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Offshore Decommissioning Directorate
Department of Industry, Science and Resources
Australian Government

Via email: decomdirectorate@industry.gov.au

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Submission on Offshore Decommissioning and Financial Assurance Reforms

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 SCA 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.

The development of decommissioning and financial assurance reforms for industry in the offshore environment is essential. Central to such reform must be the engagement with Traditional Owner communities for the extent of their cultural heritage, both tangible and intangible, up to 200nm. Within this context, their representative and inclusive Traditional Owner Representative Institutions (**TORIs**) should be afforded the full realisation of free, prior and informed consent (**FPIC**) for projects from development, licensing and eventually decommissioning.

This submission will proceed in two parts. The first (Part A) will examine the nature of Traditional Owner rights in the offshore environment with reference to the United Nations' *Declaration on the Rights of Indigenous Peoples* (**UNDRIP**) and other jurisdictional law and jurisprudence. The second (Part B) will address specific proposed areas for reform and their interaction with these rights.

These recommendations will include:

- All of project life financial projections are undertaken during the planning phase with mandatory reviews for decommissioning throughout its life.
- Transparent financial analysis and reporting so that regulators can accurately assess the real capacity for a project's decommissioning during the licensing process.
- Financial capacity for decommissioning is guaranteed through financial instruments such as bonds.
- The regulatory recognition of the role and function of TORIs.
- Introduction of Indigenous Procurement Policy (**IPP**) provisions to enable economic development and nation building of affected TORIs.
- At all stages of the project's development, approval, reporting and end of life, affected Traditional Owners must be provide their free, prior and informed consent, through their Traditional Owner Representative Institutions, for the project to progress.

A Traditional Owner Rights in the Offshore Environment

1 Collective Rights and Representative Institutions

Traditional Owners' rights and interests in both land and Sea Country are collective rights, that is they 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.

The 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.

Understanding who manages the rights is essential to understand with whom consultation must occur for any permit considerations under the NA Guidelines. At Annexure A, is a system of statutory recognition of TORIs developed by the Sea Country Alliance and published in its June 2024 *Outline of Regulatory and Policy Reform Proposal*. 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.

Given the relationship of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC**) regulatory approval process within offshore regimes, inclusion of the TORI model within all aspects of project development would provide greater certainty for proponents. In doing so, Traditional Owner rights would be respected and cultural heritage (both tangible and intangible) protected. To some extent, the TORI model has already been accommodated in the *Offshore Electricity Infrastructure Regulations 2022* (Cth) (**OEI Reg's**). At s64, they require that activities subject to consultation must consult *inter alia* with:

> (b) Aboriginal or Torres Strait Islander people or groups that the licence holder reasonably considers may have native title rights and interests (within the meaning of the *Native Title Act 1993*) in relation to:
> (i) the licence area; or
> (ii) areas of land or water that are adjacent to the licence area;
> (c) Aboriginal or Torres Strait Islander organisations that are established under a law of the Commonwealth, a State or a Territory and that the licence holder reasonably considers to have functions related to managing, for the benefit of Aboriginal or Torres Strait Islander people:
> (i) land or water in the licence area; or
> (ii) areas of land or water that are adjacent to the licence area;
> (d) Aboriginal or Torres Strait Islander organisations or groups that the licence holder reasonably considers to be parties to agreements related to land and water rights for Aboriginal or Torres Strait Islander people under the *Native Title Act 1993* or any law of a State or Territory, where the land or water rights relate to:
> (i) land or water in the licence area; or
> (ii) areas of land or water that are adjacent to the licence area.

In incorporating the collectively held rights of Traditional Owners managed through their TPRO, regulation can support genuine implementation of FPIC. Articulated in UNDRIP, FPIC is central to the recognition of the cultural rights collectively managed by the TORI.

2 Free, Prior and Informed Consent

The principle of FPIC contained within UNDRIP is broadly accepted as a principle of international law applicable to proponents engaging with Indigenous Peoples with respect to their traditional lands and other resources. This acceptance is seen in a range of statements from international human rights organisations, the content of international Industry Standards, some national and regional legislation in some countries and government and corporate policy in many others.

Despite this broad acceptance of the principle of FPIC, it is frequently little understood and often ignored either through intent or ignorance. Existing research suggests that UNDRIP generally, and FPIC in particular, while acknowledged is often not given effect to because it is either seen as unworkable or misunderstood or both. Traditional Owners report that even where FPIC is said by proponents to be implemented the reality is somewhat different.

The requirements necessary to give effect to FPIC are that there is a process for agreement with the Representative Institution, of the relevant Traditional Owners, that satisfies the requirements of FPIC.

These requirements may be summarised as follows.

- Traditional Owners must be consulted on anything that will involve interference with their rights and interest. This is the requirement of **Prior** in FPIC.
- FPIC also requires that in consultation, Traditional Owners are provided full information about the project, how it is intended to be carries out and any alternative ways of carrying it out the. This is the requirement of **Informed** in FPIC.
- If new information is received after initial approval is given further consultation with Traditional Owners must be undertaken.
- 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 on an equal basis.
- 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. 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".

Understanding the implications and consultation requirements for consideration of projects will ensure appropriate consideration of Traditional Owners' rights in the offshore marine environment.

3 Recent Jurisprudence

Recent decisions in the Federal Court have highlighted deficiencies in the way Traditional Owners' interests, including in relation to cultural heritage in Commonwealth offshore areas, have been considered in the context of offshore energy projects. It is useful to identify the nature of cultural heritage interests in offshore interests as described in these cases

In December 2022, the Full Federal Court[1] in *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193 ("*Santos FFC"*) affirmed a decision of Bloomberg J[2] of the Federal Court to overturn an approval by NOPSEMA under the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (**OPGGS Regulations**), 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.

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

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

The OPGGS 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[3] 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. 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.[4]

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

[3] Santos FFC per Kenny and Mortimer at [39].
[4] *Ibid* at [68].

> 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.[5]

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.[6]

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 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".

It can therefore be considered that all Traditional Owners, whose collective cultural rights are represented through their TORI, have rights that extend in the offshore environment. As such, they need necessarily be consulted and, with respect to these rights, afforded genuine FPIC.

4 Consideration of the EPBC

Much regulated activity in the offshore environment includes requirements created under the EPBC. In turn, in some circumstances explored below, this requires consideration of Indigenous cultural heritage values.

The EPBC is primarily engaged with respect to the nine protected matters, also referred to as Matters of National Environmental Significance (**MNES**), and also with

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

respect to Commonwealth land and actions by a Commonwealth agency. The nine MNES are:

- world heritage properties, national heritage places, wetlands of international importance (Ramsar wetlands);
- listed threatened species and ecological communities;
- migratory species protected under international agreements,
- Commonwealth marine areas;
- the Great Barrier Reef Marine Park;
- nuclear actions; and,
- water resources in the context of coals seam gas or large coal mining development.

In relation to each of the MNES, the EPBC creates a range of offences for taking an action that will have or is likely to have a "significant impact" upon the respective MNES (EPBC, Part 3).

Regarding world and national heritage places, the EPBC establishes a process whereby a place can be listed as a National Heritage Place by the Minister on the advice of the Australian Heritage Council based on its Indigenous heritage value. Pursuant to the definition contained in EPBC s 528, the definition of Indigenous heritage value utilised for these purposes draws on the significance attached to the place by "Indigenous persons".

Two other aspects of the EPBC of particular significance to the protection and management of cultural heritage, relate to "Commonwealth marine areas" under EPBC s 24 and "Commonwealth land" under EPBC s 26. As noted above, the EPBC operates to regulate any action that may have an impact on the environment of an MNES (including a Commonwealth marine area) or Commonwealth land.

In operation then the EPBC will operate to regulate any action that has an impact on the environment of these areas. 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).

It is apparent this definition of the "environment" of a Commonwealth marine area and Commonwealth land is sufficient to include cultural heritage.

Both the EPBC and ATSIHPA apply in Commonwealth waters (Commonwealth marine areas under the EPBC). ATSIHPA operates in the same fashion as it does in an onshore context (including its potential protection of intangible cultural heritage discussed below) and does not require separate consideration. Similarly, there a specific NTA

future act procedures applicable to offshore areas (NTA s 24NA). These procedures are essentially part of the "provide an opportunity for comment" class of future acts.

In the absence of genuine engagement with the Traditional Owners regarding their cultural heritage offshore, proponents currently and will continue to risk an ATSIHPA declaration that will stop works. The financial impacts of such a stop work declaration would be significant and is entirely avoidable if due processes of FPIC are afforded Traditional Owners from the development, implementation and conclusion stages of a project.

B Proposed Areas for Reform

5 Decommissioning Planning

We support the development of full lifecycle planning that requires ongoing engagement, checking for financial accuracy and transparency and milestones for reengagement with the relevant TORI for or FPIC. An essential component of such planning is that for decommissioning. Ensuring that Traditional Owners are both consulted and afforded FPIC during this process will enable valuable outcomes including community economic opportunities and increased cultural heritage protection.

The regulatory environment offshore needs to change and implement additional requirements of titleholders in a number of ways. Proponent bids for titles need to be predicated on Traditional Owner FPIC for their proposed projects and must necessarily include appropriate consideration of decommissioning, updated as the project progresses. This will allow Traditional Owners and proponents to negotiate equitable agreements for the protection of cultural heritage and wellbeing of communities. Such agreements will respect the rights of Traditional Owner communities under international and national legislation and unique of users and stakeholders in the marine environment.

5.1 Estimating Costs

The costs associated with realising decommissioning must be appropriately and robustly estimated during the initial project planning. In this way, they can incorporate into the overall evaluation of the viability of a project. In order for the regulatory assessment of such projects, these estimating processes must be transparent. It is essential that as the project progresses, sometimes over decades, that there are key project milestone and triggers that require a reassessment of the projects remaining staged budget projections, including those for decommissioning.

5.2 Managing Proposal for Alternative End States

The impact of sea dumping is enormous on Traditional Owners as they try to manage their cultural heritage in the marine environment. Whilst proposals must demonstrate that the environmental impacts and risks from leaving infrastructure in place are acceptable and are reduced to as low as reasonably practicable,[7] this

[7] Consultation Paper, p18

does not include the required considerations of Traditional Owners. In many instances the impact of dumped infrastructure is ongoing damaging to both tangible and intangible cultural heritage and an active source of grief for Traditional Owner communities.

6 Financial planning and assurance

Understanding the complete financial expectations of a project throughout its life is essential to the regulatory process. Whilst there is an expectation that all offshore infrastructure will be removed during the decommission stage of a project, this does not always occur. The primary capacity to undertake removal must be in place before any additional considerations are applied to potential sea dumping.

We agree that the market and the government should be able to have confidence that the financial strategy for decommissioning a project is sound and believe that titleholders should be required to submit specific financial information as part of their wider decommissioning planning obligations.[8]

Both the reporting on and facilitation of processes for acquiring appropriate forms of credit would assure this process. Increasingly, bonds are the means by which such assurances should be provided.

Consideration should also be given to developing mechanisms by which any surety bonds that are lodged are made available as the foundation of Traditional Owner equity projects in the ultimate decommissioning process. The Sea Country Alliance would be pleased to discuss the further development of this proposal with the Department. Such a mechanism would support the proposals contained in 6.1 below.

6.1 Indigenous Preferential Procurement and Economic Outcomes

The latest estimates from the Centre of Decommissioning Australia, an independent body focused on the challenge of aging infrastructure, put the value of the work in Australian waters at $58.5 billion (AU) in a massive long-term exercise that will stretch well into the next decade for existing infrastructure and probably beyond.[9]

As with the primary extraction revenue derived to largely benefit international corporations and shareholders, the value of the decommissioning should be shared with Traditional Owners through processes established in the Commonwealth Government's IPP.

In this particular context, the requirements of the IPP could be tailored to ensure that affected TORIs are allocated work under a mandatory set aside provision. This approach is adopted to some extent already in relation the Commonwealth's IPP in respect of work undertaken in (defined) remote areas.

The Commonwealth IPP has been recognised as an important policy approach to facilitating the establishment and growth of Indigenous businesses; supporting

[8] Consultation Paper, p19

[9] Parker, S., The Lowy Institute, *The great offshore decommissioning*, 2023

improvements in Indigenous employment; and achieving improvements in overall Indigenous well-being. Recognition of the importance of IPPs has seen them adopted in some form by the Commonwealth Government, five of the eight state and territory governments, by many key resources firms and, more generally in the private sector, through the Business Council of Australia's "Raising the Bar" initiative and the work of Indigenous Chambers of Commerce.[10]

The insertion of IPP requirements into the offshore regulatory environment will positively contribute to self-determined nation building by affected TORIs.

Conclusion

With the implementation of these reforms, it is hoped that Traditional Owner rights will be realised in the offshore environment. It is also anticipated that the full suite of rights afforded in international law will be enforced, particularly regarding FPIC and protections of intangible as well as tangible cultural heritage up to 200nm.

The decommissioning environment offshore is one that provides enormous capacity for Traditional Owner communities to benefit and to protect their cultural heritage. If not managed effectively now, through the following recommendations, there is great risk to wellbeing and destruction of internationally significant cultural heritage.

Recommendations:

- All of project life financial projections are undertaken during the planning phase with mandatory reviews for decommissioning throughout its life.
- Transparent financial analysis and reporting so that regulators can accurately assess the real capacity for a project's decommissioning during the licensing process.
- Financial capacity for decommissioning is guaranteed through financial instruments such as bonds.
- The regulatory recognition of the role and function of TORIs.
- Introduction of Indigenous Procurement Policy (**IPP**) provisions to enable economic development and nation building of affected TORIs.
- At all stages of the project's development, approval, reporting and end of life, affected Traditional Owners must be provide their free, prior and informed consent, through their Traditional Owner Representative Institutions, for the project to progress.

The SCA members look forward to progressing these essential recommendations.

Yours faithfully,

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Co-Chair

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Co-Chair

[10] Federation of Victorian Traditional Owner Corporations, *Economic Empowerment for Aboriginal Victorians: The Role of Indigenous Preferential Procurement Programs*, 2022, https://fvtoc.com.au/sections/indigenous-preferential-procurement/

Glossary

ATSIHP Act	*Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth)
Consultation Paper	*Offshore decommissioning and financial assurance reforms Consultation paper*
EPBC Act	*Environment Protection and Biodiversity Conservation Act 1999* (Cth)
FPIC	Free, prior and informed consent
MNES	Matters of National Environmental Significance
NOPSEMA	National Offshore Petroleum Safety and Environmental Management Authority
NOPTA	National Offshore Petroleum Titles Administrator
NT Act	*Native Title Act 1993* (Cth)
OEI Reg's	*Offshore Electricity Infrastructure Regulations 2022* (Cth)
OPGGS Act	*Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth)
PBC	Prescribed Body Corporate
SCA	Sea Country Alliance
Sea Dumping Act	*Environment Protection (Sea Dumping) Act 1981* (Cth)
TORI	Traditional Owner Representative Institution
UNDRIP	United Nations' Declaration on the Rights of Indigenous Peoples

Annexure A

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.