Environmental Defenders Office

Submission regarding the consultation requirements for offshore oil and gas storage regulatory approvals

8 March 2024

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.

www.edo.org.au

Submitted to:

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Acknowledgement of Country

EDO recognises and pays respect to the First Nations peoples of the lands, seas and rivers of Australia. We pay our respects to First Nations Elders past, present and emerging, and aspire to learn from traditional knowledges and customs that exist from and within First Laws so that together, we can protect the environment and First Nations' cultural heritage through both First Laws and Western laws. We recognise that sovereignty was never ceded and express our remorse for the injustices and inequities that have been and continue to be endured by Aboriginal and Torres Strait Islander peoples since the beginning of colonisation.

EDO recognises self-determination as the right to freely determine one's political status and freely pursue their economic, social and cultural development. EDO respects all First Nations' rights to be self-determined, which extends to recognising the many different First Nations within Australia and the Torres Strait Islands, as well as the multitude of languages, cultures, protocols and First Laws.

First Laws are the laws which existed prior to colonisation and continue to exist today within all First Nations. It refers to the learning and transmission of customs, traditions, kinship and heritage. First Laws are a way of living and interacting with Country that balances human needs and environmental needs to ensure that the environment and ecosystem which nurtures, supports, and sustains human life, is also nurtured, supported, and sustained. Country is sacred and spiritual, with culture, First Laws, spirituality, social obligations and kinship all stemming from relationships to and with the Land.

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 people will identify with that term and that they may instead identify using other terms or with their immediate community or language group.

First Laws is used to describe the laws which exist within First Nations. It is not intended to diminish the importance or status of the customs, traditions, kinship and heritage of First Nations in Australia. EDO respects all First Laws and values their inherent and immeasurable worth. EDO recognises that there are many different terms used throughout First Nations for what is understood in the Western world as 'First Laws'.

EDO's role

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 Cultures 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 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 Cultures. The high-level recommendations in this submission comply with Australia's obligations under international law and provide respectful and effective protection of First Nations' Countries and Cultures.

Introduction

In January 2024, the Department of Industry, Science and Resources (**DISR**) released a consultation paper relating to the consultation requirements for offshore petroleum and greenhouse gas storage regulatory approvals (**Consultation Requirements Review**).

Environmental Defenders Office (**EDO**) welcomes the opportunity to comment on the consultation paper and on the Consultation Requirements Review more broadly.

Offshore resources activities in Commonwealth waters are regulated under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) (**OPGGS Act**) and the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2023* (Cth) (**Offshore Environment Regulations**). Under the Offshore Environment Regulations, titleholders are required to consult with, amongst others, "a person or organisation whose functions, interests or activities may be affected by the activities to be carried out under the environment plan" (reg 25, Offshore Environment Regulations). The scope of the consultation requirements in the Offshore Environment Regulations were clarified by the Full Court of the Federal Court in *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193 (***Tipakalippa***), and by the Federal Court in *Cooper v NOPSEMA (No 2)* [2023] FCA 1158 (***Cooper***).

Titleholders' consultation with people and organisations whose functions, interests or activities may be impacted by proposed offshore resources activities is an essential feature of Australia's existing offshore environmental management framework. The consultation process allows people who are impacted by offshore gas activities the subject of environment plans to have their say. In the absence of this process, titleholders may not otherwise be able to obtain this information. It also ensures that these people are properly informed of the scope and impact of the proposed activities.

The importance of the consultation process is particularly pertinent for First Nations communities, who have cared for and relied on Country for millennia. It is critical that First Nations communities are adequately and genuinely consulted in relation to offshore resources projects that may impact their homes, cultures and ways of life, and their cultural and spiritual connections to Country. This is in line with Australia's international human rights obligations, and long-standing principles of environmental law.

EDO's position is that the consultation requirements in the Offshore Environment Regulations and OPGGS Act are sufficiently clear and enforceable, however, this review provides an opportunity to confirm and strengthen requirements. First and foremost, EDO is of the view that the consultation rights of all relevant persons, but especially First Nations peoples in relation to offshore projects, should not be weakened. To that end, EDO refers to the Minister for Resources, the Hon. Madeleine King MP's comments made in the House of Representatives on 10 August 2023 [emphasis added]:

> *I also want to acknowledge the traditional owners of the Tiwi Islands and their connection to their land and sea country. I've been very clear on this issue for some time now. It is the government's position that all corners of industry, including the oil and gas sector, must genuinely consult with First Nations peoples as part of the regulatory approvals processes. All people, including First Nations people, have the right to be consulted on activities that impact them.* ***They have a right for their voice to be heard. This was made clear by the Federal Court's judgement, and the government does accept that finding, which is the court case that you referred to. We are not looking to change that at all.***

EDO is of the view that the regulatory scheme could be strengthened in a number of key areas, and that this Review provides an opportunity to do so. As such, this submission makes **16 recommendations** to improve the regulatory scheme.

This submission addresses:

1. the operation of the existing regulatory scheme, including the effect of *Tipakalippa* and *Cooper*; and

2. recommendations to strengthen and improve community rights under the regulatory scheme.

EDO notes significant concerns about the timing and timeframe for carrying out this important Review. With only a short original consultation period (which has since been extended) and one public information session scheduled on the original closing date, there is a risk that communities and stakeholders will not be able to adequately engage with the process. EDO is concerned that adequate engagement with relevant communities has not taken place, including by allowing in-person responses to be provided by community, in community, rather than relying on written submissions. Good consultation principles, including taking into account factors which could impact on stakeholders' ability to engage (such as the wet season in the Northern Territory, northern Western Australia and far north Queensland, ability to access the consultation paper online, or read written materials when English is not a first language), must apply in this review – as well as being reflected in its outcomes.

Summary of recommendations

Recommendation 1: The regulatory scheme be amended to embed the principles of FPIC in all consultation requirements.

Recommendation 2: The regulatory scheme be amended to ensure that communities are not overburdened with multiple projects and environment plans at the same time. This could be achieved by requiring titleholders to conduct consultation processes in a streamlined manner, work with any other relevant titleholders, and clearly signpost to community which projects/environment plans they are consulting about.

Recommendation 3: The regulatory scheme be amended to require a titleholder to: (a) identify in writing the information that it obtained from a relevant person or community during the consultation process for a particular environment plan that it proposes to utilise for the purpose of satisfying the requirements in reg 34 of the Offshore Environment Regulations with respect to a second environment plan; and (b) give that relevant person or community a reasonable opportunity to respond (either orally or in writing) to the titleholders' use of the information for that purpose.

Recommendation 4: The regulatory scheme be amended to require a titleholder to provide to relevant persons who they are consulting with the most recent draft of an environment plan.

Recommendation 5: The regulatory scheme be amended to require a titleholder to provide to relevant persons a draft of an environment plan which has been amended in response to consultation, prior to the submission of the environment plan to NOPSEMA.

Recommendation 6: The regulatory scheme be amended to clarify that consultations are to be an iterative process and that relevant persons should be afforded multiple opportunities to provide input, both in relation to co-designing the consultation process and the provision of information.

Recommendation 7: The regulatory scheme be amended to grant NOPSEMA the power to monitor a titleholder's conduct throughout the consultation process, including by enabling NOPSEMA to give directions to proponents as to the manner in which consultation is to occur. Such directions must always uphold the needs of First Nations communities in the consultation process.

Recommendation 8: The definition of "relevant person" in the Offshore Environment Regulations be amended to confirm that it extends to persons beyond Australian jurisdiction whose functions, interests or activities may be affected, where those persons are reasonably ascertainable.

Recommendation 9: The regulatory scheme be amended to require titleholders to provide to NOPSEMA a full and unedited audio or audio-visual record of consultation, where all or most of the consultation process has been conducted orally. There should be an exception to this requirement where the consultation process concerns culturally sensitive material to which intellectual property rights may attach, or confidential or gender restricted materials.

Recommendation 10: The regulatory scheme be amended to require titleholders to provide to relevant persons, upon request, any material referred to by a titleholder during the consultation

process and an opportunity to review any notes or recordings made of meetings where information is provided orally, before these records are provided to NOPSEMA. There should be an exception to this requirement where the consultation process concerns culturally sensitive material to which intellectual property rights may attach, or confidential or gender restricted materials.

Recommendation 11: The regulatory scheme be amended to require titleholders, as part of the co-designed consultation process, to establish processes to manage culturally sensitive and confidential information, and information over which Indigenous Cultural and Intellectual Property rights may attach, which is provided by relevant persons during consultation**.**

Recommendation 12: The regulatory scheme be amended to require titleholders to have regard to the impacts and risks that a proposed activity may have on spiritual and cultural connections (when consulting with First Nations peoples). NOPSEMA must engage qualified experts to properly assess this information.

Recommendation 13: The regulatory scheme be amended to require titleholders to have regard to the impacts and risks that a proposed activity may have on submerged cultural heritage.

Recommendation 14: The regulatory scheme be amended to require that the consultation process be culturally safe and appropriate by requiring titleholders to:

a. ensure cultural customs and protocols are followed, including in relation to the observance of Sorry Business, gender restricted information, the collective nature of storytelling, any issues that can't be discussed in open forums and similar customs;

b. identify and adhere to any established protocols for consultation;

c. ensure that, where needed, interpreters are made available; and

d. ensure that all members of a relevant community have adequate opportunity to participate in the process.

Recommendation 15: The regulatory scheme be amended to allow First Nations people to be properly resourced to participate in the consultation process, including through remuneration for their time and expertise.

Recommendation 16: The regulatory scheme be amended to require titleholders to engage qualified interpreters for relevant persons during the consultation process, and to translate documents referred to during the consultation process, as requested.

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I. The existing regulatory scheme is clear and enforceable

Offshore resources activities in Commonwealth waters are governed by the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) (**OPGGS Act**) and the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2023* (Cth) (**Offshore Environment Regulations**). Under the Offshore Environment Regulations, titleholders are required to consult with, amongst others, "a person or organisation whose functions, interests or activities may be affected by the activities to be carried out under the environment plan" (reg 25(1)(d), Offshore Environment Regulations). The National Offshore Petroleum Safety and Environmental Management Authority (**NOPSEMA**) may only accept an environment plan if it is "reasonably satisfied" that the plan demonstrates that the titleholder has carried out the requisite consultations, and the measures (if any) that the titleholder has adopted, or proposes to adopt, because of the consultations are appropriate (reg 34(g), Offshore Environment Regulations).

NOPSEMA's Guideline titled "Consultation in the course of preparing an environment plan" (**Consultation Guideline**) provides guidance to titleholders in relation to the consultation requirements in the Offshore Environment Regulations. The Consultation Guideline is not legally binding. Relevantly, the Consultation Guideline purports to incorporate the reasoning of the Full Court of the Federal Court in *Tipakalippa.*

To that end, EDO acted for Mr Dennis Murphy Tipakalippa and Ms Raelene Cooper in two recent cases that were heard by the Full Court of the Federal Court and the Federal Court respectively. The *Tipakalippa* and *Cooper* decisions have provided authoritative guidance on the nature of the consultation requirements in the Offshore Environment Regulations incumbent on titleholders for offshore projects.

We have set out below the two key takeaways from the *Tipakalippa* and *Cooper* decisions, being that: (1) the Regulations guarantee consultation for First Nations' peoples whose interests may be affected by an offshore activity; and (2) consultation is intended to inform the assessment of the environment, and the adequacy of measures taken to address a project's impacts, and therefore must be completed before an environment plan is accepted. EDO considers that it is necessary to do this to correct publicly available misinformation about the decisions.

A. The Offshore Environment Regulations guarantee consultation for First Nations peoples who may be affected by offshore activities

The Full Federal Court's decision in *Tipakalippa* confirmed that First Nations peoples' spiritual and cultural connections to Sea Country requires them to be consulted under the regulatory scheme. It also provided authoritative guidance on the nature of consultation requirements incumbent on titleholders for offshore projects.

The *Tipakalippa* proceeding was brought by a Traditional Owner from the Tiwi Islands, Mr Dennis Murphy Tipakalippa. Mr Tipakalippa sought judicial review of NOPSEMA's decision to accept an environment plan that allowed Santos to conduct drilling activities near the Tiwi Islands as part of the Barossa Gas Project. Mr Tipakalippa successfully argued that NOPSEMA could not have been lawfully satisfied that Santos carried out its consultation requirements under the Regulations, as Santos had failed to consult with him and his clan, the Munupi people, who have spiritual and

cultural connections to Sea Country that may be impacted by the project. This finding was upheld on appeal.

The key issue on appeal was the proper interpretation of the "relevant person" test in reg 25(1)(d) of the Offshore Environment Regulations (formerly reg 11A(1)(d) in the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (Cth)).

In EDO's view, *Tipakalippa* clarified the scope of the "relevant person" test in three key ways.

First, the decision clarified that titleholders and NOPSEMA must construe the phrase "functions, interests or activities" broadly.[1] In particular, the term "interests" should be given a meaning conforming to that generally accepted in other areas of public law.[2] Importantly, the Court considered that a broad construction of the "relevant person" test was necessary to promote the objects of the Offshore Environment Regulations, being to ensure that projects are consistent with the principles of ecologically sustainable development and that environmental impacts and risks are reduced to as low as reasonably practicable (**ALARP**) and are of an acceptable level.[3]

Second, the decision confirmed that First Nations peoples' connection with Sea Country can be an "interest" for the purpose of the Offshore Environment Regulations, and that this is not contingent on a proprietary or statutory right, as these interests are of a kind "well known to contemporary Australian law".[4] Despite Mr Tipakalippa being a Traditional Owner, the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) did not give Mr Tipakalippa and the Munupi clan any recognised proprietary or statutory rights over the area likely to be impacted. However, the Court considered that it was "clear beyond doubt" that Mr Tipakalippa and the Munupi clan held a traditional connection to the sea and its marine resources that were "immediate and direct" interests under the regulatory scheme,[5] and that these interests had a real potential of being significantly adversely affected by the proposed activities.[6] These interests arose from traditional cultural connection with the sea, absent any proprietary overlay.[7] In light of this, Santos' failure to consult with Mr Tipakalippa and the Munupi clan meant that NOPSEMA could not have been lawfully satisfied that the environment plan had met the necessary criteria under reg 34 of the Offshore Environment Regulations (formerly reg 10A in the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (Cth)).

Lastly, the decision clarified the nature of consultation required by titleholders under the Offshore Environment Regulations.[8] The Full Federal Court held that communal interests do not present a barrier in performing consultation in a practicable and reasonable way, pointing to other regulatory schemes to demonstrate they are indeed capable of being reasonably ascertainable. The Court detailed particular standards in which consultation should be conducted, stating that there is good reason to adopt a pragmatic and practical approach and that the nature of consultation must be appropriate and adapted to the nature of the interests of the relevant

[1] *Tipakalippa,* [51].
[2] *Tipakalippa,* [65].
[3] *Tipakalippa,* [51].
[4] *Tipakalippa,* [68].
[5] *Tipakalippa*, [68].
[6] *Tipakalippa,* [67].
[7] *Tipakalippa* [68].
[8] *Tipakalippa*, [104].

persons. Properly notified and conducted meetings may be sufficient depending on the context, however, conduct that is superficial or tokenistic will not be adequate. The Court was clear that consultation must be "genuine" in that relevant persons must be given sufficient information and time to make an informed assessment and to respond, and that titleholders are required to demonstrate that relevant persons were afforded a reasonable opportunity to participate in consultation.

EDO notes that NOPSEMA has updated the Consultation Guideline to reflect the Court's findings in *Tipakalippa*. We are of the view that the wording contained in the current regulations, in conjunction with the guidance provided in the Consultation Guideline, provide sufficient flexibility for consultation processes to be adapted to different contexts, as determined by relevant persons and communities being consulted, and should be retained in their current form.

B. NOPSEMA cannot accept an environment plan until consultation is complete

The Federal Court's judgment in *Cooper* confirmed that the regulator cannot accept an environment plan before adequate consultation is completed, consolidating relevant persons' rights to consultation before the acceptance of an environment plan.

The *Cooper* proceeding was brought by Mardudhunera Traditional Custodian, Ms Raelene Cooper. Ms Cooper sought judicial review of NOPSEMA's decision to accept Woodside's environment plan to undertake seismic testing for the Scarborough Gas Project, located off the coast of Murujuga, in the Pilbara region of Western Australia. NOPSEMA accepted the environment plan, subject to certain conditions that required Woodside to conduct further consultation before it commenced the seismic blasting, and which would require Woodside to change the environment plan if the consultation identified new cultural features or heritage values of places. In approving the environment plan, NOPSEMA relied on former reg 10(6) (current reg 33(7)(b)(ii)) of the Offshore Environment Regulations), which allows NOPSEMA in certain circumstances to accept an environment plan "subject to limitations or conditions applying to operations for the activity". Woodside then took steps to commence blasting, despite failing to satisfy a condition of approval that First Nations stakeholders be consulted.

Ms Cooper successfully argued that NOPSEMA did not have the power to approve the environment plan because it was not reasonably satisfied that the consultation required by reg 25 of the Offshore Environment Regulations (formerly reg 11A) had been carried out, and so could not be reasonably satisfied of the criteria in reg 34(g) of the Offshore Environment Regulations (formerly reg 10A(g)).[9]

In EDO's view, *Cooper* does not change the content of the law – nor does it create uncertainty about the lawful application of the Offshore Environment Regulations. Rather, the decision simply confirms that consultation must be undertaken before an environment plan may be accepted. To that end, EDO is of the view that the decision strengthens the rights of First Nations communities to be consulted in relation to offshore gas development in two key ways.

First, the decision emphasised the "fundamental importance" of the consultation process, which is reflected in the requirement in the Offshore Environment Regulations for the inclusion of the

[9] *Cooper,* [65]-[68].

consultation report in the environment plan.[10] This is because NOPSEMA is "materially dependent" on the titleholder's consultation to identify all environmental impacts and risks.[11]

Second, the decision clarified that NOPSEMA cannot approve environment plans in circumstances where the consultation process has not been completed before the environment plan is submitted by the titleholder to NOPSEMA.[12] NOPSEMA is also not able to approve an environment plan subject to conditions that further consultation take place.[13]

C. Reform and legal context for this review

EDO is of the view that neither the *Tipakalippa* or *Cooper* decisions alter the content of the regulatory scheme or 'move the goalposts' for consultation requirements under the OPGGS Act. The cases are instances where the proponent, or NOPSEMA, failed to act within the law. They provide confirmation by the Federal Court that best practice consultation should be pursued for offshore oil and gas actions that impact on First Nations communities, culture, and Sea Country. As such, these decisions should not be used as a reason to alter, or weaken, the current regulatory scheme. Notably, in *Tipakalippa,* the Court rejected arguments that the Regulations in their current form would include an "unworkable" definition of relevant persons that would result in an "overwhelming magnitude of the classes of persons who might need to be individually consulted".[14] The Federal Court has addressed this concern by stating that it saw "no particular difficulty with the proposition that the First Nations peoples who have a traditional connection to the sea, and to the marine resources it holds…are reasonably ascertainable".[15]

EDO is concerned by some of the terminology used in the consultation paper released by DISR as part of the Consultation Requirements Review. In particular, we refer to the following sections of the consultation paper:

- On page 10, DISR states that "[i]dentifying who to consult when preparing an environment plan for an offshore resources activity can be complex. While it might be relatively straightforward to identify relevant persons whose functions, interests or activities may be *directly* affected by an activity, the process for identifying those who may be *indirectly* affected is less clear".

- DISR go on to state that "[t]he potential impacts of offshore resources activities can cover large geographical areas. This can make it difficult to identify who is or who is not a relevant person for the purposes of consultation on a proposed offshore resources activity".

- On page 10, DISR ask the following questions relating to "identifying relevant persons":
    - "19. Is it preferable for some relevant persons to be engaged via representative bodies or industry associations, instead of individually? For example, this could include fishing associations in the case of consultation with the fishing industry"; and

[10] *Cooper,* [59].
[11] *Cooper,* [59].
[12] *Cooper,* [65]-[68].
[13] *Cooper,* [65]-[68].
[14] *Tipakalippa,* [86].
[15] *Tipakalippa,* [90].

- "20. Should people and organisations have an opportunity to self-identify as relevant persons?..."

- On page 11, DISR ask the following questions in a purported attempt to "clarify" the definition of who "may be affected":
  - "21. How could the Offshore Environment Regulations clarify what is meant by a person or organisation that 'may be affected' by an offshore resources activity?"
  - "22. When assessing whether consultation has been undertaken that is appropriate for the proposed offshore resources activity, how should NOPSEMA consider the likelihood and consequence of an impact on relevant persons".

In EDO's view, all of the above statements and questions contained in the consultation paper suggest that DISR is seriously contemplating narrowing the scope of who is considered a relevant person, or alternatively, creating consultation rights that would apply differently to certain classes of people. As set out above, EDO strongly resists any such changes to the regulatory scheme, particularly to the extent that they would involve an attempt to limit consultees' rights on the basis of geographic distance from the operations area. Communities are the best placed to assess whether a risk is material and significant for their functions, interests and activities – not proponents who may utilise any narrowed definition of "relevant person" in the regulatory scheme to significantly limit the scope of "relevant persons" who they consult with.

EDO is of the view, consistent with that expressed by Minister King on 10 August 2023 in respect of *Tipakalippa*,[16] that the Court's findings should not be changed – nor should the consultation rights of First Nations peoples in relation to offshore projects be weakened. It is critical this review does not result in changes to the rights of First Nations peoples to be consulted on offshore projects which would undermine either the *Tipakalippa* or *Cooper* decisions. In this context, several other concurrent reform and review processes are of note, and EDO is concerned about the possibility that changes to the regulatory scheme as a result of the review have been pre-empted.

This review is taking place at the same time the Federal Government is consulting on changes to the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**), including a new suite of National Environmental Standards which will apply to all accredited bodies under the EPBC Act, including NOPSEMA. These Standards will include a Community Engagement and Consultation Standard, and a First Nations Engagement and Participation in Decision-Making Standard. These standards will apply to NOPSEMA, insofar as NOPSEMA's functions under a Strategic Assessment Program will need to be accredited against these standards by a new Environment Protection Agency (**EPA**). EDO therefore questions the utility of undertaking the consultation requirements review at this time. This is particularly so given the Government's intended timeline to have the new nature positive legislation introduced, and passed through the Parliament, before the end of 2024. Once this occurs, the accreditation arrangements may need to be reviewed and changed again, to adhere to the Standards.

Legislation introduced into Parliament on 15 February 2024, the Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment (Safety and Other Measures) Bill 2024 (**OPGGS**

16 https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2F27161%2F0120%22;src1=sm1

Bill), attempts to deal with this issue. In its current form, it appears section 790E of the OPGGS Bill seeks to maintain the validity of the existing accreditation of NOPSEMA approvals under the EPBC Act to cover future changes to the OPGGS Act or regulations. The OPGGS Bill would therefore enable rules or processes by which NOPSEMA operates to be substantially changed, and there would be no need to reconsider or reissue accreditation. This Bill is currently under inquiry by the Senate Standing Committees on Economics, with an incredibly short seven days for the public to make submissions.

EDO is of the view any amendments that allow substantive changes to be made to any regulatory aspects of an accredited program must trigger appropriate review and scrutiny. Under the proposed nature positive reforms this process would require explicit consideration of whether proposed changes are consistent with national environmental standards as a minimum – for both protection of matters of national environmental significance, and for First Nations and community consultation. This should be done by an independent EPA as proposed in the new nature positive laws and the non-regression principle should be explicitly applied.

The introduction of the OPGSS Bill ahead of the completion of the Consultation Requirements Review, the limited timelines for the public and stakeholders to make submissions, in conjunction with inaccurate media commentary about the implications of the *Cooper* and *Tipakalippa* decisions described above, are of considerable concern to EDO.

II. Recommendations to strengthen and improve community rights under the regulatory scheme

EDO is of the view that community rights could be strengthened under the regulatory scheme in a number of key areas, including by amending the regulatory scheme to include the principle of free, prior and informed consent **(FPIC)**; ensuring that communities are not overburdened with multiple projects and multiple environment plans at the same time, and that the consultation process is not rushed; granting powers to NOPSEMA to monitor the conduct of titleholders during the consultation process; and confirming the definition of "relevant person" in the Offshore Environment Regulations includes relevant persons located outside of Australia. In terms of the consultation process more broadly, EDO considers that the regulatory scheme must have regard to the impact of a proposed offshore resources activity on First Nations peoples' spiritual and cultural connections, and should be conducted in a culturally safe and appropriate manner.

We have expanded on each of these areas below and have made recommendations with respect to each area.

A. Free, prior and informed consent of First Nations communities is essential

The principle of FPIC, enshrined in articles 19 and 32 of the United Nations Declaration on the Rights of Indigenous People (**UNDRIP**) is of critical importance in the context of environmental regulation and decision-making. FPIC is the right of Indigenous 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.[17]

FPIC is also interrelated with the right of self-determination, which is expressed in article 4 of UNDRIP as the right to "autonomy or self-government in matters relating to their internal and local affairs".[18] Self-determination is particularly important for First Nations peoples in Australia, who are still overcoming the ongoing impacts of colonisation, including dispossession.

Obtaining FPIC is an ongoing process by which decision-makers seek input through the decision-making process.[19] Through FPIC, First Nations peoples should be able to "influence the outcome of decision-making processes affecting them."[20] This means that consultations must have the ability to alter the decision at issue or to develop accommodations of the interests at stake. Some actions, such as taking cultural resources, should not occur without consent,[21] and when Indigenous peoples' resources have been taken, used, or damaged without consent, the State must provide a right to redress.[22]

EDO is of the view that all environmental legislation in Australia must be underpinned by FPIC and the right of self-determination, particularly in the context of development assessment and approval, and in ongoing management and rectification of environmental harm. This includes the OPGGS Act and Offshore Environment Regulations. First Nations peoples must be involved in these decision-making processes, and ultimately must be able to withhold consent for development activities that will significantly affect their cultural interests.

The FPIC principles in UNDRIP provide clear and relevant guidance on how the consultation obligations in the Offshore Environment Regulations can be interpreted consistently with Australia's international legal obligations. Relevantly, best practices under FPIC include the following:

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[17] Joint Standing Committee on Northern Australia, Parliament of Australia, A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge (Final Report, October 2021) 178-179.

[18] 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) art 4.

[19] *See, e.g.,* Committee on the Elimination of Racial Discrimination, "Concluding Observations of the Committee on the Elimination of Racial Discrimination: Mexico," CERD/C/MEX/CO/16-17, para. 16-17 (4 Apr. 2012) ("effective" consultations must be carried out "at each stage of the process").

[20] 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, para. 15.

[21] Art. 10, UNDRIP (No relocation shall take place without the free, prior and informed consent of the Indigenous peoples concerned); Art. 11(2) (States shall provide redress for cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent); The Equator Principles: A financial industry benchmark for determining, assessing and managing environmental and social risk in projects (July 2020), principle 5 p. 12 , (Projects with impacts on lands and natural resources subject to traditional ownership or under the customary use of Indigenous Peoples or relocation impact must obtain consent), < https://equator-principles.com/app/uploads/The-Equator-Principles_EP4_July2020.pdf>.

[22] Art. 28(1), UNDRIP.

a. **Scope:** Consistent with the *Tipakalippa* decision, the first step is identifying *all* potentially affected First Nations stakeholders and communities who should be consulted.[23] For example, this may include coastal or island communities affected by offshore activities, regardless of where they reside.[24] In determining who to consult and the topics to discuss, a project's impacts on a range of interests must be considered, including social, spiritual, cultural, and environmental interests.[25] This range should be considered when interpreting "functions, interests or activities" in reg 25 of the Offshore Environment Regulations.

b. **Manner:** Consultation should occur in neutral and physically accessible locations[26] in the local language and in a culturally appropriate manner[27] and free from coercion or intimidation.[28] Consultations must respect and work through traditional and contemporary forms of Indigenous peoples' governance, including collective decision-making structures and practices.[29] This will require identifying any existing representative bodies of the

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[23] Secretariat of the Convention on Biological Diversity, "Akwé:Kon Guidelines," Guideline 13 (2004) (A formal process to identify the indigenous and local community members, experts and organizations, and relevant stakeholders should be engaged, including local and open consultations. Once *all parties* have been identified, it is appropriate that a committee representative of the parties be formally established and its mandate defined to advise on the impact assessment processes) (emphasis added); *See also,* Office of the High Commissioner for Human Rights, "The Corporate Responsibility to Respect Human Rights," HR/PUB/12/02, p. 8 (2012) (defining a stakeholder of a project as "any individual who may affect or be affected by an organization's activities" and an affected stakeholder as an "individual whose human rights have been affected by an enterprise's operations, products or services").

[24] 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, para. 32. EDO considers this could also include inland communities impacted by offshore activities.

[25] *See, e.g.,* Art. 32(2)-(3), UNDRIP.

[26] *See, e.g.,* Office of the High Commissioner for Human Rights (OHCHR), "Guidelines for States on the effective implementation of the right to participate in public affairs," para. 69, p. 15; UN, "Consulting Persons with Disabilities Indicator 5," p. 20 May 2021) (Some people with disabilities may require adjustments or accommodations to be able to participate in consultations on an equal basis with others (e.g., transport, support, breaks, facilitators)); World Bank, "Bank Directive Addressing Risks and Impacts on Disadvantaged or Vulnerable Individuals or Groups," p. 1 (27 Mar. 2021) (consultation should consider accessibility issues related to age, including the elderly and minors, and circumstances where people may be separated from their family, the community or other individuals upon whom they depend).

[27] *See, e.g.,* The Equator Principles: A financial industry benchmark for determining, assessing and managing environmental and social risk in projects (July 2020), principle 5 p. 11 , (Projects with impacts on lands and natural resources subject to traditional ownership or under the customary use of Indigenous Peoples or relocation impact must obtain consent), < https://equator-principles.com/app/uploads/The-Equator-Principles_EP4_July2020.pdf>..

[28] *See, e.g.,* International Finance Corporation, Performance Standards on Environmental and Social Sustainability, p. 13 (1 Jan. 2012).

[29] Australian Human Rights Commission, "Declaration Dialogue Series Paper No. 3: We have a right to participate in decisions that affect us ("AHRC, 'We have a right to participate'"), p. 8, 12-13 (July 2013) https://www.humanrights.gov.au/sites/default/files/2014_AHRC_DD_3_Consent.pdf; Australian Government, Department of the Environment, "Engage Early: Guidance for proponents on best practice Indigenous engagement for environmental assessments under the Environmental Protection and Biodiversity Conservation Act 1999 (EPBC Act)" ("Dep't. of Environment, Engage Early"), p. 8 (Feb. 2016) http://www.environment.gov.au/system/files/resources/3201a986-88e8-40f3-8c15-6e659ed04006/files/engage-early-Indigenous-engagement-guidelines.pdf.

potentially affected First Nations communities,[30] and conducting consultations through the First Nations peoples' own representative organisations and/or processes where possible.[31] This may include consultation with individuals. Consultations should avoid creating divisions within the community.[32] Consultations should also encourage and incorporate the views of all community members, including women, young people,[33] and persons with disabilities. Finally, to ensure that it is conducted in a culturally appropriate manner, the process for consultation should be developed in consensus with potentially affected First Nations people.[34]

c. **Information:** "Informed consent" is a key pillar of FPIC and should inform the interpretation of "sufficient information" under reg 25(2) of the Offshore Environment Regulations. Under FPIC, consultations should involve the timely disclosure of information on the proposed activities,[35] including information on the institutions involved and timeframes for projects.[36]

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[30] Special Rapporteur Victoria Tauli-Corpuz, "Report of the Special Rapporteur on the Rights of Indigenous Peoples, 'Rights of Indigenous Peoples,'" A/HRC/45/34, para. 55 (18 June 2020) https://www.undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F45%2F34&Language=E&DeviceType=Desktop&LangRequested=False; Dep't. of Environment, "Engage Early," p. 7-8.

[31] Art. 18-19, UNDRIP; 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, para. 23, Annex para. 11; UN Human Rights Commission, Special Rapporteur James Anaya, "Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights Including the Right to Development: Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People," A/HRC/12/34, para. 69, 15 (Jul. 2009) ("The duty to consult is not limited to circumstances in which a proposed measure will or may affect an already recognized right or legal entitlement"); A Australian Human Rights Commission, "Declaration Dialogue Series Paper No. 3: We have a right to participate in decisions that affect us ("AHRC, 'We have a right to participate'"), p. 18 (Appendix 1, principle 10) (July 2013) https://www.humanrights.gov.au/sites/default/files/2014_AHRC_DD_3_Consent.pdf;.

[32] 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. 12.

[33] Committee on the Rights of the Child, "Report of the Committee on the Rights of the Child, Forty-Second Session," CRC/C/42/3, para. 95-96 (3 Nov. 2006) (States must ensure "prior consultation is carried out with Indigenous communities and that all precautions be taken to avoid harmful impact of the health of children").

[34] *See, e.g.,* UN Human Rights Commission, Special Rapporteur James Anaya, "Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights Including the Right to Development: Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People," A/HRC/12/34, para. 50-51, 15 (Jul. 2009) ("The duty to consult is not limited to circumstances in which a proposed measure will or may affect an already recognized right or legal entitlement").

[35] UN Human Rights Commission, Special Rapporteur James Anaya, "Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights Including the Right to Development: Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People," A/HRC/12/34, para. 50-51, 15 (Jul. 2009) ("The duty to consult is not limited to circumstances in which a proposed measure will or may affect an already recognized right or legal entitlement").

[36] *See* UN Human Rights Commission, Special Rapporteur James Anaya, "Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights Including the Right to Development: Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People," A/HRC/12/34, para. 66, 15 (Jul. 2009) ("The duty to consult is not limited to circumstances in which a proposed measure will or may affect an already recognized right or legal entitlement").

The information should fully describe the nature of the proposed activity and its projected impacts in a form accessible to the community.[37] This may require providing adequate resources and support – including expert or technical support – to participate in a full, informed, and effective manner.[38] With respect to offshore projects, the information should also describe the project's cumulative impacts. First Nations peoples' rights can be violated by the cumulative impacts of a project even though the project, on its own, would not affect their rights.[39] Cumulative impacts are especially important to understand in the context of the extractive industry because its "impacts… on indigenous peoples are very often interconnected and cumulative."[40] Therefore informed consent is only possible with sufficient information on cumulative impacts.

d. **Assurances:** To be effective, consultation should be made with assurances to refrain from taking any formal, irreversible decisions prior to the commencement of consultation,[41] and should be conducted by an agency that has the power to take account of the comments and alter the decision in response.[42] NOPSEMA is the appropriate agency to perform this role under the Offshore Environment Regulations.

e. **Timing:** Consultation should commence as early as possible,[43] and prior to exploration or exploitation of subsea resources. It should occur periodically through different stages of the project[44] or when there is a significant shift in the operating context; for example, in the event of rising social tensions.[45]

In EDO's view, all consultations with relevant persons under the Offshore Environment Regulations who are First Nations peoples should be based on the principles of FPIC set out above.

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[37] *Id*, para 54.

[38] UN Human Rights Commission, Special Rapporteur James Anaya, "Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights Including the Right to Development: Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People," A/HRC/12/34, para. 50, 15 (Jul. 2009) ("The duty to consult is not limited to circumstances in which a proposed measure will or may affect an already recognized right or legal entitlement").

[39] United Nations, Office of the High Commissioner for Human Rights, Human Rights Committee, *Jouni E. Länsman et al. v. Finland*, Comm. No. 671/1995, views adopted 30 Oct. 1996 (CCPR/C/58/D/671/1995, 22 Nov. 1996), para. 10.6-10.7.

[40] UN, Dep't. of Economic and Social Affairs, "State of the World's Indigenous Peoples," p. 53 (2021).

[41] UN, Dep't. of Economic and Social Affairs, "State of the World's Indigenous Peoples," para 70 (2021)

[42] UNEP Governing Council, "Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters," (Bali Guidelines), UNEP/GCSS.XI/11, Decision SS. XI/5, Part A, Guideline 11 (2010).

[43] 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, para. 21; *See* UN Development Program, "Guidance Note on UNDP Social and Environmental Standards, Stakeholder Engagement," p. 8 (Dec. 2020); OHCHR, "Guidelines for States on the effective implementation of the right to participate in public affairs," para. 62, p. 14, para. 70, p. 15.

[44] 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, para. 15.

[45] UN Human Rights Commission, Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework," A/HRC/17/31, Princ. 18, p. 20. (21 Mar. 2011).

For this reason, EDO recommends that the regulatory scheme be amended to embed the principles of FPIC in all consultation requirements.

Recommendation 1:

The regulatory scheme be amended to embed the principles of FPIC in all consultation requirements.

B. Communities should not be overburdened with multiple projects and environment plans at the same time

Offshore petroleum projects, including their construction, exploration activities, production, and impacts, can be very foreign and confusing concepts for those unfamiliar with the industry. The information contained in environment plans often includes complex and technical information relating to, amongst other things, specialist equipment and engineering activities. The feedback that we consistently receive from communities is that they find it difficult to understand the information in environment plans, including in supposed plain-language written materials provided in the course of consultation. This issue is particularly prevalent amongst relevant persons for whom English is a second or third language, and where there are cultural differences that make it difficult to communicate certain concepts.

To avoid undue complexity and confusion, EDO considers that communities should not be overburdened with multiple projects and environment plans at the same time. This could be achieved by requiring titleholders to conduct consultation processes in a streamlined manner, work with any other relevant titleholders, and clearly signpost to community which projects/environment plans they are consulting about. This will ensure that relevant persons are given sufficient relevant information relating to each project, and aspect of the project, to allow them to make an informed assessment of the possible consequences of the specific activities on their functions, interests or activities.

In addition, EDO considers that it is critical that proponents provide relevant persons who they are consulting with the most recent draft of an environment plan. In our experience, our clients' have expressed concerns that the information sheet provided by proponents to relevant persons during the consultation process contains an insufficient level of detail to enable them to properly participate in the consultation process.

We also consider that proponents should provide relevant persons with the draft of an environment plan which has been amended in response to consultation, prior to the submission of the environment plan to NOPSEMA. In our experience, some proponents have a practice of not disclosing any changes to the environment plan to consultees, or alternatively, provide consultees with short extracts from the amended environment plan, lacking in context.

One area in which this has been a particular problem is with proposed mitigation measures. In our experience, titleholders have included mitigation measures in an environment plan that have not been proposed and discussed during consultation, and without further opportunities for relevant persons to access this information and provide feedback. This creates a substantial risk that these

measures do not adequately address concerns expressed by relevant persons and a further risk that they are not successful in reducing risks and impacts to ALARP and to an acceptable level.

If a titleholder considers that it is necessary (or desirable) to utilise information obtained from relevant persons or communities in the course of a consultation process for an environment plan for the purpose of satisfying the requirements in reg 34 of the Offshore Environment Regulations with respect to a *second* environment plan, titleholders should identify in writing the information that they propose to utilise for the purpose of the second environment plan. The titleholders should also give that person or community a reasonable opportunity to respond (either orally or in writing) to the titleholders' use of the information for that purpose. This should not limit titleholders' obligations with respect to consultation with affected relevant persons.

It is vital that First Nations people determine the conditions and appropriate ways in which any information is shared as part of the consultation process, so as to conform with traditional protocols and ensure cultural safety (see discussion of Indigenous Cultural and Intellectual Property below). Exceptions to information sharing must be in place where the consultation process concerns culturally sensitive material to which intellectual property rights may attach, or confidential or gender restricted materials.

Recommendation 2:

The regulatory scheme be amended to ensure that communities are not overburdened with multiple projects and environment plans at the same time. This could be achieved by requiring titleholders to conduct consultation processes in a streamlined manner, work with any other relevant titleholders, and clearly signpost to community which projects/environment plans they are consulting about.

Recommendation 3:

The regulatory scheme be amended to require a titleholder to: (a) identify in writing the information that it obtained from a relevant person or community during the consultation process for a particular environment plan, that it proposes to utilise for the purpose of satisfying the requirements in reg 34 of the Offshore Environment Regulations with respect to a *second* environment plan; and (b) give that relevant person or community a reasonable opportunity to respond (either orally or in writing) to the titleholders' use of the information for that purpose.

Recommendation 4:

The regulatory scheme be amended to require a titleholder to provide to relevant persons who they are consulting with the most recent draft of an environment plan.

Recommendation 5:

The regulatory scheme be amended to require a titleholder to provide to relevant persons a draft of an environment plan which has been amended in response to consultation, prior to the submission of the environment plan to NOPSEMA.

C. Consultations should not be rushed

EDO considers that there should be ample time between consultation sessions (or, between consultations sessions and any opportunity to provide final comment) for any given consultation process, and that the conduct of these sessions should be an iterative process that is guided by communities. Relevant persons should be provided with a sufficient amount of time to consider the information, hold potential community meetings, obtain input or reports from independent experts, and provide considered feedback to titleholders.

The number of meetings and amount of time between each session should be determined by relevant persons as part of a co-designed consultation process undertaken with the titleholder. This will ultimately differ based on each community's preferences, their cultural practices and protocols, their resourcing and other such determinative factors. This is consistent with titleholders' obligations under reg 24(b)(i)-(iv) and reg 25(3) of the Offshore Environment Regulations.

In addition, EDO considers that each consultation meeting should afford participants an ample amount of time within the session to consider the information presented, converse with any other participants, and ask questions or provide feedback. We note that communication styles and cultural protocols and customs differ across types of relevant persons and in particular First Nations communities and peoples. Consideration should be given to language barriers, different communication styles and cultural practices, and allowances made for communal decision-making. Consideration should be given to how meetings can be conducted in a culturally safe way to adequately reflect this. Opportunity should be given for participants and clans to talk privately, for people to approach titleholder representatives individually, and the ability to request further sessions and opportunities for engagement.

Recommendation 6:

The regulatory scheme be amended to clarify that consultations are to be an iterative process and that relevant persons should be afforded multiple opportunities to provide input, both in relation to co-designing the consultation process and the provision of information.

D. NOPSEMA should be able to monitor conduct of titleholders

Consultation is crucial – not only to enable titleholders to gather the requisite information to identify the features and values of the environment that might be affected for the purposes of drafting an environment plan for NOPSEMA's consideration – but to also provide relevant persons with the opportunity to make an informed assessment of the possible consequences of an activity on their functions, interests and activities. This is recognised by NOPSEMA in its Consultation Guideline. In particular, section 7 of NOPSEMA's Consultation Guideline sets out general principles for effective consultation, which includes "collaboration". In respect of this principle, the Consultation Guideline states: "an effective consultation process will have mutually beneficial outcomes to relevant persons and the titleholder through approaching consultation as a collaborative process".

EDO considers that the consultation process would be strengthened by granting powers to NOPSEMA which would allow it to monitor a titleholder's conduct throughout the consultation process, including by enabling NOPSEMA to give directions to proponents as to the manner in which consultation is to occur, to maximise the prospect of lawful, productive consultation before

an environment plan is submitted. This process would enable NOPSEMA to ensure that all titleholders comply with their obligations with respect to consultation before an environment plan is submitted. EDO considers that this approach would generate efficiencies for consulted communities and proponents, in circumstances where the adequacy of consultation processes is currently only assessed when an environment plan is submitted. To properly undertake this function and make appropriate directions, NOPSEMA would need to have internal expertise on First Nations community engagement. Direction from NOPSEMA should always uphold the needs and requirements of First Nations communities in the consultation process.

EDO considers that the power could be structured in a similar manner to existing provisions in the Offshore Environment Regulations, which give NOPSEMA the power to issue directions and conduct inspections after an environment plan has been approved.

Recommendation 7:

The regulatory scheme be amended to grant NOPSEMA the power to monitor a titleholder's conduct throughout the consultation process, including by enabling NOPSEMA to give directions to proponents as to the manner in which consultation is to occur. Such directions must always uphold the needs of First Nations communities in the consultation process.

E. Relevant Persons

The consultation requirements under the Offshore Environment Regulations must be read consistently with Australia's international obligations to avoid transboundary harm. Under international law, Australia has obligations to prevent, reduce and control transboundary harm including marine pollution arising from activities within its jurisdiction.[46] Due diligence requires notifying other States of potential harm,[47] consulting with those States,[48] and reviewing environmental impact studies that, among other things, take into account harm to the traditions and culture of Indigenous peoples.[49]

Courts have previously recognised that offshore activities in Australian waters may have transboundary impacts and that titleholders could owe legal duties to persons affected by impacts beyond Australian territory. For example, in the *Tipakalippa* case at first instance, the Federal Court emphasised that the titleholder had recognised the presence of Indonesian

[46] *See, e.g.,* United Nations Convention on the Law of the Sea (1982) 1833 UNT.S. 397, entered into force on 1 November 1994, Article 194 (Measures to prevent, reduce and control pollution of the marine environment); Rio Declaration on Environment and Development (1992) United Nations Conference on Environment and Development, Río de Janeiro, 14 June 1992, A/CONF.151/26/Rev.1 (Vol. 1) (**Rio Declaration**), Principle 2. *See also* United Nations Framework Convention on Climate Change, entered into force on 21 March 1994, Preamble.

[47] Rio Declaration, Principle 19 (States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith).

[48] Ibid. *See also,* ICJ, *Case concerning the Gabčikovo-Nagymaros Project* (*Hungary v. Slovakia*), Judgment of September 25, 1997, para. 112.

[49] Inter-Am. Ct. H.R., Human Rights and the Environment, supra n. 6, para. 142, 145-169.

traditional fishers within the environment that may be affected.[50] The Court then raised the question whether "Indonesian fishing activities" were considered in defining the relevant persons to be consulted.[51] In its reasoning, the Court assumed that the interpretation of relevant persons under reg 25(d) (formerly reg 11A(1)(d)) of the Offshore Environment Regulations could include persons with affected functions, interests or activities beyond Australia's jurisdiction.

More broadly, there are cases involving transboundary harm where it is recognised that offshore gas companies operating within Australian jurisdiction can owe duties to persons outside Australia who may be impacted by the companies' operations. In the case concerning the Montara oil spill,[52] the Federal Court found that the company breached its duty of care to Indonesian fishers by negligently failing to seal a well and causing reasonably foreseeable oil spill harms to those fishers. The fact that the Indonesian fishers resided outside Australia and that the project impacts extended beyond Australian waters did not preclude the company from owing a duty of care towards those individuals.[53] Even though the company's oil spill modelling concluded that there was no risk to Indonesian shorelines, the Court found that the company's failure to model the actual risk posed by its negligent conduct did not mean that this risk was not "reasonably foreseeable" and found that the company was liable for harm to the Indonesian claimants.[54]

In light of the above, EDO recommends that the definition of "relevant person" in the Offshore Environment Regulations be amended to clarify that where persons are beyond Australian jurisdiction whose functions, interests or activities may be affected and are reasonably ascertainable, those persons must be consulted by titleholders.

Recommendation 8:

The definition of "relevant person" in the Offshore Environment Regulations be amended to confirm that it extends to persons beyond Australian jurisdiction whose functions, interests or activities may be affected, where those persons are reasonably ascertainable.

F. Provision of information, resources and recordings

It is critical that NOPSEMA has access to a full, unedited record of consultation, whether the process has occurred in written or oral form. Where consultation takes place either wholly or partly by way of meetings, it is important that what is said by both the proponent and relevant persons be captured in full. Otherwise, there are no safeguards in place to ensure that proponents do not make statements which are misleading, downplay risks or omit important information to elicit favourable responses.

While we note that titleholders are currently required to provide full text records of consultations, we consider that audio-visual recordings provide a more comprehensive and accurate account of events. As such, we recommend that in circumstances where all or most of the consultation process is being conducted orally, titleholders be required to provide a full and unedited audio or audio-visual record to ensure the integrity of the consultation process and NOPSEMA's capacity to

[50] *Tipakalippa* [114(v)].
[51] *Tipakalippa* [154].
[52] *Sanda v PTTEP Australasia (Ashmore Cartier) Pty Ltd (No 7)* [2021] FCA 237.
[53] *Sanda v PTTEP Australasia (Ashmore Cartier) Pty Ltd (No 7)* [2021] FCA 237, [1040].
[54] *Sanda v PTTEP Australasia (Ashmore Cartier) Pty Ltd (No 7)* [2021] FCA 237, [1039]-[1040] and [1050]-[1051].

properly assess the consultation process. We note that regs 24(b) and 25 of the Offshore Environment Regulations require the provision of a summary and full text of responses by a relevant person. Consistent with these requirements it is important that a lesser standard is not adopted with respect to consultations that are conducted orally.

This must be subject to culturally sensitive information handling practices, as detailed below.

Recommendation 9:

The regulatory scheme be amended to require titleholders to provide to NOPSEMA a full and unedited audio or audio-visual record of consultation, where all or most of the consultation process has been conducted orally. There should be an exception to this requirement where the consultation process concerns culturally sensitive material to which intellectual property rights may attach, or confidential or gender restricted materials.

In addition, EDO considers that any material referred to by a titleholder during the consultation process, including internally produced aides such as audio-visual material, together with external resources such as academic reports, should be made available to relevant persons upon request. This will enable relevant persons to make an informed assessment of the potential impacts and risks of a proposal on the functions, interests and activities of each relevant person. Participants in consultations should also be provided an opportunity to review any meeting records before these are provided to NOPSEMA. There should be an exception to this requirement where the consultation process concerns culturally sensitive material to which intellectual property rights may attach, or confidential or gender restricted materials (see further discussion below).

Recommendation 10:

The regulatory scheme be amended to require titleholders to provide to relevant persons, upon request, any material referred to by a titleholder during the consultation process and an opportunity to review any notes or recordings made of meetings where information is provided orally, before these records are provided to NOPSEMA. There should be an exception to this requirement where the consultation process concerns culturally sensitive material to which intellectual property rights may attach, or confidential or gender restricted materials.

G. Culturally sensitive information and intellectual property

First Nations peoples and communities are often required to provide Traditional and Cultural Knowledge as part of a consultation process to properly inform titleholders about how their interests may be impacted by a project. Traditional Knowledge is knowledge resulting from intellectual activity in a traditional context, and includes know-how, practices, skills and innovations. Traditional Knowledge can be found in a wide variety of contexts, including: agricultural knowledge; scientific knowledge; technical knowledge; ecological knowledge; medicinal knowledge, including related medicines and remedies; cosmology; and biodiversity-related knowledge. Cultural Knowledge encompasses particular forms of expression of the knowledge of places—such as dance, art, stories, kinship and ceremonies. It includes knowledge that is not to be openly shared, but which is transmitted through particular genealogically and spatially referenced processes.

This information may be subject to particular customs, protocols and practices that dictate the circumstances and manner in which the information and knowledge can be told, as well as the content of the information. For example, some information may be limited to being told to specific genders, or can only be communicated by people of certain clan groups. Much of this will depend on the particular First Nations persons and communities being consulted and will differ in circumstances. It is vital that First Nations people determine the conditions and appropriate ways in which any information is provided to titleholders as part of the consultation process, so as to conform with traditional protocols and ensure cultural safety.

The rights of First Nations peoples to protect their cultural heritage, including Traditional and Cultural Knowledge, is known as Indigenous Cultural and Intellectual Property (**ICIP**). Terri Janke's 'True Tracks: Indigenous Cultural and Intellectual Property Principles for putting Self-Determination into Practice'[55] provides important guidance in providing a framework for negotiating rights between ICIP holders and users, in accordance with Article 31 of UNDRIP, to which Australia is a signatory.

It is integral that any Traditional Knowledge or Cultural Knowledge provided by First Nations peoples is respected and acknowledged as the intellectual property of those knowledge holders and that all data that is recorded as part of the assessment, whether included in the environment plan or not, remain the property of relevant First Nations people.

Relevant persons must retain ownership of Traditional Knowledge and Cultural Knowledge and have the right to control how their information concerning cultural practices, traditions or beliefs is collected, curated, integrated, analysed, used, shared and published.[56] They must have the option of specifying that information is confidential and should not be shared with anyone except any relevant experts and NOPSEMA. In such circumstances, it may not be possible to share that information with the titleholder, and it may need to be received by the experts on a confidential basis for the purposes only of informing their work.

In accounting for these matters, it may be necessary for titleholders and relevant persons to establish a protocol to manage the provision and use of ICIP when co-designing the consultation process.

Recommendation 11:

The regulatory scheme be amended to require titleholders, as part of the co-designed consultation process, to establish processes to manage culturally sensitive and confidential

[55] Terri Janke, 'True Tracks: Indigenous cultural and intellectual property principles for putting self-determination into practice' (2019), < https://openresearch-repository.anu.edu.au/bitstream/1885/156420/1/Janke_PhD_ANU_True%20Tracks_ICIP%20Principles_Self Determination_2019.pdf>.

[56] This is reflected in National Standard 8 in Appendix B2 of the *Samuels Review – Recommended National Environmental Standard for Indigenous Engagement and Participation in Decision-Making*. Samuel, G 2020, Independent Review of the EPBC Act – Final Report, Department of Agriculture, Water and the Environment, Canberra, October. CC BY 4.0, available at: <https://epbcactreview.environment.gov.au>.

information, and information over which Indigenous Cultural and Intellectual Property rights may attach, which is provided by relevant persons during consultation**.**

H. Culturally appropriate First Nations consultation

Sufficient information to make an informed decision

When consulting with First Nations people and communities, titleholders must have regard to the potential spiritual and cultural impacts and risks. First Nations peoples are the foremost experts in relation to matters of spiritual and cultural significance. Appropriately capturing that expertise may require proponents to engage relevant experts to work with people and communities in a culturally appropriate and effective manner. Who these people are, and how this process is to be conducted, should be decided and led by the impacted community.

Further, in the context of offshore extractive industries, it is possible that offshore activities can impact historic properties connected to First Nations peoples' interests that were once part of a terrestrial landscape that has been inundated by global sea level rise during the Late Pleistocene and Holocene.[57] Research indicates that the scale of underwater cultural heritage 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.[58] Accordingly, impacts on First Nations' submerged sacred sites or other subsea resources must be considered.

First Nations underwater cultural heritage is not being adequately protected by Commonwealth legislation.[59] The objective of the *Underwater Cultural Heritage Act 2018* (Cth) (**UCH Act**) is clearly not the protection of First Nations underwater cultural heritage, with 'automatic' protection only applying to vessels, aircraft, and their remains, which have been in Australian or Commonwealth waters for at least 75 years.[60] In contrast to this immediate protection granted for vessel and aircraft remains, any protection of First Nations underwater cultural heritage is reliant on a Ministerial declaration, subject to regulatory criteria, and only provided after a site has been discovered.

In the absence of broader reform, the OPGGS Act regime must be able to properly deal with, and protect, First Nations underwater cultural heritage in line with Australia's obligations under international law. In all cases, this means the statutory regime must be consistent with Australia's obligations under international law to consult all First Nations people who may be affected by an

[57] 4 US Department of the Interior, Bureau of Ocean Energy Management Office of Renewable Energy Programs, Developing Protocols for Reconstructing Submerged Paleocultural Landscapes and Identifying Ancient Native American Archaeological Sites in Submerged Environments: Geoarchaeological Modeling (March 2020) (Geoarchaeological Modeling Report), https://espis.boem.gov/final%20reports/BOEM 2020-024.pdf.

[58] 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.

[59] See also, EDO's Submission on draft guidelines to protect underwater cultural heritage (12 May 2023).

[60] *Underwater Cultural Heritage Act 2018 (Cth)* s 16

activity (as described above).[61] This may require a robust and community-led submerged cultural heritage assessment process to ensure that such impacts are properly assessed by the titleholder ahead of consultation.

Best practice information gathering must also be adopted. Development of advice for information gathering has occurred in other jurisdictions and may guide development of the regulations to ensure that culturally safe practice is followed to prevent harm to submerged cultural heritage.

1. *Reconstruct the boundaries of ancient shorelines and submerged terrestrial landscapes to understand whether currently submerged areas may contain sites of prior human habitation.*[62] This increases the likelihood that the study understands where sensitive landscapes or sites may be located.[63] Terrestrial landscape reconstructions must be combined with First Nations' knowledge to create a more robust understanding of where sensitive landscapes may be located.[64]

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.*[65] This should be done by conducting both remote sensing and analysing sediment samples.[66] Similarly, reconstructing the local and regional ecological and climate conditions that were experienced by First Nations communities in the past.[67]

3. *Once ancient shorelines, landforms, ecology, and climates have been reconstructed, assess how ancient landscapes may be culturally sensitive by applying First Nations peoples' knowledge and input.*[68] When assessing for cultural sensitivities, identify whether any particular ancient landforms have been preserved, such as a former river or bay. First Nations people should be consulted about how people would have related to the area in the past, either through fishing, trade or other connections.[69] The study should interview present-day First Nations communities who have knowledge about that particular landform.[70]

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[61] 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).
[62] 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 (**Best Practices Report**) 34.
[63] *Id*.
[64] *Id*, 30, 32.
[65] *Id*, 35-37.
[66] *Id*, 36.
[67] *Id*, 38-41.
[68] *Id*, 41.
[69] *Id*, 28.
[70] 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 (**Geoarchaeological Modelling Report**), 8 (citing the "Danish Topographical Model" or "Danish Fishing Site Model").

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.[71] To improve their predictive capacity, the models must be combined with First Nations peoples' knowledge and cultural perceptions of, and interactions with, ancient landscapes.[72] Predictive models informed by First Nations knowledge should inform surveys and "ground-truthing" exercises such as diving.

5. Use *the proper geophysical survey instruments.*[73] Best practices should be followed in using these instruments,[74] and the collected data should be interpreted in combination with First Nations' knowledge to improve accuracy.[75]

6. *Identify large areas that may be culturally sensitive, rather than solely trying to identify individual archaeological "sites."*[76] Known as a "Cultural Landscape approach," this method views entire ancient landforms that have survived to the present day as places of cultural importance.[77] 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 necessary to understand the cultural significance of a site. This approach is consistent with the UCH Act that recognises entire underwater cultural heritage areas may be protected.[78]

7. *Increase and fund First Nations peoples' capacity to study with other researchers.* Successful collaboration requires baseline capacities necessary for working together.[79]

8. *Ensure that protocols are agreed for how information provided by First Nations people is recorded, used and shared.* Information provided by First Nations people as part of cultural heritage assessment processes belongs to First Nations' 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 First Nations) about areas that are the subject of assessment must be provided to First Nations communities at key junctures of the process.

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[71] *Id*.
[72] US DOI, BOEM, Best Practices Report, 43.
[73] 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.
[74] *Id*, 7-10. See generally, US DOI, BOEM, Geoarchaeological Modelling Report.
[75] See, e.g., US DOI, BOEM, Best Practices Report, 37.
[76] *Id*, 47.
[77] *Id*. 48.
[78] *Underwater Cultural Heritage Act 2018 (Cth)*, s 20.
[79] US DOI, BOEM, Best Practices Report, 48-49.

Recommendation 12:

The regulatory scheme be amended to require titleholders to have regard to the impacts and risks that a proposed activity may have on spiritual and cultural connections (when consulting with First Nations Peoples). NOPSEMA must engage qualified experts to properly assess this information.

Recommendation 13:

The regulatory scheme be amended to require titleholders to have regard to the impacts and risks that a proposed activity may have on submerged cultural heritage.

Cultural awareness and protocol in consultation with First Nations people and communities

Respectful, meaningful and two-way consultation requires a high degree of cultural awareness, understanding of cultural protocols and capacity to conduct consultation in a culturally appropriate and effective manner. Whilst this will be different between communities, it is important that proponents, at a minimum, engage with First Nations people and communities by doing the following:

1. Ensure cultural customs and protocols are followed, including in relation to the observance of Sorry Business, gender restricted information, the collective nature of storytelling, any issues that can't be discussed in open forums and similar customs.
2. Identify and adhere to any established protocols for consultation.
3. Ensure that, where needed, interpreters are made available.
4. Ensure that all members of a relevant community have adequate opportunity to participate in the process.

It is likely that a proponent will need to seek out appropriate expertise, whether through community organisations, community leaders or other relevantly qualified experts.

It is critical that First Nations peoples and communities be appropriately resourced to participate in consultation processes, including remuneration for their time and expertise. Where required or requested, relevant persons should be supported by the use of qualified interpreters during consultations, and have resources and materials used in the consultation process translated and/or communicated in the language of the relevant persons.

Recommendation 14:

The regulatory scheme be amended to require that the consultation process be culturally safe and appropriate by requiring titleholders to:

a. ensure cultural customs and protocols are followed, including in relation to the observance of Sorry Business, gender restricted information, the collective nature of storytelling, any issues that can't be discussed in open forums and similar customs;

b. identify and adhere to any established protocols for consultation;

c. ensure that, where needed, interpreters are made available; and

d. ensure that all members of a relevant community have adequate opportunity to participate in the process.

Recommendation 15:

The regulatory scheme be amended to allow First Nations people to be properly resourced to participate in the consultation process, including through remuneration for their time and expertise.

Recommendation 16:

The regulatory scheme be amended to require titleholders to engage qualified interpreters for relevant persons during the consultation process, and to translate documents referred to during the consultation process, as requested.

Thank you for the opportunity to make this submission.
Please do not hesitate to contact our office should you have further enquiries.