climate conditions that were experienced by Traditional Owners in the past.<sup>29</sup>
3. *Once ancient shorelines, landforms, ecology, and climates have been reconstructed, assess how ancient landscapes may be culturally sensitive by applying Traditional Owners' knowledge and input.*<sup>30</sup> When assessing for cultural sensitivities, identify whether any particular ancient landforms have been preserved, such as a former river or bay. Traditional Owners should be consulted about how people would have related to the area in the past, either through fishing, trade or other connections.<sup>31</sup> The study should interview present-day Traditional Owners who have knowledge about that particular landform.<sup>32</sup>
4. *Recognise the limits of models.* Models alone “will not produce an accurate prediction about the location of culturally sensitive areas”; for example, subterranean dwellings were found offshore of Connecticut in an area that a model had designated as “low sensitivity” due to the steep slope of the area.<sup>33</sup> To improve their predictive capacity, the models must be combined with Traditional Owners' knowledge and cultural perceptions of, and interactions with, ancient landscapes.<sup>34</sup> Predictive models informed by First Nations knowledge should inform surveys and “ground-truthing” exercises such as diving.
5. *Use the proper geophysical survey instruments.*<sup>35</sup> Best practices should be followed in using these instruments,<sup>36</sup> and the collected data should be interpreted in combination with Traditional Owners' knowledge to improve accuracy.<sup>37</sup>
6. *Identify large areas that may be culturally sensitive, rather than solely trying to identify individual archaeological “sites.”*<sup>38</sup> Known as a “Cultural Landscape approach,” this method

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<sup>27</sup> *Id.*, 35-37.

<sup>28</sup> *Id.*, 36.

<sup>29</sup> *Id.*, 38-41.

<sup>30</sup> *Id.*, 41.

<sup>31</sup> *Id.*, 28.

<sup>32</sup> US DOI, BOEM, Office of Renewable Energy Programs, “Developing Protocols for Reconstructing Submerged Paleocultural Landscapes and Identifying Ancient Native American Archaeological Sites in Submerged Environments: Geoarchaeological Modeling,” (Mar. 2020) [https://espis.boem.gov/final%20reports/BOEM\\_2020-024.pdf](https://espis.boem.gov/final%20reports/BOEM_2020-024.pdf) (**Geoarchaeological Modelling Report**), 8 (citing the “Danish Topographical Model” or “Danish Fishing Site Model”).

<sup>33</sup> *Id.*

<sup>34</sup> US DOI, BOEM, Best Practices Report, 43.

<sup>35</sup> See, e.g., US DOI, BOEM, “Guidelines for Providing Archaeological and Historic Property Information Pursuant to 30 CFR Part 585” (27 May 2020), <https://www.boem.gov/sites/default/files/documents/about-boem/Archaeology%20and%20Historic%20Property%20Guidelines.pdf>, 7.

<sup>36</sup> *Id.*, 7-10. See generally, US DOI, BOEM, Geoarchaeological Modelling Report.

<sup>37</sup> See, e.g., US DOI, BOEM, Best Practices Report, 37.

<sup>38</sup> *Id.*, 47.

views entire ancient landforms that have survived to the present day as places of cultural importance.<sup>39</sup> Approaches that seek only to identify individual objects or sites within the development envelope/project area itself will be inadequate where the site or object forms part of a broader landscape of which the project area is a part. Looking beyond the project area may be this be necessary to understand the cultural significance of a site. This approach is consistent with the UCH Act that recognises entire UCH areas may be protected.<sup>40</sup>

7. *Increase and fund Traditional Owners' capacity to study with other researchers.* Successful collaboration requires baseline capacities necessary for working together.<sup>41</sup>
8. *Ensure that protocols are agreed for how information provided by Traditional Owners is recorded, used and shared.* Information provided by Traditional Owners as part of cultural heritage assessment processes belongs to Traditional Owners and their communities. Free, prior and informed consent must be given about how information will be recorded, used and shared and protocols governing the collection and use of cultural information must be agreed with knowledge holders. Information gathered through the assessment process (including information other than that provided by Traditional Owners) about areas that are the subject of assessment must be provided to Traditional Owners and knowledge holders at key junctures of the process.

Further, while the guidelines make a general statement that the process of identifying and assessing UCH in the environment that may be impacted “can greatly benefit from consultation with relevant communities and individuals”, the methodology outlined elsewhere in the guidelines does not require engagement with First Nations Peoples at key intervals of the assessment process. For example:

1. The desktop assessment phase emphasises conducting database searches, historical analysis and literature review but doesn't highlight the relevance of First Nations knowledges or texts or mandates consultation. It is difficult to see how the location, nature, extent and significant of First Nations UCH, the nature of potential risks to it and the proportionality of relevant controls and management policies could be adequately assessed in the absence of consultation.
2. The focus throughout is ensuring the engagement of expert marine archaeologists, indicating a clear preoccupation with types of UCH that are automatically protected under the UCH Act, which is a very Eurocentric notion of cultural heritage. The guidelines should also recommend obtaining expertise relevant to the assessment of First Nations UCH centrally, experts who have cultural expertise in accordance with tradition. Traditional Owners are the experts in their own cultural heritage. Traditional Owners may also wish to seek assistance from Australian Archaeologists, Anthropologists, and Geoscientists at their request where appropriate.

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<sup>39</sup> *Id.* 48.

<sup>40</sup> *Underwater Cultural Heritage Act 2018 (Cth)*, s 20.

<sup>41</sup> US DOI, BOEM, Best Practices Report, 48-49.

**Recommendation 5: Methods to identify, record and assess UCH in the marine environment must include principles of best practice information-gathering.**

**Recommendation 6: Consultation and engagement with First Nations Peoples must be mandatory and required at each assessment stage.**

### **Account for intangible cultural heritage and culturally significant adverse impacts**

As noted above, EDO is concerned these guidelines may be used to guide compliance for legislative regimes beyond the UCH Act. The guidelines as drafted are clearly insufficient for guiding proponents where assessment of impacts on cultural heritage is required under other approval processes, or obligations exist to protect cultural First Nations cultural heritage. If the guidelines are to be used for this purpose, however, they must clearly contemplate the protection of intangible cultural heritage, or further guidelines should be drafted.

For communities with longstanding connections to submerged sites, particularly First Nations peoples, it can be difficult to differentiate between tangible and intangible cultural heritage. Underwater cultural heritage that has a physical manifestation is not just limited to physical remnants of occupation, but can include landforms that have a spiritual or cultural value. Cultural values may also exist in known significant places that do not correspond to landforms or have a physical manifestation. International law ensures the protection of both kinds of heritage. UNESCO describes “intangible cultural heritage” as “traditions or living expressions inherited from our ancestors and passed on to our descendants, such as oral traditions, performing arts, social practices, rituals, festive events, knowledge and practices concerning nature and the universe or the knowledge and skills to produce traditional crafts.”<sup>42</sup> State obligations to protect intangible cultural heritage are codified in the *UNESCO 2003 Convention for the Safeguarding of the Intangible Cultural Heritage* (**UNESCO 2003 Convention**). Although Australia is yet to ratify it, the UNESCO 2003 Convention has gained wide acceptance with 181 State parties.

While the treaty regimes on UCH and intangible cultural heritage remain separate and there is no specific international agreement integrating both, read together, they give rise to obligations for States to safeguard intangible UCH. The UNESCO 2003 Convention provides that States must take necessary measures to ensure the safeguarding of intangible cultural heritage “present in its territory.” Given that Australia’s territory includes Australian and Commonwealth waters, the protections of UCH should also apply to intangible cultural heritage. In light of the deficiencies in current legislative protection of intangible First Nations cultural heritage, the guidelines should require project proponents to not limit their inquiry to only the tangible aspects of UCH, but take a more holistic approach to managing both tangible and intangible UCH.

The guidelines also fail to account for culturally significant adverse impacts on UCH. Adverse impact is defined under the UCH Act as conduct which: “directly or indirectly physically disturbs or otherwise damages the protected UCH”; or “causes the removal of the protected UCH from waters

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<sup>42</sup> UNESCO (2023) “What is Intangible Cultural Heritage?”, <https://ich.unesco.org/en/what-is-intangible-heritage-00003>.

or from its archaeological context.”<sup>43</sup> EDO recommends the guidelines account also for cultural or spiritual adverse impacts which could arise from an activity.<sup>44</sup>

**Recommendation 7: The guidelines should ensure that intangible UCH is protected, and account for cultural and spiritual adverse impacts (not only physical adverse impacts) on both tangible and intangible UCH.**

### **Provide further guidance on any derogation from in situ preservation**

As provided for by the UNESCO 2001 Convention and Rule 1 of the Annex, the preservation in situ of underwater cultural heritage shall be considered as the first option before allowing or engaging in any activities directed at this heritage.<sup>45</sup> The draft guidelines allow for derogation from this principle “where all other alternatives are exhausted or because of critical time sensitivities.”<sup>46</sup> It is implied that lack of economic viability may be a justification for relocation or other alterations to UCH. The draft guidelines suggest partial removal may be authorised by the relevant agency (e.g. excavating or relocating the UCH articles most affected by the project), provided that it is undertaken in accordance with the Annex Rules.

However, EDO is concerned that little guidance is provided on when a proponent may seek to relocate, rebury or otherwise alter UCH. In contrast to other types of UCH, removal or reburial of First Nations UCH may be impossible without harm to the cultural values of the place, object or site, including its intangible cultural heritage values. EDO recommends no derogation from the principle of in situ preservation be allowed for First Nations UCH unless there is free, prior and informed consent of relevant First Nations Communities. No criteria or guidance with respect to options other than in situ preservation should put forward unless it is consistent with this principle and has been the subject to comprehensive, targeted and ongoing consultation with relevant First Nations Communities.

**Recommendation 8: No derogation from the principle of in situ preservation be allowed for First Nations UCH, except with free, prior and informed consent of relevant First Nations Communities.**

### **Conclusion**

As First Nations UCH may be identified under the UCH Act scheme, it is critical that the guidelines provide clear and culturally appropriate advice to proponents undertaking activities which may affect First Nations UCH. The draft guidelines in their current form are clearly insufficient and not fit for this purpose. The recommendations in this submission provide an indication of best practice for consultation with First Nations Communities to identify and protect UCH. However, EDO

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<sup>43</sup> *Underwater Cultural Heritage Act 2018 (Cth)*, s 30.

<sup>44</sup> See e.g. Peter de Kruijff, ‘Andrew and Nicola Forrest lose bid to build irrigation project that traditional owners fear could kill sacred serpent’ (ABC News, 6 April 2023) available at <https://www.abc.net.au/news/2023-04-06/forrests-lose-bid-to-build-project-that-could-kill-sacred-snake/102199638>.

<sup>45</sup> UNESCO 2001 Convention, article 2.5.

<sup>46</sup> Above n 14, Draft guidelines, 23.

remains concerned about the timeframe for providing feedback on the draft guidelines, and strongly recommends further consultation be undertaken with First Nations groups and affected communities before they are adopted.

It also remains unclear whether the guidelines will be used to inform compliance beyond the UCH Act. If this is the intention, the guidelines should not be released in their current form. Should they be applied more broadly, the guidelines must be significantly re-worked to reflect not only domestic best practice, but Australia's international obligations relating to both tangible and intangible First Nations cultural heritage. Fulsome consultation with First Nations communities and representatives is essential in this process.

Finally, EDO reiterates the need for wholesale legislative reform, which must protect First Nations cultural heritage across the country, including underwater.