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*Submission to consultation on the National Environmental
Standard (Community Engagement) 2026*

1 Introduction

This submission is made to the to the Environmental Law Reform Taskforce by the National Native Title Council (NNTC) in collaboration with the Mabo Centre in relation to the *National Environmental Standard (Community Engagement) 2026 (Exposure Draft)* (herein “the Standard”).

The reform of the commonwealth environmental laws has provided an opportunity to better recognise the rights of Australia’s Traditional Owners in its natural environment, to ensure improved protections for Aboriginal and Torres Strait Islander cultural heritage, and to facilitate improved of Traditional Owners in environmental decision making. It is important these objectives are enhanced in the final Standard.

It is appreciated that many of these outcomes will be achieved the means of the application of the First Nations Engagement Standard (FNES) to be made under the reformed *Environment Protection and Biodiversity Conservation Act* as amended in 2025. (the Act). However, as noted in this submission, the other Standards to be made under the Act, including that currently under consideration, can, if not appropriately drafted, undermine these objectives. By contrast, if the recommendations contained in this submission are adopted, we believe the Standard can enhance the desired outcomes.

This submission recognises that the proposed FNES will be the primary mechanism for the involvement of Traditional Owners in Commonwealth environmental decision making. Appropriately however the FNES is expected to have a key focus on putting in place arrangements to require the participation of the Traditional Owners of the lands the subject of proposal. In the appropriate course of events, this engagement will occur through the representative body of those Traditional Owners (the Prescribed Body Corporate under the *Native Title Act* or similar institution). In the language of the *United Nations Declaration the Rights of Indigenous People* this representative body can be

described as Traditional Owner Representative Institution¹ (TORI). The TORI is the representative body for the Traditional Owners of land directly affected by a project proposal. This submission considers the circumstances where the (Community Engagement) Standard is the vehicle for engagement with Aboriginal and Torres Strait Islander peoples who, while not the Traditional Owners of the lands contained in a proposal, still have a legitimate interest as a member of the affected *community beyond that of the broader “public”*.

The submission’s primary recommendation is that the definition of “affected persons” be reviewed to contemplate such Aboriginal and Torres Strait Islander people.

2 About Us

2.1 National Native Title Council

Established in 2006, the NNTC is the peak body for Australia’s Native Title and other Traditional Owner organisations. The NNTC represents Native Title Representative Bodies and Service Providers as well as Prescribed Bodies Corporate recognised under the *Native Title Act 1993 (Cth.)* and other equivalent Traditional Owner Representative Institutions established under Traditional Owner land rights legislation such as the *Traditional Owner Settlement Act 2010 (Vic)*, the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)* and the *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981 (SA)*.

2.2 The Mabo Centre

Launched in February 2025, the Mabo Centre is a First Nations-led partnership between the NNTC and The University of Melbourne. The Mabo Centre builds on the extensive and ongoing engagement with Traditional Owners undertaken by the NNTC.

Based on the University’s Parkville campus in Naarm, and working closely with Traditional Owners and communities, the Mabo Centre undertakes research to identify best practices, deliver training to strengthen and share knowledge, and develop local leadership skills to maximise economic outcomes through leveraging land and sea rights. Over time, this will ensure strong principles of self-determination are embedded into native title agreements, better supporting community aspirations and provide greater opportunities for economic development and entrepreneurship on Country.

¹ See UNDRIP Article 18.

3 Review of the Text of the Standard

To commence with consideration of the Standard's Objective clause (clause 5), before moving to consider how the objectives are sought to be given effect to thorough consideration of the definitions clause (clause 4) and how these defined terms are deployed, particularly in the context of clause 9.

Clause 5 – Objectives

The Objective set out in the Draft CE Standard at clause 5 is as follows:

The objective of this standard is to ensure decisions made under the Act relating to the protection and management of protected matters are supported by meaningful engagement and co-operation between government, the community, landholders and Indigenous persons, and to assist in the cooperative implementation of Australia's international obligations

While, of itself, the Objective is uncontentious it conceals several ambiguities. "Indigenous persons" are identified separately from "landholders". Subsequent to the clarification provided by the High Court in *Commonwealth of Australia v Yunupingu* [2025] HCA 6 it is clear that native title holders are "landholders" and thus the dichotomy in the Objective clause between "Indigenous persons" and "landholders" facilitates later lack of clarity in the Standard itself. Notably the term "landholder" is not defined.

To compound this lack of clarity, the term "community" is employed (consistent with the title of the Standard) and yet is not defined within the Standard. "Community" is otherwise only used in the Standard in the context of "community leader" (clause 11). The Standard would be improved by increased clarity regarding these terms.

Clause 4 – Definitions

Two definitions attract attention:

affected persons means persons that are affected or potentially affected by a proposal because of their geographical proximity to the site of the proposal. (Emphasis added)

engagement means a planned consultation in which a person seeks input or feedback from the public to inform a proposal. (Emphasis added)

In relation to “affected persons”, notably the *only* criteria for membership of the class of “affected persons” is “geographical proximity”. This term itself is not defined within the Standard.

The status of “affected person” is significant. A proponent holds particular obligations to “affected persons” that they do not hold to the public in general (see clauses 9(3), 9(4)(i)(E), 9(4)(iv) and 11 (4)(ii)(C)).

Outside of “affected persons” the obligations of a proponent to engage with “the public” (presumably this term is seen as a synonym for “community” but this is unclear) are somewhat vague. The public must be “informed” of a proposal (clause 9 (4)), advised what influence they may have, and given an opportunity to comment. Information about the public input is to be provided to the decision maker.

However, “the public” need only provided with a 10-business day window to make their comment (clause 8(4)(iii)).

By contrast the obligation with respect to affected persons under clause 9(4)(iv) is described as follows

(A) provides affected persons with appropriate ways to contact the person about a proposal and the engagement process;

(B) responds promptly to any queries received from affected persons about the proposal and the engagement process;

(C) where appropriate, offers follow-up conversations to discuss concerns relevant to a proposal...

4 Consideration

The restriction of the particular status of “affected persons” to those with a **geographical proximity to the site of the proposal** is unnecessarily restrictive and imprecise. Aboriginal and Torres Strait Islander people who have a geographic proximity to the proposal site will (it is assumed) be engaged with the proposal approval process through the FENES by way of participation in their TORI. However, there may often be other Aboriginal and Torres Strait Islander people who have a legitimate and particular interest in the proposal beyond that of the general “public” who are denied “affected person” status. Examples of this particular interest may include a cultural connection to physical places or totemic fauna. It could (without further definition of geographical proximity) extend to ecosystem connection through water tables or fauna migratory paths.

The definition of “affected person” in the Standard should be amended to make clear such Aboriginal and Torres Strait Islander peoples are *within* the scope of the definition.

In a similar vein, the Standard would be improved with improved precision and definition around terms utilised, Examples have been provided above but include “community” (leader), “landholder” and “stakeholder”.

Finally, with respect to “the public”, and assuming acceptance of the proposed extension of the definition of affected persons, the proposed minimum 10 business day consultation period would appear impractically short.

We invite you to discuss this submission with us at your convenience.

Regards,



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Director



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