OUTLINE OF REGULATORY AND POLICY REFORM PROPOSALS

# SEA COUNTRY ALLIANCE

## TRADITIONAL OWNERS AND AUSTRALIAN OFFSHORE ENERGY PROJECTS

February 2024

*Adopted by the Sea Country Alliance National Leadership Group 13 February 2024*

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# EXECUTIVE SUMMARY

This Discussion Paper (**Paper**) has been produced by the Sea Country Alliance (**SCA**). The SCA is a broad alliance of Australian Traditional Owner groups with statutory responsibility over or adjacent to Commonwealth waters.

The Paper identifies the nature of Traditional Owners interests in Sea Country and addresses issues associated with all offshore energy projects – gas and wind. It proposes administrative and regulatory reforms to afford recognition of Traditional Owner rights over Sea Country and overcome uncertainty that has arisen from recent decisions in the Federal Court.

The reforms proposed recognise the Commonwealth Government's commitment to enact the principles contained in the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**) and other relevant international law.

The reforms proposed will:

- Achieve practical streamlined processes,
- Provide all parties with certainty and confidence,
- Ensure appropriate recognition of Traditional Owner Representative Institutions (**TORI**), and
- Recognise as legitimate the aspirations of Traditional Owners regarding Sea Country resources.

The Paper proposes a slightly different approach be adopted with respect to Traditional Owners whose Sea Country may be directly affected by proposed offshore energy projects, and those whose Sea Country lies in the broader Environment that May be Affected (**EMBA**).

Certain principles are common to both situations:

- Reforms confirm the appropriate Traditional Owner negotiation party is the relevant TORI, giving both effect to UNDRIP principles and providing negotiation certainty,
- The point of negotiation should be at consideration of the grant of title not at the point of individual operational approvals, and
- Resources to support Traditional Owner engagement in the negotiation process should be provided by both government (to ensure 'standing capacity') and proponents (in respect of particular negotiations).

In the case of Traditional Owners directly affected by a project proposal, project approvals should be on the basis of the proponent concluding an agreement with Traditional Owners. In the absence of an agreement with Traditional Owners, a decision maker would only proceed with the grant of title if satisfied that the circumstances of that case warranted that action.

With respect to Traditional Owners whose Sea Country is in the EMBA area, the Paper proposes a process of consultation around preventing and responding to contingent events.

The Paper also proposes establishment of a national Traditional Owner Climate Resilience Fund (**Fund**) which would receive payments from proponents and would be aggregated for the benefit of EMBA community Traditional Owners. The payments would be a voluntary policy mechanism available to proponents and would indicate their good faith to decision makers. The Fund would be jointly managed by representatives of Traditional Owners, industry and government.

To commence the process of implementing these reforms the Paper recommends immediate establishment of a Working Group by the relevant Ministers. The Working Group would comprise of appropriately senior representatives of Traditional Owner organisations, relevant industry bodies (gas and wind) and relevant government agency representatives.

# 1 INTRODUCTION

The regulation of energy projects (gas and offshore wind) in Commonwealth waters is managed under several pieces of legislation and associated regulation:

- *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth)
- *Offshore Electricity Infrastructure Act 2021* (Cth)
- *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

Several recent decisions in the Federal Court have highlighted deficiencies in the way Traditional Owners' interests in Commonwealth offshore areas have been considered in the context of offshore energy projects. This jurisprudence has highlighted the need to ensure that Traditional Owner interests are given due recognition in the development and operation of offshore energy projects. The decisions have also highlighted the fact that, to date, this has not occurred and also that the current regulatory framework supporting this legislation is not apt to facilitate this outcome.

As a result, over the course of 2023, there were discussions held amongst a broad range of TORIs. The National Sea Country Alliance Summit **(Summit)** held in Darwin in November 2023, and the subsequent establishment of the SCA as a new Traditional Owner peak organisation, is an illustration of this work. There were also discussions held between TORIs and industry and government representatives, aimed at developing an appropriate proposal for policy and regulatory reform, to address this situation.

As a result of these discussions, several key outcomes were identified that would be required of any reform project and that were shared by all parties. These outcomes will:

- Achieve practical streamlined processes,
- Provide all parties with certainty and confidence,
- Ensure appropriate recognition of TORIs, and
- Recognise as legitimate the aspirations of Traditional Owners regarding Sea Country resources.

This Paper represents a starting point for developing an appropriate regulatory and policy reform proposal that achieves these outcomes.

The Paper embodies the views of Traditional Owners as expressed at the Summit and subsequently within the SCA. The proposals also reflect current international legal norms and expectations as contained in the UNDRIP and other relevant international instruments to which the Australian Commonwealth Government is a party.

As such, they are a legitimate expression of Traditional Owner expectations based on international legal norms, the application of which the Commonwealth Government has accepted. Therefore, neither should the proposals within this Paper be seen as an ambit bid in a negotiation process or the content of this Paper be seen as an ultimatum.

Traditional Owners and their representative institutions fully accept that the realisation of their expectations in a practical operational, commercial and policy environment will require some adaptation and flexibility. This is why this Paper can legitimately be characterised as a starting point in the development of a workable reform proposal. Traditional Owners expect that the goodwill displayed in accepting the need for some flexibility will be reciprocated by the other parties to the forthcoming discussions.

# 2 THE NATURE OF TRADITIONAL OWNER INTERESTS IN SEA COUNTRY

Much recent commentary on the issue of Traditional Owners and Offshore Energy Projects has focussed on the issue of potential impact on the First Nations Cultural Heritage aspects of the offshore marine environment. It is important to continue to bear in mind that Traditional Owner interests in Sea Country are broader than this and extend to rights in respect of commercial, economic and social activities and the rights that First Nations peoples derive as the Traditional Owners of *their* Sea Country.

These broader set of interests have been frequently recognised judicially in Australia. The majority of the High Court in *Commonwealth v Yarmirr*, in the context of consideration of the existence of native title rights and interests in offshore areas, 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.[1]

What is abundantly clear from this judicial authority and associated administrative practice is that Traditional Owners have interests which include:

> 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 coastal areas that may be affected by any environmental incident.[2]

These interests have also been described 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.[3]

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.*[4] In this matter the High Court made clear that a native title right to take resources for any purpose could include for commercial purposes.

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[1] *Commonwealth v Yarmirr* [2002] HCA 56; 208 CLR 1 per Gleeson CJ, Gaudron, Gummow, and Hayne JJ.
[2] *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193
[3] *Commonwealth v Yarmirr* [2002] HCA 56; 208 CLR 1 per Gleeson CJ, Gaudron, Gummow, and Hayne JJ
[4] *Akiba v Commonwealth.* (2013) 250 CLR 209.

The basis for native title rights including commercial rights in best described by one of the Traditional Owner witnesses who gave evidence in the Federal Court in *Akiba* at first instance. 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.[5]

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.

It is this broad class of interests, unique to Traditional Owners amongst the broader Australian community, that gives rise to the need for appropriate recognition under a reformed regulatory and policy framework.

[5] *Akiba v Queensland (No 3)* (2010) 204 FCR 1, 527.

# 3 FOUNDATIONAL PRINCIPLES

The proposal operates within two key domains associated with the differing impact levels of projects upon differing Traditional Owner communities. In the first domain are Traditional Owner communities whose sea country is intended to be directly affected by a proponent's operations (Directly affected communities). In the second domain are those Traditional Owner communities whose sea country *may* be affected by a proponent's operations (EMBA communities). Each of these domains contains a several elements, a number of which are common to both. These common elements are identified as Foundational Principles.

## REPRESENTATIVE INSTITUTIONS, COLLECTIVE RIGHTS AND NEGOTIATION PARTY CERTAINTY

Common to both domains, the proposal identifies that Traditional Owners' rights and interests in both land and Sea Country are collective rights. These are rights of a people. Individual rights can only exist as an element of the collective right. This principle is well recognised in international Law. UNDRIP clearly sets out Traditional Owner rights as collective rights in for example Articles 18 and 26. UNDRIP also provides (Art 18) that it is through *representative institutions* that collective rights are exercised.

These principles (collective rights and representative institutions) are also recognised in Australian Law. The *Native Title Act 1993* (Cth) (**NTA**) is a clear example. Native title rights, while possessed individually, are exercised as a collective right through representative institutions and structures. Thus, a proponent under the NTA has statutory certainty in dealing with a Prescribed Body Corporate (**PBC**). The proponent does not need to deal with the community of native title holders individually. In fact, any attempt to do so is ineffective under the NTA, which requires engagement through the relevant representative institution or pre-native title determination process.

This Paper, at annexure A, describes a system of statutory recognition of Traditional Owner Representative Institutions (the "TORI" referred to earlier in this paper). 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.

The absence of certainty regarding the application of these Foundation Principles to the offshore energy project environment is one of the regulatory deficiencies identified in recent jurisprudence. Remedying this shortcoming *must* be a basis of any reform proposal.

## STREAMLINED NEGOTIATIONS - GRANT OF TITLE AND OPERATIONAL APPROVALS

A further element common to both domains is the need for practicality in any negotiation framework. 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 (both wind and gas), this is manifested in the attention given to the approval of operational proposals 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.

## RESOURCING THE NEGOTIATION PROCESS

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.

### (i) 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 any 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.

### (ii) 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[6] 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.[7]

[6] *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth)

[7] 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 SPECIFIC ELEMENTS OF THE PROPOSAL

In addition to these foundation principles, the proposal is based on a recognition that the context of many offshore energy projects (particularly gas) requires a distinction 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.

## DIRECTLY AFFECTED COMMUNITY

In the case of a directly affected community there is a known certainty of an impact (at least to some extent) on the Sea Country of relevant Traditional Owners and therefore their rights and interests. There is also a known certainty that the proponent and the government will, as a result of this impact on Traditional Owners rights and interests, derive an economic return. These facts give rise to the necessary application of the fundamental expectations derived from international law and the principles underlying Australia law.

Relevantly these demand that the project proceed only on terms agreed with Traditional Owners following their Free, Prior and Informed Consent. They also demand that these terms can legitimately include a requirement for commercial and other benefits to be received by Traditional Owners.

### (i) FPIC and Consent

Many of the necessary components of the principle of FPIC have already been addressed in this Paper however it is useful to articulate then specifically in this context.

- Traditional Owners must be consulted as a **necessary preliminary step** ahead of the grant of any statutory right that will involve interference with their rights and interest. This is the requirement of **Prior** in FPIC.
- FPIC also requires the project proponent to provide full information about the project, how the proponent intends to carry it out and any alternative ways of carrying out the project. This is the requirement of **Informed** in FPIC.

- If new information is received after initial approval is given the proponent must go back to the Traditional Owners and discuss this.
- The views of affected Traditional Owners must be articulated through **representative institutions** (as understood in UNDRIP) that are provided with adequate resources to participate in discussions with proponents on an equal basis. Resources may appropriately be sourced from government funding and fees for service imposed on proponents.
- The **Consent** requirement within the principle of FPIC demands that the agreement of Traditional Owners is freely given. Relevantly this is usually understood as meaning that consent is given without the threat that a failure to give consent will be simply ignored by the relevant decision maker. If this is the case it gives rise to the possibility that consent is given to seek a 'least-worst outcome'. Consent in this context cannot be seen as "free".

UNDRIP (from which the principle of FPIC is derived) is a statement of the fundamental human rights of all people expressed within the particular context of Indigenous Peoples. As with all human rights, there will be circumstances where one set of rights can conflict with the expression of other equally legitimate rights.

In the context of offshore energy projects, it must be accepted that the ultimate arbiter of any such conflict of rights is the nation-state whose sovereign rights, with respect to the resource in question, is recognised under international law.

At a practical level, the application of these principles would require that the proponent should have obtained the consent of Traditional Owners 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 had been obtained.

In the event consent is not demonstrated, 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.

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 *Aboriginal Land Rights (Northern Territory) Act 1976* (**ALRA**).

## ENGAGEMENT WITH 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).

### (i) 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."[8] However, unlike the current Good Standing Agreements arrangements payments would not necessarily be dependent upon default of expenditure under a work bid.

### (ii) Traditional Owner Climate Resilience Fund

Specifics around the Traditional Owner Climate Resilience 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.

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

# 5 PROGRESSING THE REFORM PROCESS

The proposals contained within this Discussion Paper are in large part based upon existing experience of Traditional Owners with other natural resource developments on their Country. This experience gives confidence in the view that they can be implemented expeditiously without significant legislative amendment. They will however require some regulatory amendment, the development of appropriate administrative procedures, and the allocation of the necessary resources (as described above).

## SCOPE OF WORK

Providing the necessary foundation for the crucial involvement of existing TORIs may also involve some regulatory amendment to confirm these arguably additional functions. Areas where there is no existing PBC, Native Title Representative Body under the NTA, or Aboriginal Land Council under the ALRA, represent an additional challenge. The proposals within this paper will need to be supported by the reform process currently underway to develop a system for determination of "relevant Traditional Owners" for these areas. The task of establishing these systems is anticipated to be concluded this calendar year.

Experience has also suggested that the time necessary to develop the capacity of existing Traditional Owner organisations, to fulfill such additional functions, should not be underestimated. However, the resources necessary to commence the process of capacity development can be allocated ahead of finalisation of the regulatory components of reform. In short, the allocation of these resources should commence immediately.

Before any of the work implementing these reforms can commence however, there must be consensus as to the content of the reform proposal. The appropriate forum to progress the achievement of this consensus is one where all relevant parties are present simultaneously. This avoids the delay of 'serial negotiation'.

## IMMEDIATE NEXT STEPS

Accordingly, it is recommended that the first step in progressing reform is to establish a Working Group, comprised of appropriately senior representatives of Traditional Owner organisations, relevant industry bodies (gas and wind) and relevant government agency representatives. The Working Group should be established under the auspices of and resourced by the relevant Ministers.

This Discussion Paper will be provided to the relevant Ministers under cover of correspondence seeking establishment of this Working Group.

# GLOSSARY OF TERMS

## 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 |
| 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 |
| TORI | Traditional Owner Representative Institution |
| UNDRIP | United Nations Declaration on the Rights of Indigenous Peoples |

## CASE LAW

| | |
|---|---|
| Akiba | *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth [2013] HCA 33; 250 CLR 209* |
| Munkarra | *Munkara v Santos NA Barossa Pty Ltd (No 3) [2024] FCA 9* |
| Tipakalippa | *Santos NA Barossa Pty Ltd v Tipakalippa [2022] FCAFC 193* |
| Yarmirr | *Commonwealth v Yarmirr [2002] HCA 56; 208 CLR 1* |

## 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 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.

# Sea Country Alliance

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