Sea Country Alliance
seacountry@nntc.com.au / PO Box 431 North Melbourne VIC 3051

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The Responsible Officer
Offshore Renewable Energy Policy Section
Department of Climate Change Energy Environment and Water
GPO Box 3090,
Canberra ACT 2601

Via email: offshorerenewables@dcceew.gov.au

(Proposed) Offshore Electricity Infrastructure Amendment Regulations 2024

The Sea Country Alliance

On behalf of the Sea Country Alliance (**Alliance**), 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 55 member Alliance, ensuring that the complexity of our diverse seas, oceans and coastal areas is recognised. The Alliance has 45 Traditional Owner member corporations with statutory recognised responsibilities for Sea Country and 10 associate members which are Traditional Owner organisations with an interest in Sea Country issues.

1 Preliminaries

Submission Overview

Our submission focusses its response on the need for effective and meaningful engagement with Traditional Owners of Sea Country. In this respect the submission is primarily responding to issues raised in questions 3 and 4 of the "Consultation paper" that accompanied the exposure draft proposed regulations.

In addressing these issues, the submission will progress by:

- Describing the legal nature of Traditional Owner interests in Sea Country and the impact of Offshore Electricity Infrastructure (**OEI**).

- Examining the significance of the question of the fact that, at common law, Traditional Owners Interests are both communal and individual.
- Providing a contextual overview of the legislative regime of OEI and its current operation of which the proposed regulation form part.
- Analysing the *(Proposed) Offshore Electricity Infrastructure Amendment Regulations 2024* (**Proposed Regulations**) against this framework; and, proposing amendments to remedy the identifies deficiencies.

The paper will conclude by making some comment on the consultation process surrounding the proposed regulations.

Summary of Recommendations

The recommendations contained in the Submission are:

1. That the Proposed Regulations should be amended to specify that:
   - Any obligation to take account of Traditional Owner interests in respect of the waters contained in the licence area will be discharged by:
     - engagement with Aboriginal and Torres Strait Islander organisations recognised under a law of the Commonwealth, state or territory as having responsibility for the management of Traditional Owner interests in or adjacent to Commonwealth or state and Territory waters; and,
     - with respect to area for which there is no organisation with such statutory responsibility a licence holder shall consult with those Aboriginal or Torres Strait people who the organisation performing the function of a Native Title Representative Body under the NTA identifies to the licence holder as requiring consultation.
   - For the purposes of (proposed) r 75 a management plan should only be approved if it demonstrates that:
     - the licence holder has provided reasonable resources, to relevant Traditional Owner organisations or individuals, to support the processes of engagement with the licence holder, and
     - has reached agreement regarding the licence holder's proposed operations with any Traditional Owner organisations or individuals for which there is a requirement to engage with; or,
   - If the licence holder cannot demonstrate such agreement that the regulator is satisfied that the licence holder can demonstrate the management plan accommodates the claims put forward by Traditional Owner organisations or individuals to the greatest extent reasonably practicable.
   - Ensuring protection of Traditional Owner social and economic rights and cultural heritage, as well as ensuring that Traditional Owner communities enjoy economic and social benefits deriving from the licence holder's activities, is a

matter to which the regulator should have regard in the assessment of a management plan.

2. In the further development of the Proposed Regulation and the Offshore Electricity Industry regime generally the Department should give effect to the commitments of this Government in the Closing the Gap Agreement (*Priority Reform Area One - Policy Partnerships*). It should also, consistently with this Government's stated policy, seek to implement the United Nations Declaration on the Rights of Indigenous People, particularly Article 19, which requires the Free Prior and Informed Consent of affected Indigenous Peoples legislative and administrative measures that affect Indigenous Peoples that affect them.

2 The nature of Traditional Owner Interests in Sea Country and the Impact of Offshore Infrastructure

In order to appreciate the requirements for effective engagement with Traditional Owners under the OEI regime it is important to appreciate the specific legal and *sui generis* nature of those Traditional Owner interests. Appreciating the nature of these interests and their legal enforceability under domestic and international law will assist in an appreciation of the inappropriateness of adopting identical consultation processes for Traditional Owners and recreational fishers as is done under the Proposed Regulations.

The National Oceans Office South-East Regional Marine Plan, *Sea Country an Indigenous Perspective*[1] (**Plan**), notes the connectedness of land and sea for Traditional Owners impacted by the proposed Southern Ocean 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 OEI 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. This relationship includes knowledge and use of lands that now lie beneath the ocean all around the coast, and between mainland Australia and Tasmania."*

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

Injudiciously managed the OEI 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 affect on cultural species.

Judicial Consideration of Offshore First Nations' Interests

There is a wealth of jurisprudence recognising the existence and legal relevance of Traditional Owners' interests in offshore areas. To commence with recent examples.

In December 2022, the Full Federal Court[2] confirmed a decision of Bloomberg J[3] of the Federal Court to overturn an approval by 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.

Then 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 'Environment that May be Affected' (**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[4] 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

[2] *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193 ("*Santos FFC"*)

[3] *Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority (No 2)* [2022] FCA 1121 ("*Tipakalippa*").

[4] Santos FFC per Kenny and Mortimer at [39]

> 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. 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.[5]

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.[6]

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.[7]

What is abundantly clear from this review of 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 coastal areas that may be affected by any environmental incident"*. These interests have

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

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"*.

Of note is that the scope of interests may exceed those potentially identified as native title rights pursuant to the provisions of the *Native Title Act 1993* (Cth.) (NTA). The significance of this of course is that mere satisfaction of the future act provisions of the NTA will not ensure adequate consideration of the full suite of Traditional Owner interests.

2.1 The Significance of Traditional Owner Rights Being Both Collective and Individual

The *Offshore Electricity Infrastructure Regulations 2022* (**OEI Regulations**) at r 26(4) (e) – (f) set some aspects of the merit criteria that the Minister should consider in determining to grant a licence. These are:

> (e) conflicts that might arise with other uses or users of the licence area;
> (f) any measures that are proposed to mitigate such conflicts;
> (g) any other matters the Minister considers relevant.

Clearly the term "users" in r 26(4)(e) comprehends both individuals and groups or communities. Under (proposed) r 77 and ss 114 of 115 of the *Offshore Electricity Infrastructure Act 2021* (**OEI**), a consequent obligation to consider the resolution of a conflict of use and users also arises in respect of the assessment and approval of a Management Plan also arises.

Traditional Owner interests have this dual individual and collective character as such it is necessary for the OEI regime generally and the management plan consultation processes under the Proposed Regulations specifically to address this issue.

The foregoing assertion (regarding the dual character of Traditional Owner interests) may require some supporting analysis. This attention is warranted because, in part, it was this issue that led to the overturing of a NOPSEMA EP approval in the closely related context of the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (**OPGGS Regulations**).

The decision to overturn that NOPSEMA approval was made by Bloomberg J of the Federal Court in *Tipakalippa v NOPSEMA (No 2)* [2022] FCA 1121. That decision was affirmed by the Full Federal Court in *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193 ("*Santos FFC*").

It is therefore pertinent to consider the jurisprudence arising from these decisions as they are examining the issue the significance of individual and collective Traditional Owner rights as this pertains to a very similar consultation requirement in a similar offshore energy environment.

In considering this jurisprudence it is useful to briefly describe the regulatory framework that gave rise to the *Tipakalippa* 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 "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 OPGGS 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*[8] 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 Proposed 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*[9] 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,

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

the existence of the matter of cultural significance could only be established through reference 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.

It can thus be concluded that Traditional Owner rights in Sea Country, relevant for the purposes of the OPGGS Regulation and also for the purposes of the OEI regime, 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".

Given this is the state of current jurisprudence two significant conclusions can be drawn.

- First, the current OEI regime overall is not appropriately designed to accommodate the unique multifaceted nature of Traditional Owner rights.
- Second, the OEI regime generally, and the proposed management plan consultation arrangements specifically, are not well adapted to accommodate a statutory obligation to engage with both a community as a collective right holding entity ***and*** the individuals within that community that hold district rights *as individuals*. To address this issue will require specific regulatory provisions that specify engagement with appropriate Traditional Owner Representative Institutions fulfill the necessary consultation obligations.

Recommendations to this effect are outlined later in this submission.

3 Overview of the Structure and Current Operation of the Regime

The OEI comprises the Act and the Regulations (presumably as amended by the Proposed Regulations in due course). The Regulations (see r 5) establish the licensing scheme required to be established under s 29(1) of the Act. A component of the licensing scheme is the management plans (see s 29(1) (e) to which the Proposed Regulations relate).

The process of offshore use for renewable energy projects, under regime established within this framework, involves three key steps:

- Declaration of a Commonwealth offshore area as a Declared Area under s 17 of the Act. A declaration of this kind is made by the Minister for Climate Change and Energy (**Minister**).
- The application for and grant of a licence (of various types) under Part 3 of the Act and the Regulations. The grant of a licence is made by the Minister with the advice of the Registrar of the Act.
- The management and operation of a licence under Part 4 of the Act. A management plan is required under ss 31 and 40 of the Act respectively to conduct any operational activities under a Feasibility or Commercial Licence. The proposed regulations go to establishing the regime for these purposes.

The Act and the (Substantive) Regulations provide for several opportunities for the interests and aspirations of Traditional Owners to be accommodated within the OEI regime. The key mechanism for this to be achieved is through the imposition of conditions on any granted licence. It is useful to summarise the mechanisms by which this may as a precursor to describing the Traditional Owner experience of their operation.

Ability to Impose Conditions

Sections 17 – 20 of the Act set out the matters the Minster shall have regard to in making a declaration under s 17 and determining whether to impose any conditions upon that declaration. A number of these provisions are specifically relevant to this submission.

A declaration of a Declared Area is made pursuant to s 17(1). Pursuant to s 17(3)(d), a declaration under s 17(1) should only be made if *"the Minister is satisfied the area is suitable…"*. Pursuant to s 17(4) a Declared Area need not be continuous and need not cover the entire area which, under s 18, is the subject of a notice advising of consideration of the declaration of an area. In addition, under s 19(b)(ii) an area may be declared subject to conditions imposed under s 20.

The grant of the licence types referred to above is required to be subject to the conditions specified in s 20.[10] Notably, pursuant to s 35, a feasibility licence may be granted subject to conditions prescribed by the "licensing scheme" (i.e. the Regulations) (s 35(1)(c)) or such other conditions as the Minister thinks fit (s 35(2)). Further, these conditions may 'flow on' to any subsequent commercial license (s 35(3) and s 42(1)(g)).

The conclusion to be drawn is that s 20 creates the basis for conditions to be applied *generally* to *all* licenses granted within a Declared Area (or specified portion of it). The additional provisions at ss 35(1)(c) and s 35(2) allow for the imposition of conditions more specifically crafted to the individual licence under consideration.

Notably, the power to impose conditions is with respect to the *grant of a licence*. This is in addition to any ability to specify the requirements for the assessment and approval of Management Plans pursuant to s 114 and s 115 of the Act.

3.1 The OEI Regime in Practice

The current Minister has made declaration in relation to several Zones to date. On 1 May the Minister announced the awarding of six Feasibility Licenses under the Act in the Gippsland Basin Region. At that time, he also announced his intention to award a further six in that zone shortly.[11]

In relation to each of the Declared Area declarations, national peak Traditional Owner Organisations (the National Native Title Council and the Sea Country Alliance) have sought

[10] See, for example, 35(1)(b) in relation to feasibility licences and s 42(1)(d) is relation to commercial licences.
[11] Ministerial Media Release, 1 May 2024, "Australia's offshore wind industry a step closer to reality".

to have the Declared Area made subject to a condition under s 20, to the effect that the grant of any licence within the Declared Area should by subject to a requirement that it will have no significant impact upon the interests of affected Traditional Owners without the consent of the Traditional Owners to the grant of that licence.

No such condition has subsequently been imposed as an aspect of any Declared Area declaration.

The process of the *grant* of licences has also largely ignored Traditional Owners. Significant Traditional Owner groups affected by the Gippsland Basin proposal have received notice under s 24NA(8) of the *Native Title Act 1993* (Cth) regarding an offshore "future act" being the grant of the six licenses that occurred on 1 May 2024. This notice has been responded to, but there has been no further engagement from the Commonwealth or proponents prior to the grant of the licence.

To the best of our knowledge there is no particular requirement for the grantees of these licences to engage with Traditional Owners other than the general consultation obligations specified in the Declared Area declaration (and those contained in any subsequent Management Plan). Despite this absence of specific knowledge relating to the detail of licence conditions we are aware that the 1 May Ministerial Media Release suggests that:

> *Six potential projects have been granted or offered feasibility licences, which means they can now commence the detailed assessment work to determine feasibility, including environmental studies and management plans.*
>
> *Consultation with First Nations groups, communities, and marine users will continue throughout the feasibility licence process.*
>
> ...
>
> *The Government intends to grant another six licences, subject to First Nations consultation.*

The Media Release does not clarify the legal basis for this "First Nations Consultation" but does provide a link to a DCCEEW publication that has no apparent legal status (Offshore Renewables and First Nations people").[12]

The "First Nations Consultation" that document refers to is that under 24NA of the *Native Title Act 1993* and unspecified consultation opportunities under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC**).

Notable also is the acknowledgement in this publication that subsequent to the grant of a Feasibility (or Commercial [etc] Licence) a Licence Holder is under **no** obligation to engage with Traditional Owners under the *Native Title Act*. The "future act" is the granting of the licence.

[12] https://www.dcceew.gov.au/energy/renewable/offshore-wind/legislation-regulations#daff-page-main

Ironically, the DCCEWW publication suggests that the Minister will take feedback from consultation into account when deciding whether to offer a licence. Traditional Owners have seen no evidence to support this assertion.

The DCCEEW publication also suggests that, "[t]he Department's expectation is that First Nations groups will be provided funding by the industry to support meaningful and timely engagement." Similarly, Traditional Owners have seen no evidence to support this assertion either.

Finally, the DCCEEW publication includes the following statement under the Heading "Benefit Sharing":

> *Subject to the draft regulations, licence holders will be required to consult with First Nations communities or groups with a cultural connection to the licence area and to document the outcome of this consultation in the management plan for the project. Licence holders will be expected to take reasonable steps to determine which First Nations groups may hold a cultural connection with the licence area.*
>
> *This will provide a pathway for First Nations groups to negotiate benefit sharing arrangements directly with licence holders that is tailored to their communities. This may include energy supply, training and employment opportunities, local businesses and procurement opportunities, community benefit funds, opportunities for co-design and other initiatives in partnership with First Nations groups.*
>
> *This new industry has the potential to create intergenerational social and economic benefits for First Nations by building the prosperity of communities, businesses and individuals.*

As will be apparent from the earlier discussion, there is no current legal basis for any of the statements contained in this DCCEEW publication and highlighted in the Minister's media release. They do however identify a number of policy objectives which it clear are shared objectives of both Government and Traditional Owners.

The following section of this Submission will analyse the processes suggested in the Proposed Regulations to determine the extent to which these processes achieve these, and the other policy objectives suggested in the analysis of the law and jurisprudence surrounding Traditional Owner rights provided earlier. To the extent the processes in the Proposed Regulation do not satisfy these objectives the submissions will suggest amendments that will do so.

4 The Consultation Regime Contained in the Proposed Regulations

4.1 Description of the Regime

The key provisions in the Proposed Regulations going to Traditional Owners rights and interests are found in rr 57(1)(b) and 58(1)(b) and also in r 75. To commence with the relevant provisions of rr 57 and 58.

Reg 57(1)(b): ("*Who is to be consulted*")

> (1) The licence holder must make reasonable efforts to identify and consult the following persons, organisations, communities and groups:
>
> …
>
> > (b) Aboriginal or Torres Strait Islander communities or groups that the licence holder reasonably considers may have:
> >
> > > (i) native title rights and interests (within the meaning of the *Native Title Act 1993*) in relation to the licence area; or
> >
> > > (ii) sea country in the licence area;

Reg 58(1)(b) ("*Manner of consultation*")

> (1) For the purpose of the consultation, the licence holder must give each person, organisation, community or group being consulted sufficient information to allow an informed assessment of any reasonably foreseeable effects that the activities subject to consultation may have on:
>
> > …
> >
> > b) for a community or group mentioned in paragraph 57(1)(b)—the rights, interests or sea country mentioned in that paragraph; or
> >
> > …

Regulations 73 – 91 set out the various matters that a Management Plan must contain pursuant to the power under ss 114 and 155 of the Act to impose requirements for the assessment and approval of Management Plans.

These requirements include:

- A requirement for a report of the consultations carried out under regs 57 and 58 (r 75). This requirement is discussed further below.
- A requirement for a *prospective* stakeholder engagement strategy (r 76(1)).
- A requirement for a management system to ensure compliance with the Act and the EPBC (rr 77 and 80).

The requirement for a report of consultation under rr 57-58 is central to the assessment of the required engagement with Traditional Owners. At r 75(3) the process for responding matters raised in consultations is specified. This is worth setting out in full.

(3) The report mentioned in paragraph (2)(c) must:

(a) include a summary of any claims raised about any adverse impacts that the licence activities might have on the persons, organisations, communities and groups consulted; and

(b) for each such claim—include an assessment of the merits of the claim, and a statement of whether the licence holder considers the claim to have reasonable merit; and

(c) for each such claim that the licence holder considers to have reasonable merit—include details of:

(i) the measures (if any) that the licence holder is to implement to address the claim; and

(ii) the measures (if any) that the licence holder is to implement to ensure that the measures mentioned in subparagraph (i) are effective, and are likely to remain effective.

(4) If the plan includes details of any measures under paragraph (3)(c), the plan must require the licence holder to carry out the measures as described.

(5) The Regulator may only approve the plan if the Regulator is satisfied that:

(a) any assessments or statements included in the report under paragraph (3)(b) are reasonable; and

(b) for each claim mentioned in paragraph (3)(a) that the licence holder considers to have reasonable merit:

(i) any measures detailed in the plan under subparagraph (3)(c)(i) are reasonably appropriate, in the circumstances, to address the claim; and

(ii) any measures detailed in the plan under subparagraph (3)(c)(ii) are reasonably appropriate, in the circumstances, to ensure that the measures detailed in the plan under subparagraph (3)(c)(i) are effective, and are likely to remain effective; and

(iii) if the plan does not detail measures under subparagraph (3)(c)(i) or (ii)—it is reasonable in the circumstances for the licence holder not to implement measures under that subparagraph.

4.2 Analysis of the Regime and Recommendations for Amendment

Two matters are apparent from this examination of the proposed management plan consultation structures.

First a requirement to consult "Aboriginal or Torres Strait Islander communities or groups that …may have …sea country in the licence area" is so lacking in specificity as to be impractical. This is so for two reasons. One, the term "sea country" is not defined in the Act, substantive or proposed regulations. Second the specification of consulting with

"communities or groups" in relation to management t plan consultation requirements is not an adequate response to address the fact that the OEI regime generally has no mechanism for delaying with the dual (individual/collective) nature of Traditional owner rights.

To address these two matters requires amendments to the proposed regulations. These amendments should specify that:

- Any obligation to take account of Traditional Owner interests in respect of the waters contained in the licence area will be discharged by:
    - engagement with Aboriginal and Torres Strait Islander organisations recognised under a law of the Commonwealth, state or territory as having responsibility for the management of Traditional Owner interests in or adjacent to Commonwealth or state and Territory waters; and,
    - with respect to area for which there is no organisation with such statutory responsibility a licence holder shall consult with those Aboriginal or Torres Strait people who the organisation performing the function of a Native Title Representative Body under the NTA identifies to the licence holder as requiring consultation.
- For the purposes of (proposed) r 75 a management plan should only be approved if it demonstrates that the licence holder has provided reasonable resources to relevant Traditional Owner organisations or individuals to support the processes of engagement with the licence holder and reached agreement regarding the licence holder's proposed operations with any Traditional Owner organisations or individuals for which there is a requirement to engage with; or,
- If the licence holder can not demonstrate such agreement that the regulator is satisfied that the licence holder can demonstrate the management plan accommodates the claims put forward by Traditional Owner organisations or individuals to the greatest extent reasonably practicable.
- Ensuring protection of Traditional Owner social and economic rights and cultural heritage, as well as ensuring that Traditional Owner communities enjoy economic and social benefits deriving from the licence holder's activities is a matter to which the regulator should have regard in the assessment of a management plan.

These proposed amendments are seeking to ensure two key outcomes. First, to ensure that the OEI is legally sound and not susceptible to challenge in the nature of the *Tipakalippa* litigation. Second, to ensure the OEI regime is structured to ensure that this Government's commitment to the principle of Free Prior and Informed Consent contained in the *United Nations Declaration of the Rights on Indigenous Peoples*[13] (**UNDRIP**) and its stated policy commitment to ensuring the transition to new energy sources results in economic and social benefits to First Nations communities is given effect to.

[13] *United Nations Declaration of the Rights on Indigenous Peoples* GA/res/61/295 Ann. 1 (Sept 13, 2007).

The SCA would note it is of the view that in many respects it may be desirable for the matters suggested in the amendments outlined above to be included in the regimes around the declaration of a declared area or relating to consideration of the grant of a licence. The SCA would certainly welcome engagement with the Department to explore these options.

This noted the amendments proposed above are capable of ensuring the desired outcomes.

4.3 A Brief Note on the EPBC

The OEI regime in general and the Proposed Regulation specifically make reference to the requirement to ensure compliance with the EPBC. It is appropriate then to briefly identify those aspects of the EPBC that pertain to Traditional Owner rights and interests and may impact upon the Proposed Regulations.

The EPBC regulates any action that may have a significant impact on the environment of a Commonwealth marine area (as defined in the EPBC). Without elaborating, it can broadly be stated that a "Commonwealth offshore area" under s 8 of the Act broadly equates with a "Commonwealth marine area" under s 24 of the EPBC.

The "environment" at s 528 of the EPBC is defined as including:

(a) ecosystems and their constituent parts, including people and communities; and

(b) natural and physical resources; and

(c) the qualities and characteristics of locations, places and areas; and

(d) heritage values of places; and

(e) the social, economic and cultural aspects of a thing mentioned in paragraph (a), (b), (c) or (d).

Matters such as the existence of heritage values and places, social and cultural aspects of ecosystems locations and places, all form a component of the Commonwealth marine area environment that need be regarded. Such an approach, it is suggested, is also in conformity with the principles of Ecologically Sustainable Development set out in s 3A of the EPBC. First Nations cultural heritage is therefore a matter relevance to the assessment of a management plan.

This noted, this submission will not explore the consequence of this issue further. You will be aware that under amendments to the EPBC currently being developed it is proposed to introduce a First Nations Engagement and Participation in Decision Making Standard. Satisfaction of this Standard is proposed as one aspect of all environmental decision making under the EPBC.

Members of SCA are involved in the discussions leading to the finalisation of this Standard. As far as the SCA is aware the proposals outlined in this submission will be consistent with the operation of this Standard when it is commenced.

5 Process Around Development of the Proposed Regulations

Members of the SCA were advised in August 2023 that the Department was working to develop the proposed regulations. A complete exposure draft of the regulations was released on 12 April 2024 and submissions in response to the exposure draft were required by 12 May 2024.

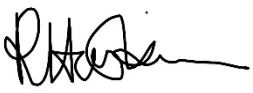
A request by SCA for an extension of this period received an ambiguous response. The Department has held no direct consultations with the SCA or its members regarding the Proposed Regulations. The Department has provided no resources to the SCA or its members for them to engage directly with Traditional Owners regarding the matters raised by the Proposed Regulations. The Department has provided no resources to the SCA to prepare this submission or at all.

The approach of the Department to developing the proposed regulations contradicts the commitments of this Government in the Closing the Gap Agreement (*Priority Reform Area One - Policy Partnerships*). It also contravenes the provisions of Article 19 of UNDRIP (FPIC in legislative and administrative measures that affect Indigenous Peoples) which this Government has committed to seek to implement.

This dismissive approach to Traditional Owners is also seen in the manner in which the OEI regime has been administered to date.

A further and final recommendation is that the Government through the Department adhere to its stated policy and work in partnership with the SCA to ensure the offshore electricity industry to in fact seek to deliver real benefits for Traditional Owners and the broader community while at the same time respect the rights and cultural heritage of Traditional Owners.

Gareth Ogilvie
Co-Chair



Rhetti Hoskins
Co-Chair