

Sea Country Alliance

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Ms. Jennifer Kay
A/g Division Head
Environment Law Reform Taskforce
Department of Climate Change, Energy, the Environment and Water

Via email: EPRconsultation@dcceew.gov.au

Friday, 29 May 2026

Dear Ms Kay,

Submission to consultation on the Draft National Environmental Standard for Matters of National Environmental Significance

The Sea Country Alliance (**Alliance**) brings together Australia's Traditional Owners with responsibility for Sea Country to speak in unison. The formation of the Alliance, following a national meeting of Traditional Owners in Darwin in November 2023, represents a step forward in realising our rights and responsibilities offshore.

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

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**). Through these instruments of, and principles embedded in, international law we seek to realise Traditional Owner rights in Sea Country both within Australian sovereign waters and in the High Seas.

1 Introduction

The Alliance proposal of the Traditional Owner Representative Institution (**TORI**) model in 2024 has continued to provide a solid basis for the recognition of collectively managed cultural rights. Embedded in the *Offshore Electricity Infrastructure Regulations 2022 (Cth)* (**OEIR**)¹, the model requires consultation with the representative institutions of the affected collective rights holders. It is anticipated that such a proposal may be considered in the First Nations Engagement Standard, rather than explicitly embedded within the *National Environmental Standard (Matters of National Environmental Significance) 2026 (Exposure Draft)* (**Draft MNES Standard**).

¹ *Offshore Electricity Infrastructure Regulations 2022 (Cth)*, s 64.

The consideration of the management of a collectively held cultural right aside, the Alliance has several concerns that could be remedied through minor amendments to the draft legislation or thoughtful regulation. These concerns include:

- the use of a self-assessment process for referral, in regard to consultation with impacts to Aboriginal and Torres Strait Islander cultural heritage;
- a lack of fulsome consideration of the role of Traditional Owner rights holders in consideration of ‘significant impact’ on their cultural heritage;
- an assumption that Traditional Environmental Knowledge (**TEK**), Intangible Cultural Heritage (**ICH**) and Indigenous Cultural and Intellectual Property (**ICIP**) more broadly are ‘optional extras’ in the consideration process; and
- a limitation on the rights of Traditional Owners as prescribed under UNDRIP in the ‘mitigation hierarchy’.

2 Self-Assessment Process

Under the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**), an action will require approval from the minister if the action has, will have, or is likely to have; a significant impact on a matter of national environmental significance (**MNES**). The identification of what is ‘significant impact’ is undertaken by the proponent and once identified, triggers their requirement to submit a referral to the Department of Climate Change, Energy, the Environment and Water (**DCCEEW**) for a decision by the environment minister on whether assessment and approval is required under the *EPBC Act*.²

Under the Draft MNES Standard, there is no requirement for engagement with the Traditional Owners, of the potentially affected cultural heritage, in this process of assessment. Also absent in the current process is the understanding that Traditional Owners are the only ones who can address the cultural significance of their cultural heritage and, necessarily, the only ones who can identify the significance of the risks to it. Perhaps one of the clearest ways to identify this is through ICH. Much ICH is not recognised through registration on regulatory databases, either through the limitations of the databases themselves or at the discretion of Traditional Owners. Without registration or any archeologically identifiable manifestations, ICH can exist in a place unbeknownst to the proponent. Subsequently it can be threatened by a project and, without consultation with the affected Traditional Owners, the proponent has no way of knowing or indeed assessing the significance of the threat.

² Australian Government Department of the Environment, *Matters of National Environmental Significance Significant impact guidelines 1.1, Environment Protection and Biodiversity Conservation Act 1999*, 2013, 1.

It is therefore essential that in any assessment of threat, Traditional Owners are required to be consulted on the existence of cultural heritage in the project area. In not doing so, it could be argued that the Draft MNES Standard Objective 5, that 'Indigenous heritage values of a National Heritage place are treated in a manner respectful of indigenous traditions and beliefs',³ would not be met.

3 Significance

Under the Draft MNES Standard consideration of 'significant impact' is required. As a process however, the significance of the cultural heritage itself must necessarily be considered before the significance of the impact can be determined.

The Draft MNES Standard, whilst not being explicit, is not alone in this consideration of significance. All Australian (Aboriginal and Torres Strait Islander) cultural heritage legislation and regulation will only operate to protect *significant* cultural heritage, rather than other types. The issue that arises is how is significance determined. Most commonly, the definitions contained in the legislation will refer to the views and beliefs of the relevant Traditional Owners (variously described).⁴

- In some legislation (for example in Western Australia and Queensland) it is the Minister, as the ultimate decision maker, who is required to form a view as to whether Traditional Owners see particular cultural heritage as "significant". There are regular challenges to decisions (in the State Administrative Tribunal or Land and Environment Court) made under this legislation.
- In other jurisdictions, such as Victoria and the Northern Territory, where Traditional Owners are (more usually) the ultimate decision makers regarding significance, challenges to decisions based on significance are very rare.
- In South Australia,⁵ the Minister is required to accept the opinion of relevant Traditional Owners as to the significance of cultural heritage in exercising their powers.

Some jurisdictions allow for the recognition of cultural heritage by both Traditional Owners (significance in accordance with Aboriginal tradition) and archaeological and anthropological definitions.

To provide guard rails, some legislation has defined principles that enshrine Traditional Owners as the only appropriate authority on their cultural heritage and its significance to them as rights holders under the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*.

³ Ibid Draft MNES Standard, 3.

⁴ Some legislation will also refer to for example "of archaeological significance".

⁵ *Aboriginal Heritage Act 1988* (SA) s 13(2).

An example of this direction is the Queensland *Aboriginal Cultural Heritage Act 2003*, that 'Aboriginal people should be recognised as the primary guardians, keepers and knowledge holders of Aboriginal cultural heritage'.⁶

As an instrument of international law, it is appropriate that the requirements of UNDRIP are upheld across commonwealth legislation. Particularly, the rights articulated in Articles 11 and 18:

The right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.⁷

The right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.⁸

Unfortunately, the Draft MNES Standard falls short in that it neither requires consultation with the legitimate representative institution of the Traditional Owner group (**TORI**) to determine whether cultural heritage exists, whether that cultural heritage is significant or if the proposed project creates a significant risk to that cultural heritage.

The importance of a TORI determining significance is that it is a collective decision made by representatives of all Traditional Owners who effectively 'own' the rights to speak for that particular cultural heritage. In accord with international law through UNDRIP, the communities who hold the rights to this cultural heritage are collectively the ones to make decisions about its significance.

The application of UNDRIP also requires at Article 19 that Traditional Owners, through their representative institutions, are enabled by the State to protect their cultural heritage. It is therefore essential that in any assessment of significance, Traditional Owners are required to be consulted.⁹ In not doing so, it could be argued that the Draft MNES Standard Objective 9, 'provisioning, regulating, cultural and supporting services provided by the water resource' are protected and conserved,¹⁰ would not be met.

4 Intangible Cultural Heritage

The Draft MNES Standard does, at s 11 Principle 4, require 'appropriate evidence, Indigenous engagement and consultation'.¹¹ Specifically, at s 11 (b), it states that proposals for actions must be supported by:

⁶ *Aboriginal Cultural Heritage Act 2003* (Qld), s 5(b).

⁷ United Nations, *Declaration on the Rights of Indigenous Peoples* ('UNDRIP'), 2007, 11.

⁸ *Ibid* UNDRIP, 15.

⁹ 'States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.' *Ibid* UNDRIP, 16.

¹⁰ *Ibid* Draft MNES Standard, 3-4.

¹¹ *Ibid* Draft MNES Standard, 7.

where relevant, effective and genuine engagement with, and contribution of knowledge from, Indigenous persons, where the engagement and contribution is appropriate and adapted to the nature of the interests of such person'.¹²

It is anticipated from this, that consideration of the appropriateness of the contribution is undertaken by the proponent and that the nature of the constitution would be provision of Traditional Owners' TEK, ICH and ICIP.

The usefulness of the self-assessment process has already been addressed but, as can be seen here, the same concerns must be considered as an ongoing issue throughout application of the Draft MNES Standard. Additionally, what also needs consideration is the way in which ICH rights are approached and considered 'appropriate'.

In 2023 the Australian Government committed to introduce legislation that recognises and protects First Nations traditional knowledge and cultural expressions. The problems identified and commitment to their solution were detailed in *REVIVE Australia's Cultural Policy for the next five years*. The interceding three years have seen the isolation of 'fake art' as the first tranche of legislative delivery, with a further tranche anticipated for the extensive remaining ICIP applications.

The 2025 *Australia-UAE Comprehensive Economic Partnership Agreement (CEPA)* clearly defines the importance of 'Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions' in the implementation of the CEPA. Particularly of note, is the identification that for practical purposes under the Agreement, ICIP is inclusive of the full range of applications anticipated to be included in tranche 2 of *Revive*:

1. The Parties acknowledge the cultural significance of genetic resources, traditional knowledge, and traditional cultural expressions, including with respect to the names and uses of plants, traditional foods, language, song, stories, songlines, dance and works of art.
2. The Parties recognise the value of protecting traditional knowledge and traditional cultural expressions, including through intellectual property rights.¹³

The Draft MNES Standard should not fail to align with existing expectations of the Australian Government upon other state parties.

5 Mitigation Hierarchy

Principle 1 of the Draft MNES Standard describes the actions to apply the mitigation hierarchy. In doing so, a proponent's action would be considered consistent with the Standard. Briefly described;

- Step One is avoidance of significant impact,
- Step Two is mitigation of significant impact if it 'cannot be avoided',

¹² Ibid Draft MNES Standard, 7.

¹³ Australian Government, *Australia-United Arab Emirates Comprehensive Economic Partnership Agreement First Nations Action Plan, 2025*, Article 17.6.

- Step Three is repair of ‘impacts on protected matters’, and
- Step Four is offset activity.¹⁴

What is absent from the hierarchy is the consideration of FPIC and that there may be cultural heritage that is so significant it simply cannot be impacted. Stage One details that significant impacts ‘should’ be avoided ‘to the extent possible’, necessarily removing the requirement that some actions are so significant that they must be avoided. Similarly, considerations of unavoidable impact at Step Two speaks to a lack of understanding of the importance of cultural heritage to the wellbeing of Aboriginal and Torres Strait Islander Peoples.

6 Conclusion

The suite of Standards attached to the EPBC Act are an important regulatory contribution to the implementation of the legislation. However, in the case of the Draft MNES Standard, it falls well short of a regulatory environment that implements UNDRIP and defends Traditional Owner rights to their own cultural heritage.

It is essential that this ambitious suite of environmental reforms places strict guardrails around impact on Aboriginal and Torres Strait Islander Cultural heritage and places control for the identification of that heritage and its significance in the hand of its Traditional Owners through their representative organisations. To do so, the following recommendations should be enacted:

- the self-assessment process for referral, in regard to consultation with impacts to Aboriginal and Torres Strait Islander cultural heritage, must include consultation with the affected Traditional Owners;
- those same Traditional Owners are the only ones who can identify the significance of the cultural heritage and identify what ‘significant impact’ would be;
- TEK, ICH and ICIP must be respected as cultural heritage, with inherent ownership rights and to which permission for use can be granted and withdrawn; and
- the ‘mitigation hierarchy’ should be amended to include provision for FPIC.

With such inclusions, the Draft MNES Standard will provide appropriate and respectful protection on behalf of all Australians.

Yours faithfully,



Gareth Ogilvie
Co-Chair

¹⁴ Ibid Draft MNES Standard, 6.