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Via electronic lodgement:
https://consult.industry.gov.au/offshore-petroleum-consultation-requirements

Response from the Sea Country Alliance to the DISR Consultation Paper *Clarifying consultation requirements for offshore petroleum and greenhouse gas storage regulatory approvals*

Introduction

On behalf of the Sea Country Alliance (**SCA**), we are pleased to put forward the following submission. The SCA is an alliance between Australia's Traditional Owners with responsibility for Sea Country that have come together to speak in unison. The formation of the Sea Country Alliance, following a national meeting of Traditional Owners in Darwin in November 2023, represents a step forward in realising our rights and responsibilities offshore.

All coastal state and territories of Australia are represented on the 56 member Alliance, ensuring that the complexity of our diverse seas, oceans and coastal areas is recognised. The Alliance has 47 Traditional Owner member corporations with statutory recognised responsibilities for Sea Country and 9 associate members which are Traditional Owner organisations with an interest in Sea Country issues (Attachment A).

The Consultation Paper that prompted this submission states that it aims to elicit responses to two overarching questions. These are stated as being:

- how can Australia's Offshore Environment Regulations ensure targeted, effective, meaningful, and genuine consultation occurs, including culturally appropriate consultation with Traditional Owners and First Nations communities?
- how should titleholders best identify who is a relevant person or organisation for the purposes of consulting on a proposed offshore resources activity?

The Consultation Paper then proceeds to pose twenty-two sub-questions intended to illuminate the responses to the overarching questions.

This submission will proceed in the first instance by directly addressing the overarching questions. In so doing it provides direct responses to a number of the sub-questions:

- how to better clarify the consultation requirements under the Offshore Environment Regulations,
- how consultation for offshore resources activities can be appropriately targeted to meet the needs of persons or organisations who may be impacted, and
- how all relevant persons, including Traditional Owners and First Nations communities, can participate meaningfully in the development of environment plans and in a manner that is culturally sensitive and appropriate.

The response to other sub-questions is contained in the model for reform outlined in the Submission.

Overview

In addressing the overarching questions, the submission will progress in four sections. The first section reviews the current jurisprudence surrounding a "relevant person" under Regulation 11A(1)(d) of the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (Cth) (the ***Offshore Regulations***). In doing so the submission necessarily considers the nature of Traditional Owners' interests in Commonwealth offshore areas and the relevant jurisprudence relating to this. The key points to note from this stage are that Traditional Owner interests:

- are *suis generis* in nature;
- and comprise rights that are cultural, social, and economic in character.

The second section of the submission examines the concept of "relevant person". Through reference to the relevant regulation and accompanying jurisprudence, the section identifies the dual character of Traditional Owner rights in Sea Country as both collective and individual. It continues to examine how the current regulatory structure is incapable of accommodating this dual character.

The third section moves to examine the structures that are necessary to allow proponents to engage with Traditional Owners in a way that provides confidence that this engagement is effective both in law and practice. This stage of the submission will develop the notion of a Traditional Owner Representative Institution (**TORI**) and explain how the application of this concept is essential in both satisfying the expectations of international law and providing operational certainty under domestic law. This third section of the submission provides effective responses to many of the sub-questions raised in the Consultation Paper.

The section also identifies the necessary difference in approach between those communities whose Sea Country is necessarily affected by a proponent intended activities (directly affected communities) and those communities whose Sea Country may only potentially be affected by a proponent's activities (environment that may be affected (**EMBA**) communities).

The fourth section of the submission advances the Traditional Owner agenda for how the structures identified in section three should be utilised to ensure that Australia complies with expectations that arise under international law. This stage also notes that adoption of the Traditional Owner agenda will additionally satisfy Government identified policies and priorities. Particularly, those with respect to ensuring the benefits that arise from offshore fossil fuel development are broadly shared across the community and provide a robust foundation to Australia's transition to a new economy.

The fifth and final section of the Submission concludes by summarising the recommendations contained within it.

1 Traditional Owner Interests in Sea Country

The concept of the existence and recognition of Traditional Owner rights in Sea Country is not new. So much so that what might be seen as surprising about *Santos NA Barossa Pty Ltd v Tipakalippa [2022] FCAFC 193* (**Tipakalippa**) is not the outcome but the surprise with which that outcome was received.

The 2002 National Oceans Office South-East Regional Marine Plan, *Sea Country an Indigenous Perspective*[1] (the **Plan**), notes the connectedness of land and sea for Traditional Owners in that region.

> *"Together they form people's "Country" – a country of significant cultural sites and "Dreaming Tracks" of the creation ancestors. As a result, coastal environments are an integrated cultural landscape/seascape that is conceptually very different from the broader Australian view of land and sea."*

The impact of offshore infrastructure and its necessary relationship to onshore infrastructure is therefore much broader, relating to both tangible and intangible Cultural Heritage. Citing archaeological records, the Plan identifies the extraordinary amount of time for which today's Traditional Owners' families have had responsibility for caring for this multi-faceted Country.

> *"Aboriginal people occupied, used and managed coastal land and sea environments within the Region for many thousands of years before the current sea level stabilised about 5000 years ago. Aboriginal people's cultural and economic relationship with the Region begins before the current coastal ecosystems were established.*

[1] National Oceans Office, Commonwealth Government of Australia, *Sea Country – an Indigenous perspective* The South-east Regional Marine Plan Assessment Reports, 2002

> *This relationship includes knowledge and use of lands that now lie beneath the ocean all around the coast, and between mainland Australia and Tasmania."*

Injudiciously considered offshore infrastructure poses a significant threat to Traditional Owner rights to live their cultural connections to this Country. Potential impacts are far more diverse than damage to submerged physical sites, they also include the visual interference on the cultural landscape and effect on cultural species.

Marine plants and animals also play a significant role in a cultural landscape, providing more than trade and food outcomes but spiritual relationships through totems and songlines.

Consideration of these rights in Commonwealth Waters have already been identified by Parks Australia through the Australian Marine Parks Engagement Principles. Principle Two states that *"management of Australian Marine Parks should be undertaken on the basis that native title exists in sea country within Commonwealth waters."*[2]

The Marine Plan Partnership for the North Pacific Coast (**MaPP**) initiative is a partnership between the Province of British Columbia (B.C.), Canada and 17 member First Nations that developed and is implementing marine use plans for B.C.'s North Pacific Coast. One of the initiatives currently being undertaken is regional Kelp monitoring. The project highlights the cultural significance of the marine environment as:

> "*each First Nation along the coast has a unique relationship with kelp. Generally, kelp are culturally important as First Nations have harvested many kinds of seaweeds including kelp for thousands of years and continue to use kelp species for food, medicine, tools, fertilizer, and many other uses."*[3]

Initiatives such as these take the establishment of culturally safe and inclusive processes, requiring support and time as part of broader environmental and cultural marine plans. Work such as this must be undertaken prior to both identifying Priority Areas for Assessment and, subsequently, the Minister proposing an area for public consultation. Once areas have been declared, Traditional Owners must be involved at all stages of design, construction and project life on a regulatory level. This must include the provision of cultural consent in accordance with rights afforded for free, prior and informed consent (**FPIC**) under UNDRIP.

[2] Australian Marine Parks, *Indigenous Engagement Principles*, https://parksaustralia.gov.au/marine/management/programs/indigenous-engagement/principles/
[3] https://storymaps.arcgis.com/stories/78945b1d95ec4b9fab5142670088174f

1.1 Jurisprudence around Offshore First Nations Interests

In December 2022, the Full Federal Court[4] confirmed a decision[5] to overturn an approval by the National Offshore Petroleum Safety and Environmental Management Authority (**NOPSEMA**), of an offshore drilling Environment Plan (**EP**). The EP was submitted by Santos and related to the 'Barossa Basin' which lies offshore from the Kimberley and Northern Territory Coasts.

The relevant regulations required a process of consultation with all people who have interests ("function, interest or activity") in both the immediately affected area of operations, and within the EMBA. The decision was based on the finding that Santos had not undertaken any or sufficient consultations with Traditional Owners who had interests in the area.

The Court at first instance found the interests of Mr Tipakalippa included interests arising from his cultural association with the EMBA. These included intangible dreaming lines, tangible manifestations of cultural heritage, his cultural connection to the relevant marine environment, interests in coastal areas that may be affected by any environmental incident (spill) and interests as someone who used the marine environment for fishing and other traditional and contemporary purposes.

The judgments both at first instance and on appeal[6] refer to and accept the following extract from the Appendix C of the EP as a summary description of those interests.

> Marine resource use by Aboriginal and Torres Strait Islander peoples is generally restricted to coastal waters. Fishing, hunting and the maintenance of maritime cultures and heritage through ritual, stories and traditional knowledge continue as important uses of the nearshore region and adjacent areas. However, while direct use by Aboriginal and Torres Strait Islander peoples [of] deeper offshore waters is limited, many groups continue to have a direct cultural interest in decisions affecting the management of these waters. The cultural connections Aboriginal and Torres Strait Islander peoples maintain with the sea may be affected, for example, by offshore fisheries and industries**.** In addition, some Indigenous people are involved in commercial activities such as fishing and marine tourism, so have an interest in how these industries are managed in offshore waters with respect to their cultural heritage and commercial interests.

Their Honours later note in relation to those interests:

> Mr Tipakalippa's and the Munupi clan's interests in the EMBA and the marine resources closer to the Tiwi Islands are immediate and direct.

[4] *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193 ("*Santos FFC*")
[5] *Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority (No 2)* [2022] FCA 1121 ("*Tipakalippa*").
[6] Santos FFC per Kenny and Mortimer at [39].

> Furthermore, they are interests of a kind well known to contemporary Australian law. Thus, interests of this kind, which arise from traditional cultural connection with the sea, without any proprietary overlay, are acknowledged in federal legislation, such as, for example, the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), and have been considered by the courts.[7]

Their Honours further pursue the matter at [74]:

> By these references to the Heritage Protection Act, we are not intending to suggest that the Heritage Protection Act was applicable to Santos' proposed drilling activities. Rather, we refer to that Act to make it clear that the law recognises the kind of interests that Mr Tipakalippa contends required Santos to consult with him and the Munupi clan. Reference to the Heritage Protection Act demonstrates that by this Act the federal Parliament has expressly contemplated the protection of areas of the sea from activities harmful to the preservation of Aboriginal tradition. The Parliament has done so without requiring the existence of particular proprietary interests; rather requiring only the existence of a connection by Aboriginal tradition.[8]

Similar views have been expressed by the High Court, in the context of consideration of the existence of native title rights and interests in offshore areas, when the majority of the Court in *Commonwealth v Yarmirr* stated:

> What has been established is the existence of traditional laws acknowledged, and traditional customs observed, whereby the applicant community has continuously since prior to any non-Aboriginal intervention used the waters of the claimed area for the purpose of hunting, fishing and gathering to provide for the sustenance of the members of the community and for other purposes associated with the community's ritual and spiritual obligations and practices. Members of the community have also used, and continue to use, the waters for the purpose of passage from place to place and for the preservation of their cultural and spiritual beliefs and practices.[9]

What is abundantly clear from this review of administrative practice and judicial authority is that Traditional Owners have interests which include (per Santos FFC):

> *"interests arising from […] cultural association with the EMBA including intangible dreaming lines, tangible manifestations of cultural heritage, his cultural connection to the relevant marine environment, interests in*

[7] *Ibid* at [68].
[8] *Ibid* at [74].
[9] *Commonwealth v Yarmirr* [2002] HCA 56; 208 CLR 1 per Gleeson CJ, Gaudron, Gummow, and Hayne JJ.

> *coastal areas that may be affected by any environmental incident"*. These interests have also been described (per *Yarmirr) as "hunting, fishing and gathering to provide for the sustenance of the members of the community and for other purposes associated with the community's ritual and spiritual obligations and practices".*

Subsequently to the decision *Commonwealth v Yarmirr,* the High Court considered the nature of native title rights and interests in the specific context of Sea Country in *Akiba v Commonwealth.*[10] In this matter the High Court made clear that a native title right to take resources for any purpose could include for commercial purposes.

The rationale for native title rights including commercial rights is best described by one of the Traditional Owner witnesses who gave evidence in the Federal Court in *Akiba*. Justice Finn in his judgment quotes Traditional Owner, Walter Nona, as saying:

> We always used things from the sea for trade or exchange for things we didn't have. … [W]hen money came we sold things from the sea for money to get things we needed. Selling things for money is new because money is new; but we always exchanged and traded things for what we needed. In that way, selling things for money is no different.[11]

This judicially endorsed statement from Walter Nona makes quite clear that rights and interests based in tradition can today have also a tangible, contemporary, commercial, manifestation.

From the foregoing it is clear that the interests of Traditional Owners in their Sea Country contained in Commonwealth offshore interests, are far great than an association with archaeological relics and extends beyond (but includes) a cultural significance of songlines. The rights and interests of Traditional Owners are cultural, but they are also social and economic.

2 "Relevant Persons", Tipakalippa and Communal Rights

The catalyst for the current consultation process is found in the judicial consideration of the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (the **Offshore Regulations**) contained in the Full Federal Court decision in Tipakalippa. The Full Court decision of course largely endorsed the decision of Bloomberg J at first instance in *Tipakalippa v NOPSEMA (No 2)* [2022] FCA 1121.

It is important to briefly describe the regulatory framework that gave rise to that litigation. Under regulation 10A(g) (i) and (ii), NOPSEMA can only accept a Drill EP if it is "reasonably satisfied" that the Drill EP demonstrates that a titleholder has carried out "consultations" with

[10] *Akiba v Commonwealth.* (2013) 250 CLR 209.
[11] *Akiba v Queensland (No 3)* (2010) 204 FCR 1, 527.

"relevant persons" and "the measures [included in the plan] (if any) that the titleholder has adopted, or proposes to adopt, because of the consultations are appropriate".

The required consultations are (relevantly) specified in regulation 11A(1)(d). This identifies as a "relevant person" (requiring consultation):

> *a person or organisation whose functions, interests or activities may be affected by the activities to be carried out under the environment plan, or the revision of the environment plan*; (emphasis added).

Regulation 11A continues to specify that each "relevant person" must be provided with *"sufficient information to allow the relevant person to make an informed assessment of the possible consequences of the activity on the functions, interests, or activities of the relevant person".* They must also be provided with sufficient time to comment.

The applicant (Mr Dennis Tipakalippa) asserted that NOPSEMA 's purported approval of the Drill EP was invalid because the Drill EP could not provide a sufficient basis for NOPSEMA to be "reasonably satisfied" that the required consultations with the relevant persons (which included him as a Traditional Owner of potentially affected sea country) had occurred at all or in the required fashion.

Santos had in fact (at least) attempted to conduct some type of consultation (sending emails which were not responded to) to the Tiwi Land Council (**TLC**) as statutory authority representative of Tiwi Island Traditional Owners for the purposes of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth.) (**ALRA**).

At issue was whether Santos' attempts at consultation were sufficient and whether there was a requirement to consult directly (and essentially individually) with Mr Tipakalippa. This issue goes to the essential issue of whether Mr Tipakalippa was *himself* a "relevant person" or was he a member of a group which *as a collective* were relevant persons (the Tiwi Islander Traditional Owner community). A subsidiary point was that if it was the collective that comprised a group of relevant persons, could that collective be represented by the TLC, given its limited statutory functions and if so, were the attempts at consultation sufficient for the purposes of the regulations.

His Honour Blomberg J considered (and the Full Court agreed) that it was the first point that was most pertinent. He states:

> *Is an interest in land not an "interest" because it is held in common or as a joint tenant? Would an activity… not be an "activity" because it was being conducted as a joint venture? Nor was there anything suggested by Santos, peculiar to the sea country functions, interests or activities of Aboriginal or Torres Strait Islander peoples that would suggest some basis for any such limitation.*

His honour here is **not** suggesting it is **not** a communal interest. However, he is very definitely saying that NOPSEMA should have been alert to at least the possibility that individual Traditional Owners have an "interest" in Sea Country for the purposes of regulation 11A(1)(d) (see e.g. [242]).

The fact that Traditional Owner rights arise and exist collectively but can be enjoyed individually is a well-established concept in Australian jurisprudence. The most authoritative statement in the issue is that of Brennan J in *Mabo No 2*[12] when his Honour states at [68]:

> … so long as the people remain as an identifiable community, the members of whom are identified by one another as members of that community living under its laws and customs, ***the communal native title*** survives ***to be enjoyed by the members*** according to the rights and interests to which they are respectively entitled under the traditionally based laws and customs, as currently acknowledged and observed. (Emphasis added)

The point regarding rights under traditional law and custom arising from the collective identity but taking a form as both individual and collective rights is made quite explicit by his Honour in the following paragraph:

> [69] Thirdly, where an indigenous people (including a clan or group), as a community, are in possession or are entitled to possession of land under a proprietary native title, their possession may be protected or their entitlement to possession ***may be enforced by a representative action brought on behalf of the people or by a sub-group or individual who sues to protect or enforce rights or interests which are dependent on the communal native title. Those rights and interests are, so to speak, carved out of the communal native title.*** A sub-group or individual asserting a native title dependent on a communal native title has a sufficient interest to sue to enforce or protect the communal title. A communal native ***title enures for the benefit of the community as a whole and for the sub-groups and individuals within it*** who have particular rights and interests in the community's lands. (Footnotes omitted, emphasis added.)

To be clear it is not suggested here that Traditional Owners rights in Sea Country necessarily equate directly to native title rights. Rather, as identified in the Tipakalippa jurisprudence, that rights in Sea Country, relevant for the purposes of the of the *Offshore Regulations* have a similar character as rights which enure "for the benefit of the community as a whole and for the sub-groups and individuals within it".

It is worthwhile at this point to note that the decision in the matter of *Munkara v Santos No 3*[13] is (with respect) consistent with this analysis. That matter turned on a conclusion that the existence of a matter of cultural significance giving rise to cultural rights, could not be determined on the basis of the (questionable) assertions of an individual. Rather, the existence of the matter of cultural significance could only be established through reference

[12] *Mabo & Ors v Queensland & Ors* (No 2) (1992) 175 CLR 1.
[13] *Munkara v Santos NA Barossa Pty Ltd (No 3)* [2024] FCA 9

led by sufficient number of members of the relevant community to support a conclusion that the existence of the matter of cultural significance was a communal view. The decision did not consider the issue of once the existence of the cultural matter was confirmed, whether an individual had standing to bring an action to enforce and protect that.

Having established that Traditional Owner rights in Sea Country, relevant for the purposes of the *Offshore Regulations,* have a character as rights which enure "for the benefit of the community as a whole and for the sub-groups and individuals within it"; the challenge then is to establish an appropriate accommodation of rights of these nature within the framework of the current *Offshore Regulations*. The various sub-questions contained in the Consultation Paper are an attempt to identify this accommodation. However, the inescapable conclusion from this review of the nature of Traditional Owner rights in Sea Country, and the jurisprudence surrounding "relevant person", is that such an accommodation will never be able to be achieved at a level to allow the necessary transactional security for proponents.

This conclusion can be seen as *inescapable* once the full implications of dual character of Traditional Owners rights as both collective and individual is appreciated. Once it is accepted that each individual Traditional Owner is a relevant person, as well as the broader Traditional Owner community, it becomes apparent that it is necessary to consult and gain the views of each individual Traditional Owner. Each individual Traditional Owner is empowered, under the current regulatory framework, to challenge the efficacy of a consultation process.

It may be that a *comprehensive* consultation process could withstand such a challenge. Indeed, the Consultation Paper sub-questions are designed to try and elicit information to develop such a comprehensive consultation process.

However, such an approach is dependent upon a proponent carrying the financial implications of the uncertainty of whether a challenge will be successful in either overturning or delaying operational approvals. Notable is of course that the current regulatory framework requires these comprehensive consultations to take place across the entirety of the EMBA in relation to each operational approval.

As industry representatives have frequently stated both publicly and privately to the SCA, the current regulatory framework is simply unworkable. That regulatory framework requires reform to address three specific issues. These are:

- Accommodation of the dual collective and individual nature of Traditional Owner Interests.
- The extent of engagement required arising from the potential geographic size of the EMBA.
- The frequency of engagement necessary arising from the current focus on consultation with relevant persons at the point of each operational approval.

The following section of this submission puts forward regulatory structure reform proposals that address these specific issues.

3 Traditional Owner Representative Institutions, EMBA Communities and Negotiation Efficiency

3.1 Traditional Owner Representative Institutions

As noted above, while Traditional Owner Sea Country rights and native title rights do not directly equate (at common law) they both share the central characteristic of having a dual collective and individual character. For this reason, it is appropriate and useful to have regard to native title structures in considering regulatory structural reform in the offshore regime.

Under the *Native Title Act 1993* (Cth.) (**NTA**) engagement between proponents and native title holders (both as a collective and with respect to individuals) occurs through structures dictated by the NTA itself. The first of these is the Prescribed Body Corporate (**PBC**) which is required to be established after a determination by the Federal Court as set out in NTA ss 55 - 60. The PBC is incorporated under the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth) (**CATSI**) Act and its members are the native title holders whose function under the NTA is to manage the determined native title rights on behalf of the common law holders. The legal efficacy of an agreement with the PBC to bind *all* native title holders or to satisfy consultation or notice provisions (provided the requisite procedures are adhered to by the PBC) is ensured by virtue of the provisions of the NTA itself. It is this mechanism that ensures native title holders have legislative certainty and collective strength in their dealings with proponents. The structure also ensures that proponents have a clear and legally certain mechanism to engage with native title holders. Without the mechanism of the PBC, proponents would be faced with the same dilemma as currently faced by industry under the offshore regime.

The NTA also includes two other mechanisms to structure engagement that are relevant to situations prior to a Federal Court determination of the existence of native title. These are the "registered claimant" and the Native Title Representative Body (**NTRB**). Prior to a Federal Court determination of the existence of native title, the NTA provides that proponents can engage with confidence with those individuals who are listed in the Native Title Claims Register (established under the NTA) as the registered claimants. Registration as a claimant requires satisfaction of certain administrative processes including the authorising and lodging of a native title determination. Once registered, and if the necessary authorising process is complied with, proponents can have confidence in their dealing with registered claimants essentially as authorised agents of the collective of native title holders.

The NTRB under the NTA can also play a role in giving proponents confidence that notification and at times consultation requirements required under the NTA have been fulfilled, provided that the proponent has complied with the prescribed statutory requirements.

The two key matters to note from this immediately forgoing discussion are:

- Providing certainty in engagement between proponents and Traditional owners in the content of rights that are both individual and collective can only be achieved through purpose built regulatory structures.
- In the context of the NTA at least these structures already exist and have been functioning effectively for several decades.

Of course, across Australia there are several other legislative Traditional Owner land rights schemes. These also provide functioning examples of proponent interaction with Traditional Owner rights of a collective and individual character being mediated and given efficacy through a legislatively authorised Traditional Owner Representative Institution. The Aboriginal Land Councils in the Northern Territory established under ALRA are one clear example.

This Submission, at Attachment B, describes a system of statutory recognition of existing Traditional Owner Representative Institutions (the "TORI" referred to earlier in this paper). The mechanism contained in this proposal also includes a process for the statutory identification of relevant Traditional Owners with which a proponent can engage in areas where there are no identified TORIs.

This system is currently being advocated also in the context of reform to Commonwealth First Nations Cultural Heritage and Environmental laws. It is recommended that this system would be utilised in the context of these proposed reforms.

It is recommended that the question of the identity of "relevant persons" for the purposes of the *Offshore Regulations* in the context Traditional Owners be resolved by adopting the TORI model. Where necessary the prescribed functions of existing statutorily recognised TORIs would be expanded to include the necessary functions under the *Offshore Regulations.*

3.2 Directly Affected and EMBA Communities

Accepting that engagement by a proponent will be with the relevant TORI the next question to be addressed is that of what form that engagement will take.

As noted earlier in this Submission, a distinction needs to be recognised between Traditional Owner communities directly affected by a proposal and those that lie within the broader EMBA.

The distinction is based not on the physical fact of geographic proximity to the project activities but rather upon the question of the distinction between an *actual* and a *possible* impact on the rights and interests of Traditional Owners. In the case of a directly affected community, the activity of the proponent *will* have an impact upon the Sea Country of Traditional Owners. In the case of a Traditional Owner community within the broader EMBA, the impact of the activity of the proponent upon Sea Country rights is only *possible*, albeit that possibility is a real one.

This distinction suggests a difference in approach is necessary. To refer again to the example of the NTA. Within the NTA a difference in the form and structure of proponent engagement with Traditional Owners influenced by matters such as the extent of impact on native title rights (both in terms of physical impact and temporal duration) is apparent. A distinction can also be discerned based on the nature and purpose of the proposed activity. Thus a "future act" that will have minimal impact on native title rights and interests for a short period of time may only warrant notification and consultation.

By contrast a future act comprising a large mining operation will only be permitted to proceed with the agreement (consent) of the relevant Traditional Owners or, in the absence of such consent, with a specific statutory authorisation made by a decision maker in accordance with defined "public interest" and "competing interest-based" criteria. In the NTA an agreed outcome takes the form of an Indigenous Land Use Agreement (ILUA) or a "section 30" agreement. Absent one of these forms of agreement, a future act requiring application of the Right to Negotiate process (such as the grant of onshore minerals or petroleum titles) can only be made subsequent to statutory authorisation by the National Native Title Tribunal. In this way the processes under the NTA can be argued to go some way towards satisfying the internal legal expectation of Free Prior and Informed Consent.

It is recommended that a similar approach be adopted with respect to engagement under the *Offshore Regulations.*

3.2.1 Directly Affected Traditional Owner Communities

At a practical level, this approach would require that the proponent should have obtained the consent of Traditional Owners through the TORI to the proposed grant of rights. Specifically, in determining whether or not to grant to a proponent a set of statutory rights that interfere with the rights and interests of Traditional Owners, a decision maker would *commence* with the proposition that consent should have been obtained.

In the event consent is not demonstrated through the existence of an agreement, the decision maker would be required to ascertain the basis for the absence of consent both in terms of adherence to procedural requirements and the reasonableness of proposed outcomes. It would only be in circumstances that the decision maker could be confident that the grant of the conflicting statutory rights represented a fair and legitimate infringement on the rights of Traditional Owners that the grant should proceed. This process parallels that of a determination that a future act can proceed by the National Native Title Tribunal.

As is the case with all administrative decision making in Australia the decision would be susceptible to judicial review if an error of law, including an error in the application of the statutory principles outlined above, could be made out by an aggrieved party.

On a procedural level, the process of confirming consent by relevant Traditional the equivalent as for a "native title decision" under the NTA (or the grant of an Exploration Licence under s 42(2)(a) of the ALRA).

3.2.2 Traditional Owner Communities within the EMBA

The fact that Traditional Owners within the EMBA may only be *possibly* impacted by the activities of the proponent does not in any way lessen their legitimate role. In the process of consideration and approval of the grant of statutory rights, that may lead to such an outcome, this role must be recognised. However, it does suggest though that the involvement of these Traditional Owners in this process should be concomitant to the potential impacts they may experience.

The contingent nature of the impacts upon these Traditional Owners rights and interests suggest that the main focus of their involvement is in the area of the management of these contingencies. That identified, it may also extend to involvement in the development of the regular operational procedures that give rise to these contingencies.

At a practical level, these considerations would suggest that the involvement of these Traditional Owners would be in the form of a 'right to comment' on the proposals contained within the project. To give real effect to such a procedural right it is important that the elements of prior consultation (that is early in the decision-making process), and the provision of full information are satisfied. To be meaningful it is necessary that the ultimate decision maker has full oversight of the process. In a manner not dissimilar to the current regulatory arrangements, this would require a proponent to detail:

- with whom consultation had occurred (and the evidence based upon which this selection was made),
- the structure and content of the consultations,
- the outcomes of those consultations and how those outcomes had been incorporated into the proposal, and
- if they had not the basis upon why this was not the case.

Unlike the current arrangements, the consultation would be conducted through the relevant TORI. Both a proponent and ultimate decision-maker will therefore have confidence of the comprehensiveness and accuracy of the outcomes of the process. In many respects then, this process reflects that for consultation described in the NTA s 24HA(7) (or s 42(2)(b) of ALRA).

3.3 Negotiation Efficiency

Having identified the identity of the negotiation party (the TORI or identified relevant Traditional Owners), the *form* of engagement (agreement making or, as relevant, effective consultation) it is necessary to address the necessary final aspects of the negotiation process. This is the subject matter of the negotiations and the question of resourcing of negotiations.

3.3.1 Subject Matter – grant of title and operational approvals

One consequence of the litigation in which the current issues have been raised is that it has focussed attention on operational processes within an overall project, rather than on the overall project itself.

In the specific context of offshore energy projects this is manifested in the attention given to the approval of operational proposals (by NOPSEMA) rather than project proposals. The result is a risk that parties negotiation resources are focussed upon relatively minor operational minutiae.

There is a useful comparison with land based hard minerals approvals. In this context, the point of negotiation between proponent, Traditional Owners and government around the terms of a project proceeding, is the point of contemplation of grant of title to the proponent. It is at this point that Traditional Owners will negotiate *processes* for appropriate involvement in operational matters, rather than making each operational decision the subject of a *de novo* negotiation process.

Fortunately, the existing offshore energy legislative regime is founded upon a similar distinction to that in onshore hard minerals regimes between grant of title and operational approvals. The point for the current purpose is that any regulatory reform must identify the contemplated grant of title (licence) as the point where the terms of the grant of title are negotiated with Traditional Owners.

The negotiations at this point should include within their scope, attention to the processes by which Traditional Owners have appropriate input to operational decisions over the life of the tenure. There should also be an opportunity at the point of declaration of a zone for Traditional Owners to consider the conditions of areas that must be excluded due to cultural reasons.

Creating the grant of title as the point of negotiation can greatly enhance negotiation efficiency, lead to greater project certainty and (through reduced timeframes) reduced costs. In the regime of offshore energy these benefits could be further enhanced through imposition of conditions on the declaration of a title zone from the outset. An example of such conditions may go to prohibitions on operations in areas identified as having high cultural heritage or environmental value. The imposition of such conditions from the outset would avoid the need for parties to negotiate these points in relation to the grant of each title.

3.3.2 Resourcing Negotiations

Natural resource development in Australia is often portrayed as a public-private partnership. The government asserts ownership of the resource and provides the regulatory infrastructure necessary to support development of the resource. Proponents provide the capital and bear the risk of the project. Both parties share in the returns from the development.

Resourcing the processes associated with Traditional Owner involvement in offshore energy projects should also adopt this model. Resources to support such involvement should come from both government and proponent as described in broad terms below.

3.3.3 The Role of Government

Government's key function is to provide the regulatory infrastructure necessary to support resource development. In the context of Traditional Owner involvement in offshore energy projects, this principle is given effect through government providing the resources to TORIs necessary to maintain a *standing capacity* to engage effectively with proponents in a timely fashion as the need arises. Practically, this means Traditional Owner organisations having the standing administrative, logistical, and technical expertise capacity to engage with a proponent when needed. Situations where Traditional Owner organisations need to develop these capacities in response to the needs of proponents have been shown (over decades of experience) to lead to costly delays for proponents and sub-optimal outcomes for Traditional Owners.

A feature unique to the offshore energy environment stems from the relatively recent focus on the specifics of the interests of Traditional Owners in their Sea Country. Many decades of *land* claims, with over thirty years under the specific regime of the NTA, has meant that there is a significant body of knowledge regarding the specifics of Traditional Owners' cultural and other interests in much of Australia's land mass (particularly in areas of high minerals prospectivity). In large part, the resources necessary to develop this body of knowledge have been provided over time through the Commonwealth Government's resourcing of the native title system.

The level of accessible knowledge relating to the interests of Traditional Owners in their Sea Country is not anywhere near this level. This accessible knowledge deficit inevitably leads to project approval delays stemming from the need to acquire the necessary information on a project-by-project basis. These project approval delays carry negative cost consequences for both proponents and governments.

To remedy this situation, it is important that Government provide project funding, delivered over several years, to TORIs. This funding would support them to develop the level of accessible knowledge relating to the cultural and other interests in their Sea Country and could usefully be targeted to areas of current or potential future high offshore energy project prospectivity.

3.3.4 The Role of Proponents

The resourcing responsibilities of proponents must include all Traditional Owner organisations' costs incurred for consideration of the proponent's proposal. The elements of this principle are well explored in the context of the NTA regime with the PBC Fees Regulations[14] both in their content and the practice developed by proponents and Traditional Owners influenced by them providing an existing regulatory example. Similar regimes are in place in other similar contexts.[15]

[14] *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth)
[15] For example, Registered Aboriginal Party fee arrangements under the *Aboriginal Heritage Act 2006* (Vic.).

The principle is also utilised in the plethora of government fee for service arrangements where an agency discharging a statutory function on behalf of a particular private individual will recover the cost of the provision of the service from the beneficiary of that service.

One practical manifestation of this principle relates to the initial approach by a proponent to a Traditional Owner organisation seeking assistance in the progress of their project. Usually, this approach will involve provision of extensive technical and expert material requiring assessment and subsequent engagement with the Traditional Owner organisation's members. Even the process of developing an estimate of the costs associated will involve the allocation of significant resources from the Traditional Owner organisation for the benefit of the proponent. To accommodate this, the required practice should ensure that a proponent provides initial resources to the Traditional Owner organisation to allow an accurate assessment of their costs in undertaking the desired engagement with the proponent.

4 Beneficial Engagement

The final matter that requires consideration is the *content* of the engagement between Traditional Owners of Sea Country and Proponents. Relevant to the consideration of this matter are some of the expectations that arise under International Law and Australian Government domestic policy. A brief consideration of these matters is a useful introduction to this issue.

4.1 International and Policy Environment

With respect to international expectations, a necessary starting point is the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**). The significance of this document is summarised in the following passage from the recent forward of the Joint Standing Committee Report into the Implementation of UNDRIP to Australia. The Committee stated:

> Indigenous rights are inherent to Aboriginal and Torres Strait Islander peoples by virtue of their unique and enduring status as the *First Peoples* of Australia. The rights recognised in the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) arose from the efforts of First Peoples around the world who worked within the United Nations structures over decades to formally articulate these rights.
>
> Australia has been a signatory of UNDRIP since 2009. The United Nations calls upon all signatories to UNDRIP to uphold the inherent human rights of Indigenous peoples and to implement these within their political and institutional frameworks, while preserving the integrity and unity of the Nation State. Like many UN documents, the UNDRIP is non-binding, however signatories proclaim the UNDRIP to

> be a 'standard of achievement to be pursued in a spirit of partnership and mutual respect'.
>
> The UNDRIP articulates 'the minimum standards of survival, dignity and well-being of Indigenous peoples of the world.' Importantly, UNDRIP does not create any new or 'special' rights, which is a common misconception. Rather, it details and reflects existing rights from other international human rights instruments and applies them to the specific contexts and situations affecting Indigenous peoples.
>
> …
>
> The High Court of Australia's ruling in *Mabo v Queensland No 2* confirmed that the concept of Australia's being declared '*terra nullius*' (land of no one) was untrue. Aboriginal and Torres Strait Islander people were here before British arrival and colonisation. UNDRIP offers the international standard for legacy issues arising from colonisation to find accommodation in the present.[16]

In keeping with this statement, the Australian Government has accepted UNDRIP as a key component of the relevant policy framework when developing policy affecting First Nations peoples. This is apparent from the 2022 statement of Minister Plibersek in presenting to the Parliament the Government's response to the Juukan Gorge Inquiry. The Minister states:

> The Australian Government will do this within the framework of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), particularly the principle of self-determination, and consistent with our commitments to the *National Agreement on Closing the Gap* and the *Uluru Statement from the Heart*.[17]

UNDRIP has a particular relevance to this discussion in two respects. First with respect to the concept of the Traditional Owner Representative Institution itself.

The second point of relevance goes to the application of the FPIC principle and the potential for benefit sharing agreements that arise from it.

The relevant provisions in respect of both of these points are Articles 26 and 32. Under these provisions indigenous Peoples have the right to participate in decision-making in matters that affect their rights, through representatives chosen by themselves in accordance with their own procedures.

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[16] *Inquiry into the application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia* Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs (per Senator Dodson – Chair) , Commonwealth of Australia 2023. pp ix-x.

[17] Australian Government, 2022, Australian Government's Response to the Joint Standing Committee on Northern Australia's: "A Way Forward: Final Report into the Destruction of Indigenous Heritage Sites at Juukan Gorge"; and "Never Again: Inquiry into the Destruction of 46,000 Year Old Caves at the Juukan Gorge in the Pilbara Region of Western Australia p 5.

> Article 26
>
> Indigenous peoples have the right to own, use, develop and control the lands, territories and resources they possess by reason of **traditional ownership** or other traditional occupation or use …
>
> Article 32
>
> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own **representative institutions** in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources….

The reference to FPIC in Article 32 is one basis upon which agreements with proponents that ensure benefits to Traditional Owners for the imposition on their rights and interests is based. Effective benefit sharing agreements support aspects of Government Policy beyond compliance with international law expectations.

As noted by Minister Plibersek in the passage above, the Australian Government has a long-standing commitment to ensuring achievement of the targets contained in the *National Agreement on Closing the Gap*. Effective benefit sharing arrangements can assist in achievement of these targets in respect of many areas; employment, education, health and cultural development to name only some.

An example of Government policy reflecting this approach can be seen in the NTA (under the ILUA/RTN structures). More recently it can also be seen in the Australian Government's *Critical Minerals Strategy 2023 – 30.* Focus Area 3 of this Strategy is stated to be 'First Nations Engagement and Benefit Sharing. This focus area is described (at p 30 of the Strategy Document) as:

> Genuine engagement and collaboration with First Nations communities that promotes benefit sharing and respects the land and water rights and interests of First Nations people and communities.

A similar approach should be adopted in the context of developing reforms to existing regulator structures to support these policy outcomes.

Indeed, the Australian Government recognises of the potential role the Gas Industry can play in delivering benefits for First Nations people is identified in, for example, the recent DISR *Future Gas Strategy Consultation Paper*. As the submission from the National Native Title Council to that Consultation process stated in its conclusion:

> 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 proposal contained in this submission, once implemented can assist in achieving these policy objectives.

Having established the international legal and domestic policy basis to creating a structure that facilitates *beneficial* engagement between Traditional Owners and proponents the next issue is to consider the content of engagement. In the previous section of this Submission a distinction was identified between directly affected and EMBA communities. This distinction is also pertinent to the consideration of the content of engagement.

4.2 Benefits to Directly Affected Communities

The model of engagement suggested in this Submission, in respect of directly affected Traditional Owner communities, is based upon satisfaction of the principle of FPIC through conclusion of an agreement between Traditional Owners and proponents. Necessarily, the content of any such agreement would be a question to be decided *freely* by the negotiation parties and not determined by regulation. This noted it is also reasonable to assume that such agreements would contain many of aspects of similar native title agreements that have been negotiated in an onshore context for many years. Such agreements go to matters such as: operational protocols, cultural heritage protections, benefit sharing, procurement employment and equity provisions. Clearly however this list is not exhaustive or prescriptive.

4.3 Benefits to Traditional Owners within the EMBA

The contingent nature of impacts upon EMBA community Traditional Owners rights and interests does not suggest a conclusion that these Traditional Owners are to be denied access to benefits stepping from a proposal. It does suggest though that the structure of these benefits needs to reflect this circumstance.

Two possible approaches may be to negotiate access to benefits based upon realisation of the happening of the contingency; in essence benefits would only be paid if an environmental incident in fact occurred. Another approach would be to discount the value of the benefit based upon a calculation of the likelihood of the occurrence of the contingency. It should be apparent that neither of these options are feasible or desirable.

A preferred approach is to aggregate the potential benefit on a national basis and develop a distribution mechanism that would maximise outcomes from the benefit on both a social (and cultural) and economic basis.

In this approach, this national aggregation would take the form of a Traditional Owner Climate Resilience Fund (**Fund**). The Fund would receive payments from proponents which would be aggregated for the benefit of EMBA community Traditional Owners. The payments could:

- either be statutorily required (although this may raise Constitutional issues),
- form a component of an agreement with directly affected Traditional Owners, or (and)
- be based in existing arrangements such as those pursuant to Good Standing Agreements in the context of work bids in the current offshore gas regime.

Like the current Good Standing Agreement arrangements, the structure would still be one of "a voluntary policy mechanism available for the titleholder and their directors, to maintain 'good standing' with the Joint Authority."[18] However, unlike the current Good Standing Agreements arrangements payments would not necessarily be dependent upon default of expenditure under a work bid.

4.4 Traditional Owner Climate Resilience Fund

Specifics around the Fund will be further developed as the current discussions progress. There exist a number of examples of similar funds from jurisdictions outside of Australia to draw upon in the development of these specifics.

At this stage, it is contemplated that the Fund would take the form of a trust managed by a company limited by guarantee and established specifically for the purpose of managing the Fund. The members of the corporation so established would be both Traditional Owner organisations as well as organisations representative of relevant industry and government. The Board would reflect this tripartite basis and ensure relevant high level fund management expertise.

Access to the benefits of the Fund would be restricted to Traditional Owner organisations. It would be on an application basis with allocation based on demonstration of satisfaction of (social, cultural and economic) merit criteria. Such criteria would be determined by the Board and published. The arrangement is not dissimilar in concept and operation to the recently established Northern Territory Aboriginal Investment Corporation (**NTAIC**) – although NTAIC is established pursuant to a statutory regime.

5 Conclusion and Recommendations

This Submission has put forward concrete recommendation in response to the two overarching questions contained in the Consultation Paper. To recap, those questions were:

- how can Australia's Offshore Environment Regulations ensure targeted, effective, meaningful, and genuine consultation occurs, including culturally appropriate consultation with Traditional Owners and First Nations communities?
- how should titleholders best identify who is a relevant person or organisation for the purposes of consulting on a proposed offshore resources activity?

[18] NOPTA, Offshore-Petroleum-Exploration-Permit-Guideline at 8.1: https://www.nopta.gov.au/application-processes/good-standing-agreement.html

The Submission has responded to these questions through an analysis of the nature of rights of Traditional Owners in law and in actuality. The Submission has made clear that the necessary identification of these rights as arising communally, but existing at both a communal and individual level, requires reform of the existing regulatory structures and not just adaptation in the processes associated with the existing structures.

In this respect the Submission has drawn parallels with the management of native title rights and interests under the NTA. These rights share the characteristic of arising communally but existing at both a communal and individual level. The Submission proposes resolution of this shortcoming through adoption of processes similar to those employed for many decades in the NTA.

In summary that proposal is:

- The regulatory recognition of the role and function of TORIs such as PBCs and Northern Territory Aboriginal Land Council.
- Reform necessary to make the point of the grant of title the point of negotiation and not the multiple subsequent operational approvals.
- The adoption of an "agreement-based" based approach with respect to Traditional Owners communities, through the relevant TORI directly affected by a proponent's intended activities. This agreement-based approach would, similarly to the NTA, make provision for the relevant statutory decision maker to be able to finally determine.
- The continuation of an effective consultation mechanisms but through the relevant TORI in respect of Traditional Owner communities within the EMBA area.
- The establishment of an aggregated fund for the benefit of Traditional Owner communities within all EMBA areas.
- The resourcing of the TORIs to undertake these functions through a combination of government and proponent funding. In this model government would support the standing capacity of a TORI whereas a proponent would bear the project related costs incurred by the TORI.

The implementation of these recommendations would give effective recognition to the existence and nature of Traditional Owner Rights in Sea Country. It would support of international expectations and Australian Government policy with respects to First Nations peoples and resources development. The implementation of the recommendation would provide the certainty and efficiency in project approvals that is necessary to support a viable offshore gas industry.

The SCA has previously suggested the establishment of a Working Group, comprised of appropriately senior representatives of Traditional Owner organisations, industry bodies and relevant government agency representatives. The Working Group should be established under the auspices of and resourced by the Minister.

The members of the Sea Country Alliance look forward to working with the Government to progress these essential recommendations.

Yours sincerely,

Dr Heron Loban

Co-Chair
Sea Country Alliance

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Glossary of Terms

1 Acronyms

AGD	Attorney-General's Department (Cth)
DCCEEW	Department of Climate Change, Energy, the Environment and Water (Cth)
DISR	Department of Industry, Science and Resources (Cth)
EMBA	Environment that May Be Affected
FNLRS	First Nations Legal & Research Services
FPIC	Free, Prior and Informed Consent
FVTOC	Federation of Victorian Traditional Owners Corporations
MO	Minister's Office
NIAA	National Indigenous Australians Agency (Cth)
NNTC	National Native Title Council
NNTT	National Native Title Tribunal
NOPSEMA	National Offshore Petroleum Safety and Environmental Management Authority
NTAIC	Northern Territory Aboriginal Investment Corporation
NTRB/SP	Native Title Representative Body / Service Provider
NTSP	Native Title Service Provider
PBC	Prescribed Body Corporate
RNTBC	Registered Native Title Body Corporate
SCA	Sea Country Alliance
TLC	Tiwi Land Council
TORI	Traditional Owner Representative Institution
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples

2 Case Law

Akiba	*Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth [2013] HCA 33; 250 CLR 209*
	Akiba v Queensland (No 3) (2010) 204 FCR 1, 527
Mabo	*Mabo & Ors v Queensland & Ors (No 2) (1992)* 175 CLR 1
Munkarra	*Munkara v Santos NA Barossa Pty Ltd (No 3) [2024] FCA 9*

Tipakalippa	*Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority (No 2) [2022] FCA 1121*
	Santos NA Barossa Pty Ltd v Tipakalippa [2022] FCAFC 193
Yarmirr	*Commonwealth v Yarmirr [2002] HCA 56; 208 CLR 1*

3 Legislation

ACHA	*Aboriginal Cultural Heritage Act 2003* (Qld)
AHA (Vic)	*Aboriginal Heritage Act 2006* (Vic)
AHA (SA)	*Aboriginal Heritage Act 1988* (SA)
AHA (Tas)	*Aboriginal Heritage Act 1975* (Tas)
AHA (WA)	*Aboriginal Heritage Act 1972* (WA)
ALRA	*Aboriginal Land Rights Act (Northern Territory) 1976* (Cth)
ASSA	*Aboriginal Sacred Sites Act 1989* (NT)
ATSIPHA	*Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth)
CATSI Act	*Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth)
EPBC Act	*Environment Protection and Biodiversity Act 1999* (Cth)
HA (ACT)	*Heritage Act 2004* (ACT)
HA (NT)	*Heritage Act 2011* (NT)
NPWA	*National Parks and Wildlife Act 1974* (NSW)
NT Regulations	*Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth)
NTA	*Native Title Act 1993* (Cth)
OEI	*Offshore Electricity Infrastructure Act 2021* (Cth)
OPGGS	*Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth)
PBC Regulations	*Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth)
TOSA	*Traditional Owner Settlement Act 2010* (VIC)
TSICHA	*Torres Strait Islander Cultural Heritage Act 2003* (Qld)

A Sea Country Alliance Membership

1 Foundation Members

New South Wales

- Bundjalung Of Byron Bay Aboriginal Corporation RNTBC (Arakwal)
- Gumbaynggirr Wenonah Aboriginal Corporations
- NTSCORP
- Yaegl Traditional Owners Aboriginal Corporation RNTBC

Northern Territory

- Aboriginal Sea Company
- Djalkiripuyngnu Aboriginal Corporation
- Indigenous Land and Sea Corporation
- Larrakia Nation Aboriginal Corporation
- Northern Land Council
- Tiwi Land Council
- Top End (default PBC/CLA) Aboriginal Corporation RNTBC

Queensland

- Butchulla Native Title Aboriginal Corporation RNTBC 9145
- Gudang Yadhaykenu Native Title Aboriginal Corporation
- Ngana Malngkanichi Pama (CNCRM) Aboriginal Corporation
- Queensland South Native Title Services
- Uutaalnganu Aboriginal Corporation
- Warrgamay Traditional Owners Aboriginal Corporation RNTBC
- Yuwi Aboriginal Corporation RNTBC

South Australia

- Far West Coast Aboriginal Corporation
- Kaurna Yerta Aboriginal Corporation
- Narungga Nation Aboriginal Corporation
- Nauo Aboriginal Corporation
- Ngarrindjeri Aboriginal Corporation
- Nukunu Wapma Thura (Aboriginal Corporation) RNTBC
- South Australian Native Title Services
- Wirangu Aboriginal Corporation
- Wirangu and Nauo Aboriginal Corporation

Tasmania

- Aboriginal Land Council of Tasmania

Victoria

- Bunurong Land Council Aboriginal Corporation
- Eastern Maar Aboriginal Corporation

- First Nations Legal and Research Services
- Gunaikurnai Land and Waters Aboriginal Corporation
- Gunditj Mirring Traditional Owners Aboriginal Corporation

Western Australia

- Bardi Jawi AC
- Esperance Tjaltjraak Native Title Aboriginal Corporation
- Kariyarra Aboriginal Corporation
- Kimberley Land Council
- Mayala Inninalang Aboriginal Corporation
- Murujuga Aboriginal Corporation
- Nanda Aboriginal Corporation
- Ngarluma Aboriginal Corporation
- Thalanyji/ BTAC
- Wirrawandi Aboriginal Corporation
- Yamatji Marlpa Aboriginal Corporation
- Yamatji Southern Regional Corporation
- Yawuru Native Title Holders RNTBC

2 Associate Members

National

- Environment Protection and Biodiversity Conservation Act Indigenous Advisory Committee

New South Wales

- South Coast People

Northern Territory

- Demed Aboriginal Corporation (Adjumarlarl Rangers)
- Garngi Community Rangers
- Laynhapuy Homelands Aboriginal Corporation - Yirralka Land and Sea Rangers

Queensland

- GIA/Ngaro Traditional Owners Reference Group Aboriginal Corporation

Tasmania

- Melythina Tiakana Warrana Aboriginal Corporation

Victoria

- Federation of Victorian Traditional Owner Corporations

Western Australia

- Ngarluma Yindjibarndi Foundation Ltd

B Traditional Owner Representative Institutions

The existence and recognition of TORIs is essential to give effect to the collective rights contained in the UNDRIP. Collective rights in UNDRIP includes the right self-determination, land rights and the right to protect and enjoy cultural heritage. The Commonwealth Government recognises its obligations as a party to UNDRIP to give effect to these rights.

Statutory recognition of a TORI will also greatly facilitate and expedite the process of approvals for proponents wishing to undertake land based or land-related activities.

The issue is complicated because, in some parts of Australia, there is yet to be established any organisation that can be credibly recognised as a TORI. In this area an authoritative mechanism to identify the relevant Traditional Owners with whom a proponent can engage is necessary. This is discussed further below.

The model described below is being advocated also in the context of proposed reforms to Commonwealth First Nations cultural heritage and environment laws. It may have potential additional application to a range of land based and land related statutory contexts.

At this stage though, the proposal is still a draft policy proposal being advocated by Traditional Owner organisations and has no official status with the Commonwealth Government.

The TORI system would provide statutory recognition for a range of existing Traditional Owner organisations created or recognised by existing statute as described below.

Traditional Owner Representative Institutions include:

a. Prescribed Body Corporate and Registered Native Title Body Corporate under the *Native Title Act.*
b. Other Statutory Organisations or Organisations currently created or recognised by statute:
    - Aboriginal Land Councils under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).
    - Anangu Pitjantjatjara Yankunytjatjara
    - Maralinga Tjarutja Council
    - Noongar Regional Corporations
    - Victorian Representative Aboriginal Parties
    - The Aboriginal Land Council of Tasmania
    - Native Title Representative Bodies.

Where there is no relevant Traditional Owner representative institution in relation to a project, it is proposed that a body comprising First Nations expertise and experience would have a function to provide advice on who the appropriate Traditional Owners are to engage with and provide consent or otherwise for the project. The name First Nations Cultural Heritage Council is the "working name' for this proposed body. The Council would proceed in the following manner:

c. Where there is no existing TORI but there is a registered Native Title Determination Application over the project area, the Council would identify the registered claimants under that application as the relevant Traditional Owners.

d. Where there is no Registered Native Title Claimant or TORI, the Council could seek advice from:

- Native Title Service Providers (who cover the affected area or object)
- Indigenous cultural heritage councils or committees
- Statutory Aboriginal organisations such as the NSW Aboriginal Land Council and Local Aboriginal Land Councils
- Other relevant state and territory government bodies or entities
- Traditional Owner groups identified in previous assessments.

Having obtained the advice the Council considered necessary; the Council would identify the relevant Traditional Owners for the project area. The Council may identify more than one individual or more than one 'group' for the purposes relevant to any particular project. The identification would only be for the purposes specific to the project in question. The identification of relevant Traditional Owners would not constitute a 'standing determination'.

A proponent engaging with either the relevant TORI or the relevant Traditional Owners as identified by Council would be considered to have engaged with the appropriate Traditional Owners for the purposes of applicable legislation.