Response to the NOPSEMA *consultation in the course of preparing an environment plan Guideline*

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Acknowledgement of Country

In the spirit of respect and humanity, the Beyond Gas Network recognises the first nations' peoples of Australia as the traditional owners and custodians of these lands and waters. We acknowledge that sovereignty over this land was never ceded and its taking was just the beginning of years of atrocities and hurt. First Nations' people are at the coalface of climate change and their communities are being torn apart by it. We pay our respects to their elders past, present and emerging and say sorry for all we have done.

1. Introduction

The ***Beyond Gas Network*** is a network of volunteer, citizen-based climate action alliances with links across Australia. It is committed to publicising the scale and impact of fossil gas

on: domestic and exported emissions; on people and on country. On the precipice of climate calamity, it advocates the rapid replacement of a fossil-fuel-based economy with a renewables-based future.

2. Submission

We welcome the guideline as a positive development and anticipate it will assist titleholders, NOPSEMA and 'relevant persons'. We comment, and recommend a process enhancement as follows.

In Santos NA Barossa Pty Ltd v Tipakalippa [2022] FCAFC 193 the court cast its net wide, in accord with the regulations, as it would. The attendant risk, not only to title-holders but also, as played out in the case with NOPSEMA being effectively required to be a co-defendant, is that court action could be put on foot by a person or organisation who considers themselves to be relevant under the regulations but who was not consulted.

The guideline has the appearance of placing this risk entirely on the titleholders. While this is consistent with the regulations, it is not necessarily reflective of the reality that NOPSEMA as a Federal Government agency may also be required to be a defendant in a court action, nor the exercise of effective administration of the regulatory regime; nor indeed the interest of conformance with the principles of ecologically sustainable development (ESD) as set out in section 3A of the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act).

It may be preferable, if perhaps administratively problematic, for at least the process, if not necessarily the guidelines, to ensure that the risks of judicial action are reduced and the interests of broad consultation and any attendant value for enhanced environmental protection are maximised.

More specifically, the regulations state that the titleholder must consult .. *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;* (underlining added).

The guideline is consistent with this: *The purpose of consultation under regulation 11A of the Environment Regulations is to ensure that authorities, persons or organisations that are potentially affected by activities are consulted and their input considered in the development of environment plans.*

In Santos NA Barossa Pty Ltd v Tipakalippa [2022] FCAFC 193, Kenny and Mortimer JJ considered that "functions, interests or activities" should be "broadly construed" to promote the object of the Regulations: [51], and that Santos's narrower construction would "undermine the achievement" of the objects of the regulations: [52]. Such a broad construction served "more than one purpose", allowing affected persons to make an informed assessment of the possible consequences, and ensuring titleholders adopt appropriate measures to address concerns: [56]-[57] (underling added).

Lee J, concurring, considered that the concept of interest "must be sufficiently broad to obtain available input into the possible risks and environmental impacts and the possible means of reducing and managing those risks and impacts": [151] (underling added).

The court found:
Secondly, the titleholder's obligation to consult is not tempered by a qualifying phrase such as "reasonable efforts" or "to the extent practicable"; nor does the obligation only extend to persons the decision-maker considers to be "relevant persons". Rather, the regulatory drafting is such that the consultation obligation, when engaged, is unqualified [135] (underling added).
Thirdly, despite the strict nature of the obligation, there is an evident need for all "relevant persons" to be ascertainable. This ascertainment must be sufficiently readily achievable to accommodate the requirement that each relevant person be consulted by the titleholder in the course of preparing an environment plan and in the manner prescribed by the Regulations. It must be taken to be the regulatory intention that the consultation requirement cannot be one that is incapable of being complied with within a reasonable time; equally, it cannot have been intended that there would be opacity as to the identity of those with whom consultations are to take place [136] (underling added).
Fourthly, the relevant function, interest or activity must logically have existence anterior to, and separately from, the activity the subject of the environmental plan: it must be something that is in existence, and may be affected by what is proposed under the environment plan [137]. (underling added)

It would seem abundantly clear that the court's interpretation of the concept of interest includes organisations with a history of objectives of protecting the marine environment generally, and arguably those with a clear pre-existing objective of minimising the impact of offshore gas developments on the climate emergency. This in addition to the First Nations peoples such as were the applicants in the case, and commonly consulted *persons of interest* such as fisheries and groups with more local marine environmental concerns.

This is a wider interpretation than in the guideline, which rests, as it must, on the Offshore Petroleum and Greenhouse Gas Storage Act (the Act). From the guideline: *The consultation process should also assist the titleholder to meet its obligation under section 280 or 460 of the Offshore Petroleum and Greenhouse Gas Storage Act which requires that it must carry out the petroleum or greenhouse gas activity respectively in a manner that does not interfere with navigation, fishing, conservation of resources of the sea and seabed,... to a greater extent than is necessary for the reasonable exercise of the titleholder's rights and obligations. (underlining added).* Nonetheless, a prudent risk-management approach may help to ensure that the apparently narrower wording of the Act does not result in further successful court action.

This reading of the case also relates to the apparently increasing risk that companies, and their projects that require government approvals, will face successful legal challenge by third parties on the basis that the government owes a duty of care to the public at large to disallow projects which will have negative consequences for climate change. While no such claim has been successful in Australia to date, international developments suggest the risk to companies is real, there are a number of recent Australian cases which have sought to

establish that the Federal Government owes a duty of care to protect Australians against the impact of climate change, and in the Torres Strait case, it was the first time an international tribunal has found that a country has violated human rights law through inadequate climate policy and that a nation state is responsible for their greenhouse gas emissions under international human rights law[1] . This risk of successful challenge may be exacerbated if the consultation fails to consider persons of interest in which the central interest is climate change mitigation via stopping of new gas projects.

Such risks may be increased if the anticipated revision of the EPBC Act includes a requirement for the Environment Minister to consider the carbon emissions of projects in making approvals. While we understand the responsible Commonwealth minister is the Resources Minister, changes to the EPBC Act may, via a revised interpretation and inclusion in the regulations, result in a more restrictive policy with respect to offshore gas exploration of the application of the principles of ecologically sustainable development (ESD). It may therefore be prudent for NOPSEMA to ensure in advance of any such changes that the consultation process encompasses persons of interest which focus on the impact on climate change of new gas projects.

Furthermore, there would seem to be attendant risks in limiting such broad consultation to one environmental group, such as with The Wilderness Society in the Bonaparte MC3D Marine Seismic Survey.

The guideline states:
Processes for the identification of relevant persons must provide for sufficiently broad capture of ascertainable persons and organisations who may have their functions, interests or activities affected or that may be affected by the activity.
The process should include reference to multiple sources of information, such as publicly available materials, review of databases and registers, published guidance, previous history, as well as advice from authorities and other relevant persons.
In some cases, relevant persons have developed guidance detailing their functions, interests or activities and how and when they wish to be consulted on activities, which will be addressed in more detail below.
Additionally, titleholders should consider various published guidance related to good practice consultation relevant to different sectors and disciplines …..

3. Recommendation and conclusion

Recommendation: that NOPSEMA develop via consultation and publish a supplementary good practice guideline specific to or encompassing consultation with environment and climate organisations.

1 https://www.mcgill.ca/humanrights/article/australia-violated-rights-torres-strait-islanders-failing-act-climate-change-un-says-heres-what

We note that in February 2023, NOPSEMA informed a Senate estimates committee that, of the 43 environment plans under assessment, only one has been approved following the Full Court's decision.

It may be that a number of the plans under assessment would benefit from an enhancement of the scope of relevant persons, in order to mitigate the risk of court challenges. If this is in contemplation, the rapid development and publishing of such a guide might assist in this process.

To conclude, we are not blind to the risk that some affected stakeholders may seek to narrow via amended regulation the scope of the operational definition of 'relevant persons', and that their motivation to do so might be greater if such a guide were to be developed and published. Suffice to say that we we heavily discount that risk in the current climate, as indicated inter alia, by:

- the reactions including among government MPs to the 2022 acreage releases;
- the utterly apparent good governance inherent in the current regulations, the guideline and the findings of the court; and in view of
- the authoritative court of appeal finding.

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