

Sea Country Alliance

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Bihm-Suk Baek
Chair
United Nations Human Rights Council Advisory Committee
Submission to the call for inputs on sea-level rise and human rights

Via email: OHCHR-hrcadvisorycommittee@un.org

Thursday, 30 April 2026

Dear Professor Baek,

Submission to the call for inputs on sea-level rise and human rights

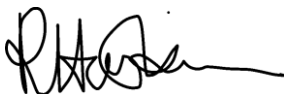
The SCA is an alliance between Australia's Traditional Owners with responsibility for Sea Country that have come together to speak in unison. The formation of the Sea Country Alliance, following a national meeting of Traditional Owners in Darwin in November 2023, represents a step forward in realising 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.

Our work is guided by rights-based standards such as the United Nations (UN) *Declaration on the Rights of Indigenous Peoples (UNDRIP)* and the principle of Free, Prior and Informed Consent (FPIC).

The relationship between realisation of cultural rights and economic and social wellbeing are profound. For this reason, we will progress to consider in the submission the recognition of cultural rights as a key indicator for health and wellbeing, adding to the broad interpretation of article 25 of the *Universal Declaration of Human Rights*.

Regards,



Rhetti Hoskins
Co-Chair

1 Please explain in what ways sea level rise affects the full enjoyment of human rights.

Rising sea levels impact the rights of many coastal Indigenous Peoples to practice their culture. This may be through the erosion of their coastal cultural sites, loss of cultural species or impact on marine use for trade. As cultural rights are collective in nature, it is important that in managing their use and recognition, it is the representative and collective entity that is consulted. As with many areas of regulation and law, the identification of individuals with whom to consult on cultural matters is erroneous in an Indigenous Peoples human rights context.

The fact that Indigenous Peoples 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*¹ 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 Indigenous Peoples rights in Sea Country necessarily equate directly to native title rights. Rather, as identified in the *Tipakalippa* jurisprudence, that rights in Sea Country, 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”.

Having established that Indigenous Peoples rights in Sea Country have a character as rights which enure “for the benefit of the community as a whole and for the sub-groups and individuals within it”; the challenge then is to establish an appropriate accommodation of rights of these nature within the framework of the current and future offshore legislation and regulations. Ideally, this would be a full adoption of UNDRIP into legislation.

¹ *Mabo & Ors v Queensland & Ors (No 2)* (1992) 175 CLR 1.

2 Which groups are particularly vulnerable to sea level rise?

As an island nation, with many smaller islands included in the broader land and marine mass, Australia is at significant risk of rising sea levels and sea temperatures. Particularly vulnerable are the Indigenous Peoples communities of the Torres Strait who reside in low-lying islands. In 2022 the UN Human Rights Committee found that *'Australia's failure to adequately protect indigenous Torres Islanders against adverse impacts of climate change violated their rights to enjoy their culture and be free from arbitrary interferences with their private life, family and home.'*² Under article 5 (4) of the Optional Protocol concerning communication that, notably, Australia has not ratified, the Committee's recognition of the effect on cultural rights of the communities of the Torres Strait is still germane.

Sea-level rise has already caused flooding and erosion on the authors' islands, and higher temperature and ocean acidification has produced coral bleaching, reef death and the decline of seagrass beds and other nutritionally and culturally important marine species. According to the Torres Strait Regional Authority, in the Torres Strait region, sea level has risen at the rate of approximately 0.6 cm per year from 1993 to 2010 (compared with the global average of 3.2 mm per year).

With respect to the impact of climate change on the islands, the village on Boigu, one of five communities particularly vulnerable to inundation, is flooded each year. Erosion has caused the shoreline to advance and has detached a small area from the island. On Masig in March 2019, a cyclone caused severe flooding and erosion and destroyed buildings. The cyclone resulted in the loss of three metres of shoreline. Approximately one metre of land is lost every year. In addition, in recent years a tidal surge has destroyed family graves, scattering human remains. On Warraber, high tides and strong winds cause seawater to flood the village centre every two to three years. On Poruma, erosion has washed away much of the island's sand over the past few decades.

Sea-level rise has caused saltwater to penetrate the soil of the islands, with the result that areas previously used for traditional gardening can no longer be cultivated. On Masig, rising sea level has caused coconut trees to become diseased, so that they do not produce fruits or coconut water, which are part of the authors' traditional diet.³

The Australian Fisheries Management Authority has released figures that paint a similar, stark picture of the future for cultural species and sites in the Torres Strait.

By 2030, annual average sea surface temperatures in the Torres Strait region are expected to be between 0.5 and 1.1°C above the average climate of 1986-2005 (23.4°C).

Marine heatwaves have become more frequent and intense, causing widespread damage to ecosystems and fish communities. Heatwave conditions may occur for more than 300 days a year by 2040.

The Torres Strait region is currently experiencing sea level increases at a rate of between 6-8mm per year. Models of sea level rise across Northern Australia predict as much as 20cm of further increase through 2030-2040.⁴

² United Nations Human Rights Office of the High Commissioner, *Australia violated Torres Strait Islanders' rights to enjoy culture and family life, UN Committee finds*, 23 September 2022.

³ United Nations Human Rights Committee, *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019*, 2023, 2.3-2.5.

⁴ Australian Government Australian - Fisheries Management Authority, *Climate change impacts on Torres Strait fisheries*, 2024.

Whilst the rights of the communities of the Torres Strait to practice and protect culture are significantly impacted by climate change, they are not alone. All coastal communities are feeling the impacts of rising sea levels and temperatures on sites and species important to their culture.

**3 What are the particular impacts of sea level rise on human rights of individuals, groups and Peoples in vulnerable situations?
How should these be prevented, and where not possible or foreseeable, mitigated, and remediated?**

In many instances, it is the intangible aspects of cultural rights and assertion of these rights that is threatened. Whilst this can often occur through ill-conceived development or regulation, it is also an effect of sea level rise. Where consideration of collective and representative Indigenous Peoples groups should be consulted on the ways in which they would like to manage cultural loss due to climate change, there are many ways that broader consideration can be made.

1. Consideration of with whom to discuss the management of unique cultural rights.
2. Respect for intangible cultural heritage.

Aboriginal and Torres Strait Islander peoples have cared for and protected their Countries for over 65,000 years. The associated knowledge and cultural associations of place and intangible rights are therefore deep and ever present. Material such as dance, language, story and artistic design are important manifestations of these intangible rights. It is essential that any protections of such knowledge provide a basis for appropriate economic development for Indigenous Peoples, who continue to experience the ongoing effects of colonisation.

The vast gap in life expectancy, health outcomes and generalised rates of violence and incarceration, is testament to the stymying of Aboriginal and Torres Strait Islander peoples' rights.

Based on this recognition of ongoing connection to country and culture, and respect for the rights and responsibilities that this determines, we must therefore include protections for all the manifestations of this intellectual property.

Central to implementing recognition of Indigenous Cultural and Intellectual Property (ICIP) must be the principle that ICIP arising from Traditional Knowledge (TK) is necessarily generated and "owned" by the community that gives rise to that TK.⁵ When this principle is given effect in a Western legal system it requires that the legal entity 'owning' the ICIP is controlled by, and representative of, the Traditional community that generated the TK that led to the ICIP.

To this end, the ultimate recognition of Indigenous Peoples rights in native foods and botanicals, cultural knowledge, intangible cultural heritage, Traditional Environmental Knowledge (TEK) and bioprospecting must be managed by the same collective and representative structures identified above.

Under international law, the ICIP rights of Australia's Indigenous Peoples are recognised in UNDRIP, the *Convention for the Safeguarding of Intangible Cultural Heritage* and the *Nagoya Protocol - Convention on Biological Diversity*. Each of these instruments has relevance to the broader management of ICIP. However, it is UNDRIP that provides the foundational principles for the structures necessary to manage ICIP derived from TK.

⁵ Food and Agriculture Organization of the United Nations, *Free Prior and Informed Consent: An indigenous peoples' right and a good practice for local communities*, 2016, p.11

8 What is the role of UN agencies, international financial institutions, and other international organisations?

The role of the UN to establish international law and frameworks establishes a baseline of expectation of behaviour for all States. It is the global thinking of the UN that enables all States to realise their participation as global members. To this extent, the recent *Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction (BBNJ Agreement)* promotes the way in which the High Seas can provide resources for all.⁶ Significantly, whilst Indigenous Peoples' rights are not specifically identified in the *United Nations Convention on the Law of the Sea*, they are recognised in the BBNJ Agreement⁷ and other United Nations instruments. Of these instruments, UNDRIP is the most prominent but there is also significant recognition in the *International Covenant on Civil and Political Rights* and decisions by the Human Rights Committee that have 'emphasised the importance of protecting Indigenous peoples' lands and resources in order to ensure their cultural survival'.⁸

The necessary absence of State sovereignty from the High Seas does not affect the cultural rights that can be assumed to be possessed by Indigenous Peoples under UNDRIP.⁹ With no parameters applied under UNDRIP, merely recommendations for State remediation in some instances, it can be assumed that the boundless nature of these rights need merely to be asserted by those groups. In this regard, the jurisprudence from Australia can be seen to support this assertion of the manifestation of cultural heritage in Sea Country. Whilst necessarily applying a State jurisdiction to these rights (at 200 nm), the application of reasoning of their existence reveals no boundaries other than those defined by the Indigenous Peoples themselves. This argument has been explored in the Australian context in *Yarmirr*.¹⁰ In this decision, the Justices confirmed that to the extent the Commonwealth law asserts sovereignty it can also give effect to Indigenous Peoples rights.¹¹

The BBNJ recognises that TEK belonging to Indigenous Peoples is extant in the High Seas. Albeit however, it is a limited recognition that extends to TEK exchange and application to management of the marine environment, including implementation of FPIC for use of this knowledge.¹² What is quite clearly established is that intangible cultural heritage exists in the High Seas and that there is a cultural right associated with its exercise that belongs to its Indigenous Peoples. It is a necessary expansion of this recognition to also recognise that the High Seas contain both tangible and intangible cultural heritage, particularly in relation to dreaming stories and land mass changes occurring over the 70,000 year period of Australian Aboriginal and Torres Strait Islander communities' cultural traditions.

⁶ United Nations Treaty Collection, '10. Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction' in *Chapter XXI Law of the Sea*, Entry into Force.

⁷ United Nations, *Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction*, opened for signature 20 September 2023, (entered into force 17 January 2026) ('BBNJ Agreement').

⁸ Australian Human Rights Commission, 'Native Title and Sea Rights' in *Native Title Report 2000*, 2000, s2.

⁹ Whilst UNDRIP speaks to states it is giving recognition to rights that exist independently of international law.

¹⁰ *Commonwealth v Yarmirr* [2002] HCA 56; 208 CLR 1.

¹¹ Gleeson CJ, Gaudron, Gummow and Hayne JJ. *Commonwealth v Yarmirr* [2001] HCA 56; 184 ALJ 113; 208 CLR 1; 75 ALJR 1582 (11 October 2001), 128.

¹² BBNJ Agreement, Article 14.

The focus of the BBNJ on Access and benefit Sharing processes is, in part, a result of the non-jurisdictional nature of the High Seas and the Area themselves. It's clear assertion of the requirement to respect ICIP and approach TEK with FPIC processes, can only result in the necessary flow on effect of economic benefits for Indigenous Peoples. To the extent that States are parties to the BBNJ, this can be realised both from projects undertaken under the BBNJ Agreement and within State jurisdictions.

9 What are the responsibilities of private actors? Specify the source of these obligations or note whether the obligations should be recognized?

The private sector has a not insignificant role to play in easing the impacts of sea level rising on Indigenous Peoples. Industry standards can be a highly effective way of embedding social license to operate (SLO) markers within industry practice. In doing so, the concerns of climate resilience, impacts and human rights recognition can be manifestly implemented in the day-to-day operations of private sector projects and business.

In this regard, the recognition of UNDRIP through FPIC and agreement making is a cornerstone. Such agreements and consents can be used to tangibly benefit First Nations communities for projects that take place on their Country (terrestrial or marine).

In 2024, the Alliance made recommendations as to how industry could support coastal First nations communities respond to climate impacts from projects in their Sea Country.

The contingent nature of impacts upon [the environment that may be affected] 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.

...

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.” However, unlike the current Good Standing Agreements arrangements payments would not necessarily be dependent upon default of expenditure under a work bid.

...

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

...

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.¹³

10 What measures (legislative, administrative, institutional, or other), if any, exist to address sea level rise at national or regional level?

Have human rights implications been taken into account in their adoption and implementation?

Are there good practices or lessons learned in regulating sea level rise that include a human rights-based approach?

Much recent commentary on the issue of Indigenous Peoples' assertion of rights in the marine environment has been in the area of Offshore Energy Projects and has focussed on the issue of potential impact on the Indigenous Peoples Cultural Heritage. It is important to continue to bear in mind that Indigenous Peoples interests in Sea Country are broader than this and extend to rights in respect of commercial, economic and social activities and the rights that Indigenous 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 *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.¹⁴

What is abundantly clear from this judicial authority and associated administrative practice is that Indigenous Peoples 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.¹⁵

¹³ Sea Country Alliance, *Outline of Regulatory and Policy Reform Proposals – Traditional Owners and Australian Offshore Energy Projects*, June 2024.

¹⁴ *Commonwealth v Yarmirr* [2002] HCA 56; 208 CLR 1 per Gleeson CJ, Gaudron, Gummow, and Hayne JJ.

¹⁵ *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193

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.¹⁶

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*.¹⁷ In this matter the High Court made clear that a native title right to take resources for any purpose could include for commercial purposes.

The basis for native title rights including commercial rights is best described by one of the Indigenous witnesses who gave evidence in the Federal Court in *Akiba* at first instance. Justice Finn in his judgment quotes Indigenous Person, 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.¹⁸

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 Indigenous People amongst the broader Australian community, that gives rise to the need for appropriate recognition under a reformed regulatory and policy framework.

¹⁶ *Commonwealth v Yarmirr* [2002] HCA 56; 208 CLR 1 per Gleeson CJ, Gaudron, Gummow, and Hayne JJ.

¹⁷ *Akiba v Commonwealth*. (2013) 250 CLR 209.

¹⁸ *Akiba v Queensland (No 3)* (2010) 204 FCR 1, 527.