Environmental
Defenders Office

Submission on the Protecting the Spirit of Sea Country Bill 2023

4 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:
Committee Secretary
Senate Standing Environment and Communications Legislation Committee
Parliament of Australia
By email: ec.sen@aph.gov.au

For further information on this submission, please contact:

Rachel Walmsley
Head of Policy and Law Reform
T: (02) 9262 6989
E: rachel.walmsley@edo.org.au

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 inherit 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.

Executive Summary

Environmental Defenders Office (**EDO**) welcomes the opportunity to comment on the Protecting the Spirit of Sea Country Bill (2023) (**the Bill**). EDO supports the Bill, and the intention of the amendment to strengthen consultation requirements for Australia's offshore oil and gas approvals regime for First Nations communities.

The Bill was introduced as a response to the decision in *Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority (No 2)* [2022] FCA 1121 (**Tipakalippa**). The Full Federal Court's decision in Tipakalippa confirmed that Traditional Owners' 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 Bill aims to codify these outcomes, and is intended to remedy perceived flaws in the current legislative regime revealed by the case.

EDO notes this inquiry is also taking place concurrently with other reform process which relate to the consultation requirements under the offshore resources regime. This includes ongoing reform of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth); a review of consultation requirements under Australia's offshore resources environmental management framework; and the introduction of the Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment (Safety and Other Measures) Bill 2024 into the Federal Parliament. These processes must not weaken the current regulatory regime and the high standard for consultation as secured by the Tipakalippa judgement. Consultation rights for all relevant persons, but especially First Nations peoples, in relation to offshore projects must be upheld and strengthened, not reduced.

In this context, this inquiry, as well as the offshore resources management review, should be used as an opportunity to strengthen the consultation arrangements and secure best practice in our offshore regulatory regime. The Protecting the Spirit of Sea Country Bill presents several options for doing so. This submission builds on the amendments in the Bill, identifying opportunities to further improve the regulatory scheme.

Summary of Recommendations

Recommendation 1:

The Bill should set out that the minimum standard for what constitutes consultation with relevant persons in preparing an environment plan must ensure:

- **i.** Co-designed and iterative consultation processes that are culturally safe and appropriate;
- **ii.** Reasonable opportunity to participate in consultation and minimum timeframes for each project and environment plan;
- **iii.** Multiple opportunities to provide input, both in relation to co-designing the consultation process and the provision of information.
- **iv.** Resourcing for First Nations people to participate in consultation processes;

v. Sufficient provision of information, including any material referred to by titleholders and up-to-date environment plans on request, presented in a way which addresses any linguistic or access barriers.
vi. Clarity for relevant persons and communities about how their information has been used, including records of consultation.

Recommendation 2:

Amend clause 3 to specify that "relevant persons" is broadly defined to include:

i. all First Nations peoples who have a cultural and spiritual connection to the sea, and to the marine resources it holds;
ii. persons beyond Australian jurisdiction whose functions, interests or activities may be affected, where those persons are reasonably ascertainable.

Recommendation 3:

Expand the definition of underwater cultural heritage to ensure intangible underwater cultural heritage, which may not correspond to specific landforms, sites or artefacts, is included under the regulatory scheme.

Introduction

The Protecting the Spirit of Sea Country Bill (**the Bill**) was introduced by Senator Dorinda Cox on 8 August 2023 and referred to the Environment and Communications Legislation Committee.

The Bill was introduced as a response to the decision in *Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority (No 2)* [2022] FCA 1121 (**Tipakalippa**). The Full Federal Court's decision in Tipakalippa confirmed that Traditional Owners' 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 Bill aims to codify these outcomes, and is intended to remedy three perceived flaws in the current legislative regime the Tipakalippa case exposed:[1]

1. As introduced, the Bill amends the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (**2009 Environment Regulations**) to specify that Traditional Owners and knowledge holders within First Nations communities are considered 'relevant persons' under regulation 11A.
2. The Bill specifies that standards must be created, through regulation under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) (**OPGGS Act**), to prescribe what constitutes consultation with relevant persons in preparing an environment plan. It states that these regulations must provide for the free, prior and informed consent (**FPIC**) of Traditional Owners consistent with the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**) for acceptance of an environment plan.
3. The Bill amends the 2009 Environment Regulations to insert new definitions of intangible cultural heritage, and underwater cultural heritage. This Part inserts an evaluation of impacts and risks to cultural heritage into environment plan requirements.

Other relevant processes

EDO notes that this consultation is taking place concurrently with other relevant reform processes. Currently underway is a review of Australia's offshore resources environmental management framework, with the Federal Government seeking views on the consultation requirements for OPGGS regulatory approvals (**OPGGS consultation review**). EDO's position is that the consultation requirements in the Environment Regulations and the OPGGS Act are sufficiently clear and enforceable, however the review provides an opportunity to confirm and strengthen this. 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. Instead, the review does present an opportunity to strengthen the regulatory scheme in several key areas, some of which are represented in this Bill.

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, including the National Offshore Petroleum Safety and Environmental Management Authority (**NOPSEMA**). Relevantly,

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[1] Protecting the Spirit of Sea Country Bill (2023), Explanatory Memorandum.

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 will need to be accredited against these standards by a new Environment Protection Agency. The Federal Government intends to have the new nature positive legislation introduced, and passed through the Parliament, before the end of 2024. Once this occurs, the accreditation 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 Bill**), attempts to pre-emptively deal with this issue. It appears 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 is of significant concern.

In this context, EDO supports the Protecting the Spirit of Sea Country Bill, and recommends that any changes to the consultation requirements for OPGGS regulatory approvals must improve and strengthen consultation obligations. Any strengthening of the regulatory scheme in line with this Bill, the EPBC Act reform process, or the OPGGS consultation review, should not give rise to a blanket exclusion for the accreditation arrangements to facilitate changes without the need to reconsider or reissue accreditation for NOPSEMA.

This submission sets out the relevant regulatory scheme which governs offshore approvals and consultation processes including the impact of the Full Federal Court's decision in Tipakalippa; and makes three high level recommendations to further strengthen the three operative Parts of the Bill.

Background and legal context

The offshore regulatory scheme has been clarified by recent case law, including the Tipakalippa decision and the decision by the Federal Court in *Cooper v NOPSEMA (No 2)* [2023] FCA 1158. For the purposes of this submission, it is relevant to set out the current regulatory regime, including how it has been clarified by the Tipakalippa decision.

The regulatory scheme

Offshore resource activities in Commonwealth waters are governed by the OPGGS Act and the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2023* (Cth) (**Environment Regulations**). EDO notes that the 2009 Environment Regulations referenced in the Bill have now been superseded by the 2023 Environment Regulations. The 2023 Environment Regulations are not materially different in relation to the amending provisions of the Bill.

NOPSEMA is Australia's independent offshore energy regulator, responsible for regulation and oversight of all parties involved in the exploration and recovery of offshore petroleum and greenhouse gas activities. For all petroleum activities in Commonwealth waters, titleholders are required to submit an environment plan to NOPSEMA for approval. For NOPSEMA to accept an

environment plan, it must demonstrate it meets the requirements of the OPGGS Act, and the acceptance criteria set out in the regulations. This includes the requirement under the Environment Regulations for titleholders 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), 2023 Environment Regulations).

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 deemed appropriate (reg 34(g), 2023 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 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.

Impact of the Tipakalippa decision

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 Environment Regulations.[2] The Tipakalippa decision 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. [3] In particular, the term “interests” should be given a meaning conforming to that generally accepted in other areas of public law.[4] Importantly, the Court considered that a broad construction of the “relevant person” test was necessary to promote the objects of the 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 and are of an acceptable level. [5]

Second, the decision confirmed that Traditional Owners’ connection with sea Country can be an “interest” for the purpose of the Environment Regulations, and that this is not contingent on a

[2] Formerly reg 11A(1)(d) in the Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009 (Cth).
[3] *Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority (No 2)* [2022] FCA 1121 [51]. (**Tipakalippa**)
[4] *Tipakalippa,* [65].
[5] *Tipakalippa,* [51].

proprietary or statutory right, as these interests are of a kind "well known to contemporary Australian law".[6] 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,[7] and that these interests had a real potential of being significantly adversely affected by the proposed activities.[8] 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 Environment Regulations.[9]

Third, the decision clarified the nature of consultation required by titleholders under the 2023 Environment Regulations. Amongst other things, titleholders are required to demonstrate that relevant persons were afforded a reasonable opportunity to participate in consultation. [10] In addition, consultation must be appropriate and adapted to the nature of the interests of the relevant persons. NOPSEMA subsequently updated the Consultation Guideline to reflect the Court's findings in Tipakalippa.

The three operative Parts of the Bill relate to these key findings, and seek to codify and clarify the consultation requirements incumbent on titleholders in relation to relevant First Nations persons.

Opportunities to strengthen the Bill

EDO supports the Protecting the Spirit of Sea Country Bill and the intention to uphold the strong standard for consultation with First Nations peoples secured in the Tipakalippa judgement. We make the following recommendations to improve the scope and operation of the Bill, and recommend that it be passed by the Parliament.

Part 1: Minimum requirements for consultation with Traditional Owners and knowledge holders

Clause 1 of the Bill specifies that the regulations under the OPGGS Act must prescribe a standard for consultation with relevant persons in preparing an environment plan. It states that these regulations must provide for the free, prior and informed consent of Traditional Owners consistent with UNDRIP for acceptance of an environment plan.

Free, prior and informed consent

The duty to obtain free, prior and informed consent is drawn from article 32(2) of UNDRIP, adopted by Australia on 3 April 2009. FPIC is grounded in the fundamental rights to self-determination and to be free from racial discrimination guaranteed by at least three treaties that Australia is a party to: the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the International Convention on the

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[6] *Tipakalippa,* [68].
[7] *Tipakalippa*, [68].
[8] *Tipakalippa,* [67].
[9] Formerly reg 10A in the Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009 (Cth).
[10] *Tipakalippa,* [104].

Elimination of All Forms of Racial Discrimination.[11] When a First Nations person or community is identified as a relevant person to be consulted on a project under the law or regulation, those consultations should be based on FPIC.

The process by which FPIC is obtained must be ongoing, with decision-makers seeking input throughout the decision making process.[12] Through FPIC, First Nations peoples should be able to influence the outcome of decision-making processes affecting them which is more than a 'mere right to be involved' or to simply 'have their views heard'.[13] This means that through consultations, First Nations peoples must have the ability to alter the decision at issue or to develop accommodations of which they are satisfied meet their interests at stake. Whilst consultation with the Traditional Owners of the lands and seas on which the project may directly affect is required, there may be requirements to consult with Traditional Owners of other First Nations Countries which may be indirectly impacted by the project. These may include lands, waters, resources and cultural values held beyond a project's immediate footprint. [14] In the offshore context, this includes First Nations Countries and cultural sites which fall into an area which may be affected by the project, not just the operational area.[15]

EDO strongly supports the integration of FPIC into the OPGGS regulatory regime. In practice, this means the regulations 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."[16] Information must be communicated in a culturally appropriate and safe way, and given in a manner that takes into linguistic barriers. This includes the ability for relevant persons and communities to access translation services.

FPIC must be the starting point for any consultation with relevant First Nations persons. EDO **supports** this amendment, but notes that the further detail in the regulations themselves would be critical for determining the efficacy of this section.

Minimum consultation standards in the regulations

In terms of setting a minimum standard for consultation, FPIC must be the starting point. EDO additionally recommends the consultation requirements can be significantly strengthened for all

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[11] Human Rights Council, *Study of the Expert Mechanism on the Rights of Indigenous Peoples*, Free, prior and informed consent: a human rights-based approach, UN Doc A/HRC/39/62, (10 August 2018) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/245/94/PDF/G1824594.pdf?OpenElement> [3].

[12] See for example, 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 (4 April 2012) [16]-[17]. ("effective" consultations must be carried out "at each stage of the process").

[13]Human Rights Council, *Study of the Expert Mechanism on the Rights of Indigenous Peoples*, Free, prior and informed consent: a human rights-based approach, UN Doc A/HRC/39/62, (10 August 2018) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/245/94/PDF/G1824594.pdf?OpenElement> [15].

[14] UN Human Rights Commission, A/HRC/39/62, [32].

[15] E.g. in the event of an oil spill from the operational area.

[16] 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).

consultation, not just relating to First Nations persons. The 'minimum standards' should reflect best practice.

Currently, there is no specific standard in the 2023 Environment Regulations defining how proponents must consult. However, both the Tipakalippa judgement and the Consultation Guideline prepared by NOPSEMA provide some direction. The Consultation Guideline states that:[17]

> Consultation should be a genuine and meaningful two-way dialogue in which relevant persons are given sufficient information and time to allow them to make an informed assessment of the possible consequences of the activity on their functions, interests or activities.

EDO is of the view it is important that an iterative process be undertaken with relevant persons that arrives at consensus about the way the consultation will be conducted. Whilst co-designing the consultation process may take time and effort, it is critical to ensuring that each relevant person is able to engage in meaningful and culturally safe two-way consultation. Good faith consultation is not a single event, but an ongoing process, and requires sufficient time and opportunity for relevant persons to meaningfully engage in the process. Minimum standards must guarantee these features.

Relevant persons must be afforded a reasonable opportunity to participate in consultation, including a proactive interaction (such as a community meeting or face to face engagement), and the intent and purpose of the consultation needs to be clear. This means consultation must be aimed at ensuring community views are incorporated in project design, not just explaining a foregone conclusion by the titleholder about a project. Consultation should occur for each single project and environment plan with adequate time, and NOPSEMA should be empowered to monitor the conduct of titleholders during the consultation process.

To ensure the requirement in Clause 1 to prescribe in the regulations consultation standards does not result in weakened consultation requirements compared to the current scheme (as interpreted by case law including Tipakalippa), more detail would assist. The following recommendation sets out principles which should guide the creation of minimum standards; further recommendations for specific regulatory reform are available in EDO's submission regarding the consultation requirements for offshore oil and gas storage regulatory approvals.[18]

Recommendation 1:

The Bill should set out that the minimum standard for what constitutes consultation with relevant persons in preparing an environment plan must ensure:

i. **Co-designed and iterative consultation processes that are culturally safe and appropriate;**
ii. **Reasonable opportunity to participate in consultation and minimum timeframes for each project and environment plan;**

[17] NOPSEMA, Consultation in the course of preparing an environment plan (Guideline, May 2023) 7.
[18] This will be available at www.edo.org.au when published.

iii. **Multiple opportunities to provide input, both in relation to co-designing the consultation process and the provision of information.**
iv. **Resourcing for First Nations people to participate in consultation processes;**
v. **Sufficient provision of information, including any material referred to by titleholders and up-to-date environment plans on request, presented in a way which addresses any linguistic or access barriers.**
vi. **Clarity for relevant persons and communities about how their information has been used, including records of consultation.**

Part 2: Meaning of relevant person

Part 2 of the Bill seeks to amend the Environment Regulations to specify that Traditional Owners and knowledge holders within First Nations communities are considered 'relevant persons' (under former regulation 11A).[19]

Under the Environment Regulations, relevant persons are defined as a person or organisation whose functions, interests or activities may be affected by the activities to be carried out under the environment plan, or any other person or organisation that the titleholder considers relevant. With the exception of responsible State or Territory Ministers, and any other relevant Government agency or authority to which the proposed activities might be relevant, the Environment Regulations do not provide further specifics about relevant persons. According to the Consultation Guideline, authorities, persons and organisations are to be identified on a case-by-case basis.[20]

The Tipakalippa decision confirmed that Traditional Owners' connection with sea Country can be an "interest" for the purpose of the Environment Regulations, and that where such an interest may be affected by the activities to be carried out under the environment plan, consultation must be carried out by the titleholder. The Bill codifies this by inserting a subregulation to provide that, to avoid any doubt, Traditional Owners and knowledge holders from First Nations communities are included in the meaning of relevant persons.

It is important that the amendment does not limit which First Nations community members may be considered "relevant persons" under the Environment Regulations, and therefore give rise to consultation requirements. For example, EDO notes that the term Traditional Owners may be construed narrowly, to only include native title holders, rather than the broader group of First Nations people who may have a spiritual and cultural connection to the area, as contemplated in the Tipakalippa judgement. To avoid this clause being read down or inadvertently limited, and to align the Bill with the Tipakalippa judgement, EDO **recommends** clause 3 more broadly define relevant First Nations people, for example as First Nations peoples who have a cultural and spiritual connection to the sea, and to the marine resources it holds.[21]

Relevant persons outside Australia

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[19] Now reg 25 of the Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2023 (Cth).
[20] NOPSEMA, Consultation in the course of preparing an environment plan (May 2023) 5.
[21] *Tipakalippa,* [90], [60].

EDO is of the view the consultation requirements currently include persons whose functions, interests or activities may be affected by a project (and who are therefore relevant under the Environment Regulations) regardless of the person's geographical location. It may provide clarity to proponents to confirm this in the Regulations. 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 traditional fishers within the environment that may be affected.[22] The Court then raised the question whether "Indonesian fishing activities" were considered in defining the relevant persons to be consulted.[23] In its reasoning, the Court assumed that the interpretation of relevant persons under reg 25(d)[24] could include persons with affected functions, interests or activities beyond Australia's jurisdiction.

EDO recommends clause 3 be amended to confirm this, so that the term relevant persons includes persons beyond Australian jurisdiction whose functions, interests or activities may be affected, where those persons are reasonably ascertainable.

Recommendation 2:

Amend clause 3 to specify that "relevant persons" is broadly defined to include:

i. **all First Nations peoples who have a cultural and spiritual connection to the sea, and to the marine resources it holds;**
ii. **persons beyond Australian jurisdiction whose functions, interests or activities may be affected, where those persons are reasonably ascertainable.**

Part 3: Protection of cultural heritage

Part 3 of the Bill seeks to amend the Environment Regulations to insert a new definition of intangible cultural heritage, and definition of underwater cultural heritage. This Part also inserts an evaluation of impacts and risks to cultural heritage into environment plan requirements.

First Nations underwater cultural heritage is increasingly being recognised and studied, with a growing understanding in Western law and Western 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.[25] 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

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[22] *Tipakalippa* [114(v)].
[23] *Tipakalippa* [154].
[24] Formerly reg 11A(1)(d)) in the Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009 (Cth).
[25] 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).

dredging, offshore cables and pipelines, and fossil fuel exploration.[26] 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 heritage, both tangible and intangible, which are of importance to First Nations communities.[27]

In the Tipakalippa judgement, the Full Federal Court recognised 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,[28] 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).[29] The Bill codifies this by expressly including underwater cultural heritage into the offshore regulatory scheme under the OPGGS Act and the Environment Regulations.

Intangible cultural heritage

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. Importantly, 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.”[30] 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 underwater cultural heritage 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 underwater cultural heritage. 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

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[26] 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.
[27] Benjamin, above n 2.
[28] I.e. under the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (Cth).
[29] *Santos NA Barossa Pty Ltd v Tipakalippa [2022] FCAFC 193* [36] (Kenny and Mortimer JJ). (Tipakalippa Appeal)
[30] UNESCO (2023) “What is Intangible Cultural Heritage?”, https://ich.unesco.org/en/what-is-intangible-heritage-00003.

territory includes Australian and Commonwealth waters, the protections of underwater cultural heritage should also apply to intangible cultural heritage.

EDO supports the inclusion of intangible cultural heritage, and underwater cultural heritage into the Environment Regulations. However, we **recommend** expanding the definition of underwater cultural heritage at Clause 6 to ensure that intangible underwater cultural heritage, which does not correspond to a physical landmark or trace of human existence, is still captured. While the definition of 'intangible cultural heritage' reflects the Convention and is supported, linking intangible cultural heritage to 'traces of human existence' and requiring it to be associated with a particular site or artefact may be limiting. Cultural values may also exist in known significant places that do not correspond to landforms or have a physical manifestation, or underwater landscapes and places themselves may have cultural significance (without traces of human existence). The Bill would be strengthened by ensuring the definition is wide enough to encompass these.

Recommendation 3:

Expand the definition of underwater cultural heritage to ensure intangible underwater cultural heritage, which may not correspond to specific landforms, sites or artefacts, is included under the regulatory scheme.

Conclusion

The decision in Tipakalippa confirmed the existing Environment Regulations guarantee the right of First Nations peoples to be properly consulted about offshore resource projects which impact on Sea Country. It enforced existing laws requiring NOPSEMA to only approve offshore oil and gas actions where these consultation obligations have been fully completed with 'relevant persons' and clarified that 'interests' for the purposes of the Regulations included cultural and spiritual connections to the sea.

The Protecting the Spirit of Sea Country Bill aims to codify aspects of this judgement. EDO supports this intention. In light of the numerous other reform processes taking place concurrently with this inquiry, EDO will consistently advocate for reforms that strengthen the consultation requirements under the OPGGS Act and Environment Regulations, and national environmental laws. These processes must not be used as an opportunity to reduce consultation rights for First Nations peoples or for other relevant persons. The amendments in this Bill, and EDO's recommendations to strengthen them, are examples of how the offshore resource consultation regime must be improved, not weakened.

Thank you for the opportunity to make this submission.

Please do not hesitate to contact our office should you have further enquiries.