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Dear Ms Fitzmyers

### **Australian Government Future Gas Strategy Consultation**

On behalf of the National Native Title Council (NNTC), I am pleased to put forward the following submission. The NNTC is the peak body for Australia's Native Title and other Traditional Owner organisations. The NNTC represents Native Title Representative Bodies and Service Providers as well as Prescribed Bodies Corporate (PBCs) recognised under the *Native Title Act* (NTA) and other equivalent Traditional Owner Corporations (TOC) established under parallel legislation such as the Victorian *Traditional Owner Settlement Act 2010*.

Our submission highlights the importance of the recognition of Traditional Owner rights in relation to any consideration of the future development of Australia's natural gas ("gas") reserves both onshore and offshore. In particular the submission notes the importance of giving effect to the principle of Free Prior and Informed Consent (FPIC) when there is any consideration of development of natural resources (including gas) on the traditional lands of Australia's First Nations. It emphasises that the FPIC principle is central to the rights contained in the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP<sup>1</sup>). It notes the Australian Government has accepted its obligations under this vital international instrument. The submission identifies the important distinction between land based and offshore gas production proposals and suggests the adoption of tailored strategies in respect of each environment. The submission concludes by committing the NNTC to working collaboratively with the Australian Government on this issue and suggests the development of ongoing consultation structures and joint work programs to give effect to this collaboration.

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<sup>1</sup> United Nations, *Declaration on the Rights of Indigenous Peoples*, 2007

## Background

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The Australian Government through the Department of Industry Science and Resources (DISR) is conducting a public consultation to inform the development of the Future Gas Strategy (FGS). It is intended the FGS will provide a medium-term (to 2035) and long-term (to 2050) plan for gas production, consumption and substitution in Australia.

A consultation paper has been released to support the FGS development process. The consultation paper poses a number of questions to guide the consultation process. It identifies four objectives of the strategy. There are stated (p 1) as being:

- support decarbonisation of the Australian economy.
- promote Australia's energy security and affordability.
- enhance Australia's reputation as an attractive trade and investment destination.
- help [Australia's] trade partners on their own paths to net zero.

The Consultation Paper refers to First Nations peoples twice. The first is in the context of a community that may reside near natural gas developments. The second reference again identifies First Nations peoples as an aspect of communities that may be affected by natural gas developments. This reference (p 5) is as follows: "...communities in gas producing areas, First Nations peoples, landholders hosting gas developments, unions and environmental advocacy groups."

First Nations peoples have legally enforceable rights in respect of any developments proposed on their traditional lands and waters. The rights of Traditional Owners in this regard are recognised under both international and domestic Australian law. The status of Traditional Owners in any legitimate FGS must not be reduced to "community stakeholders".

Consistent with this rights-based framework it is unremarkable that different sections of the Traditional Owner community may have different perspectives on matters associated with the future development of the Australian gas industry both in general and in relation to particular projects. The fundamental principle of FPIC with respect to proposed developments on traditional lands and waters is consistent with this reality. That principle demands that the decision of relevant Traditional Owners regarding whether or not and in what form a particular development should proceed must be respected.

On this basis many of Australia's Traditional Owners may agree that there are significant social benefits in seeing an Australian gas industry that can support the nation's transition to a ultimate net zero economy. Some may not. Those that do, are entitled as rights holders to also seek to ensure that any development on their traditional lands and waters also supports their own community's economic prosperity and cultural integrity.

This submission is intended to identify approaches to empower Traditional Owners who do wish to engage with gas industry developments to achieve their identified objectives. The identified approaches also recognise and enable Traditional Owners who do not wish to engage to have that capacity also. This is the key to the principle of FPIC in *any* resource context.

## Questions of tenure

Australia's gas production takes place both on land and offshore. To Traditional Owners land and sea country is an inseparable ongoing entity. However, under Australian national law the location of a gas production site will have significant impact on the legal regime attached to it and, accordingly, the particular fashion manner in which Traditional Owner rights are exercised.

### *Land based (and near coastal) gas production.*

Land based (and near coastal) gas production will take place under the regimes of state and territory legislation.<sup>2</sup> Production proposals in these locations will be subject to the relevant future act provisions of the NTA. Relevantly those future act provisions, in the context of gas production, will require either the satisfaction of the "Right to Negotiate" process or the conclusion and registration of an Indigenous Land Use Agreement (ILUA). Of these options the ILUA is the preferred approach by both Traditional Owners and by most internationally significant resources companies. This preference arises from a number of bases. An ILUA:

- More closely satisfies international expectations around FPIC;
- Can authorise a complete project rather than individual tenure-based components of an overall project; and,
- Is not dependent upon completion of the native title determination process.

Beyond the NTA, land (and near coastal) gas production proposals are generally not *directly* an area of Commonwealth Government responsibility. Outside this straightforward legal analysis however, clearly the Commonwealth does have a role in the overall framework of gas production. This role is founded in responsibility in areas such as trade and industry, policy and funding, and environmental regulation, to identify but a few.

Through these mechanisms the Commonwealth can play a significant role in influencing the arrangements around land and and and near coastal gas production proposals. It is on this basis that the following recommendation is made.

### **Recommendation 1**

*Access to Commonwealth funding and, as far as legally possible, regulatory approvals for new land based and near coastal gas production proposals should be contingent upon the proponent concluding an ILUA with the relevant Traditional Owners.*

<sup>2</sup> For example, the *Petroleum and Geothermal Energy Resources Act 1967* (WA).

### *Offshore Gas Production*

Offshore Gas Production is the subject of a Commonwealth legislative regime.<sup>3</sup> In this environment the Commonwealth is able to determine approval for gas production proposals in relation to a resource it asserts ownership of. The rights of Traditional Owners under the relevant legislation in relation to the processes of exploitation of the resources contained in their Sea Country were recently recognised by the Full Federal Court in *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193.

Consistent with that authority and with the principle of FPIC Traditional Owner rights in relation to offshore gas production proposals should also be recognised. That recognition should also be consistent with the recommendation relating to land and near coastal production proposals.

#### **Recommendation 2**

*Approvals of new offshore gas production proposal under Commonwealth legislation should be the subject of a requirement that the proponent conclude a binding agreement in relation to that proposal with the relevant Traditional Owner representative institution.*

The detail around the modifications to the current offshore regime needed to give effect to the recent judicial authority are still under development and negotiation. However, there is confidence that the relevant Traditional Owner representative institution will, in the overwhelming number of cases, be the Traditional Owner corporation recognised under the NTA which is adjacent to the production proposal..

#### Traditional Owner Participation in Gas Production and the Energy Transition

Thus far this submission has primarily traversed issues associated with the process of negotiation with Traditional Owners with a view to obtaining their consent to gas production facilities on their traditional land and waters. However, to the NNTC, it is important that the FGS look beyond simply issues of process to also consider the question of outcomes.

Traditional Owners in many parts of the country have significant experience in engaging with the gas production industry over many years, primarily (but not exclusively) under the auspices of the NTA. The NNTC believes there would be significant value in collaborating with DISR to undertake an analysis on the experiences, content and outcomes that has arisen from this engagement. This analysis could then be usefully applied to developing best practice guidance in relation to future engagement between the gas production industry and Traditional Owners.

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<sup>3</sup> Primarily the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (Cth) and, to a more limited extent, the NTA.

The NNTC also believes there would be a valuable basis of collaboration with DISR in a further project. This project would consider Traditional Owner involvement both directly in the gas production industry and also strategies to facilitate Traditional Owner participation in the transition to Australia's future net zero economy.

These two bases of collaboration provide the foundation for the thirds and final recommendation of this submission.

**Recommendation 3**

*That DISR collaborate with the National Native Title Council to establish an ongoing Working Group charged with undertaking analysis and providing information in relation to the historic and future participation of Traditional Owners in the gas production industry.*

**Conclusion**

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The gas production industry can provide a valuable basis to support Australia's transition to a net zero economy. In doing so the industry can also provide an important vehicle for recognition of the rights of Traditional Owners and a foundation for the future economic prosperity and cultural integrity of Australia's First Nations. The NNTC believes acceptance of the recommendation contained in this submission will provide the means to achieve these goals. The NNTC looks forward to working with DISR and the broader Australian Government to achieve what we are confident are these shared aspirations.

Yours sincerely,



Jamie Lowe  
Chief Executive Officer