



Environmental  
Defenders Office

**Submission to NOPSEMA on the Guideline on  
'Consultation in the course of preparing an Environment  
Plan'**

**15 March 2023**

## About EDO

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

**Successful environmental outcomes using the law.** With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

**Broad environmental expertise.** EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

**Independent and accessible services.** As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

**[www.edo.org.au](http://www.edo.org.au)**

## Submitted to:

National Offshore Petroleum Safety and Environmental Management Authority  
Level 8, 58 Mounts Bay Road  
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By website: < <https://consultation.nopsema.gov.au/environment-division/consultation-guideline/> >

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## Acknowledgement of Country

The EDO recognises First Nations Peoples as the Custodians of the land, seas, and rivers of Australia. We pay our respects to Aboriginal and Torres Strait Islander Elders past, present, and emerging, and aspire to learn from traditional knowledge and customs so that, together, we can protect our environment and cultural heritage through both Western and First Laws. In providing submissions, we pay our respects to First Nations across Australia and recognise that their Countries were never ceded and express our remorse for the deep suffering that has been endured by the First Nations of this country since colonization.

## Executive Summary

Environmental Defenders Office (**EDO**) welcomes the opportunity to provide feedback to NOPSEMA on its guideline on “Consultation in the course of preparing an environment plan” (**Guideline**),<sup>1</sup> pursuant to the *Offshore Petroleum and Greenhouse Gas Storage (Environment Regulations)* (Cth) (**Environment Regulations**).

### Summary of Recommendations:

1. NOPSEMA should strengthen the Guideline to clearly specify that a titleholder bears the onus to proactively identify the full range of relevant persons, and to state that, in particular circumstances, the range of relevant persons may, in addition to First Nations people and communities, include environmental organisations whose functions, interests or activities may be affected.
2. The Guideline should clarify that consultations may be an iterative process and that relevant persons should be afforded multiple opportunities to provide input, both in relation to co-designing the consultation process and in the provision of information.
3. The Guideline should specify that titleholders are expected to provide relevant persons with the resources and support to effectively participate in consultation.
4. The Guideline should specify that when consulting with First Nations Peoples, regard should be had to the risks and impacts a proposed activity may have on spiritual and cultural connections. Relevantly qualified experts may need to be engaged to appropriately capture this information.
5. The Guideline should include that titleholders should have regard to the impacts and risks that a proposed activity may have on submerged cultural heritage, and procure and provide information as part of the consultation process accordingly, which may require a community-led cultural heritage assessment.
6. The Guideline should emphasise the importance of upfront and honest disclosure by titleholders and specify that titleholders must provide frank and comprehensive information about the potential impacts and risks of a proposal on the functions, interests and activities of each relevant person.
7. The Guideline should include that where all or most of the consultation process is being conducted orally, titleholders be required to provide a full and unedited audio or audio-visual record.
8. The Guideline should include that when consulting with First Nations people and communities, the consultation process should be culturally safe and appropriate and that titleholders, at a minimum, should:

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<sup>1</sup> NOPSEMA, *Consultation in the Course of Preparing an Environment Plan*, Doc. No. N-04750-GL2086 A900179, 15 Dec. 2022,

<https://www.nopsema.gov.au/sites/default/files/documents/Consultation%20in%20the%20course%20of%20preparing%20an%20Environment%20Plan%20guideline.pdf> (**2022 Consultation Guideline**).

- a. Ensure cultural customs and protocols are followed, including in relation to the observance of Sorry Business, gender restricted information, the collective nature of storytelling, any issues that can't be discussed in open forums and similar customs;
  - b. Identify and adhere to any established protocols for consultation;
  - c. Ensure that, where needed, interpreters are made available;
  - d. Ensure that all members of a relevant community have adequate opportunity to participate in the process
9. The Guideline should include that when consulting with First Nations Peoples, titleholders may be required to seek out appropriate experts such as community groups, community leaders and other relevantly qualified experts.
10. The Guideline should provide that First Nations people should be properly resourced to participate in the consultation process, including remuneration for their time and expertise.
11. The Guideline should clarify that a 'relevant person' under reg 11A(1)(d) may include a person located beyond Australian jurisdiction.

## Introduction

The EDO acted for Mr Dennis Murphy Tipakalippa in proceedings in the Federal Court and Full Federal Court.<sup>2</sup>

As you would be aware, the EDO made a preliminary submission to NOPSEMA on 13 December 2022 outlining key principles relevant to consulting with First Nations Peoples. We then met with NOPSEMA representatives, together with Tiwi representative Antonia Bourke, the same day to discuss our preliminary submission in more detail.

This submission builds on our preliminary submissions and our meeting with NOPSEMA. Once again, we note that we make this submission as the EDO and do not make this submission on behalf of any client or community.

We expect that NOPSEMA has worked with First Nations people and organisations to ensure that appropriate input on the consultation guideline has been received and taken into account.

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<sup>2</sup> *Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority (No 2)* [2022] FCA 112; *Santos NA Barossa Pty Ltd (Santos) v Tipakalippa* [2022] FCAFC 193.

## Support for the Guideline

We wish to acknowledge that, on the whole, in our view the Guideline faithfully and practically gives effect to the Full Federal Court's judgement in *Tipakalippa*.

We commend the Guideline and acknowledge NOPSEMA's efforts to ensure that the judgement is operationalised in an effective and appropriate manner.

We consider that the matters and recommendations raised below will clarify and enhance aspects of the Guideline. This submission is divided into two sections:

- a. the first section deals with Australian-based relevant persons and builds on the content in the Guideline;
- b. the second section deals with the application of the Guideline to relevant persons outside Australia.

## Section 1: Consultation with Australian-based relevant persons

### Identification of relevant persons

As is plain in the Full Court's judgement, it is critical for a titleholder to identify *each* relevant person. These may include potentially affected First Nations people and communities. However, the relevant persons for a particular activity are also likely to encompass a range of other people and groups, including environmental organisations whose interests, functions or activities may be affected.

We note that titleholders regularly specify that environmental organisations are relevant persons in Environment Plans submitted to NOPSEMA. This reflects the fact that the work of certain environmental groups is directed toward the preservation of marine environments in which petroleum activities are proposed. Such work may include, without limitation, research and conservation activities in furtherance of the groups' objects and functions. However, in our experience, a titleholder is more likely to recognise an environmental group as a relevant person where the environmental group has made pre-emptive representations to the titleholder specifying how its interests, functions and activities may be affected.

It is important that the Guideline clearly states that the onus is on the titleholder to take steps to identify the full range of relevant persons and that this process involves identifying relevant persons who may not be aware of the proposal and have therefore not taken proactive steps to identify themselves to the titleholder – whether they may be First Nations peoples or communities, environmental groups, or other relevant persons.

**Recommendation 1:** NOPSEMA should strengthen the Guideline to clearly specify that a titleholder bears the onus to proactively identify the full range of relevant persons, and to state that, in particular circumstances, the range of relevant persons may, in addition to First Nations people and communities, include environmental organisations whose functions, interests or activities may be affected.

## Reasonable time and process

As the Guideline states in its scope, ‘titleholders must engage directly with persons and organisations in designing their consultation processes, which will differ in each circumstance, to ensure that they meet the purpose intended in the Environment Regulations including by...adapting those processes to the nature of the authority, persons and organisations to be consulted.’

It is important that an iterative process be undertaken with relevant persons that arrives at consensus about the way the consultation will be conducted. Whilst co-designing the consultation process may take time and effort, it is critical to ensuring that each relevant person is able to engage in meaningful two-way consultation.

Good faith consultation is not a single event, but an ongoing process. As such, when face to face meetings are conducted, relevant persons should not be expected to provide input or feedback on the spot. Given the technical complexity of most Environment Plans, it is likely that relevant persons would require time to process information that has been provided to formulate a response. As such, titleholders should plan for as many face to face meetings as necessary to ensure sufficient time and opportunity is provided to relevant persons to meaningfully engage in the process.

By way of example, the NT EPA states in its guidance to proponents about environmental impact assessment that it is important that “participants [be allowed to] make well-informed decisions in a culturally-appropriate manner that is free from coercion and sufficiently in advance of approvals or commencement.”<sup>3</sup>

Relevant persons may wish to obtain input or reports from independent experts to enable them to provide a meaningful response to highly technical information. If this is the case, then proponents must factor such requests into the reasonable period of time provided to relevant persons to prepare a response.

Where necessary, the titleholder should provide relevant persons with resources and support to participate in consultation. This may include, for example, covering the costs of travel to attend face to face meetings, making arrangements for virtual participation where this is requested by relevant persons, providing expert or technical support or providing access to data to enable relevant persons to engage independent experts.

**Recommendation 2:** The Guideline should clarify that consultations may be an iterative process and that relevant persons should be afforded multiple opportunities to provide input, both in relation to co-designing the consultation process and in the provision of information.

**Recommendation 3:** The Guideline should specify that titleholders are expected to provide relevant persons with the resources and support to effectively participate in consultation.

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<sup>3</sup> Northern Territory Environment Protection Authority, *Environmental impact assessment: Guidance for proponents* at 14 (6 Jan. 2021), [https://ntepa.nt.gov.au/\\_data/assets/pdf\\_file/0005/884696/guidance-proponents-stakeholder-engagement-and-consultation.pdf](https://ntepa.nt.gov.au/_data/assets/pdf_file/0005/884696/guidance-proponents-stakeholder-engagement-and-consultation.pdf).

## Sufficient information to make an informed decision

Titleholders must consider the range of potential impacts and risks of a proposal in the broadest sense possible. Importantly, when consulting with First Nations people and communities, titleholders must have regard to the potential spiritual and cultural impacts and risks. First Nations Peoples are the foremost experts in relation to matters of spiritual and cultural significance. Appropriately capturing that expertise may require proponents to engage relevant experts to work with people and communities in a culturally appropriate and effective manner.

Further, as noted in our submission of 13 December 2022, in the context of offshore extractive industries, it is possible that offshore activities can impact historic properties connected to First Nations Peoples' interests that were once part of a terrestrial landscape that have been inundated by global sea level rise during the Late Pleistocene and Holocene.<sup>4</sup> Accordingly, impacts on First Nations submerged sacred sites or other subsea resources must be considered. This may require a robust and community-led submerged cultural heritage assessment process to ensure that such impacts are properly assessed by the titleholder ahead of consultation.

If titleholders minimise, omit or obfuscate the true risks and impacts of a proposal, this will undermine the consultation process and likely lead to a breakdown of trust and participation by relevant persons in the consultation process. As such, it is critical that titleholders provide frank and comprehensive information about the potential impacts and risks of a proposal on the functions, interests and activities of each relevant person.

**Recommendation 4:** The Guideline should specify that when consulting with First Nations Peoples, regard should be had to the risks and impacts a proposed activity may have on spiritual and cultural connections. Relevantly qualified experts may need to be engaged to appropriately capture this information.

**Recommendation 5:** The Guideline should include that titleholders should have regard to the impacts and risks that a proposed activity may have on submerged cultural heritage, and procure and provide information as part of the consultation process accordingly, which may require a community-led cultural heritage assessment.

**Recommendation 6:** The Guideline should emphasise the importance of upfront and honest disclosure by titleholders and specify that titleholders must provide frank and comprehensive information about the potential impacts and risks of a proposal on the functions, interests and activities of each relevant person.

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<sup>4</sup> US Department of the Interior, Bureau of Ocean Energy Management Office of Renewable Energy Programs, Developing Protocols for Reconstructing Submerged Paleocultural Landscapes and Identifying Ancient Native American Archaeological Sites in Submerged Environments: Geoarchaeological Modeling (March 2020) (Geoarchaeological Modeling Report), [https://espis.boem.gov/final%20reports/BOEM\\_2020-024.pdf](https://espis.boem.gov/final%20reports/BOEM_2020-024.pdf).

## Recording of meetings

It is critical that NOPSEMA have access to a full, unedited record of consultation, whether the process has occurred in written or oral form. Where consultation takes place either wholly or partly by way of meetings, it is important that what is said by both the proponent and the relevant persons be captured in full. Otherwise, there are no safe-guards in place to ensure that proponents do not make statements which are misleading, downplay risks or omit important information to elicit favourable responses.

While we note that titleholders are currently required to provide full text records of consultations, audio-visual recordings provide a more comprehensive and accurate account of events. As such, we recommend that in circumstances where all or most of the consultation process is being conducted orally, titleholders be required to provide a full and unedited audio or audio-visual record to ensure the integrity of the consultation process and NOPSEMA's capacity to properly assess the consultation process. We note that regs 11A and 16(b) of the Environment Regulations require the provision of both a summary and the full text of responses by a relevant person. Consistent with these requirements, it is important that a lesser standard is not adopted with respect to consultations that are conducted orally.

**Recommendation 7:** The Guideline should include that where all or most of the consultation process is being conducted orally, titleholders be required to provide a full and unedited audio or audio-visual record.

## Cultural awareness and protocol in consultation with First Nations people and communities

Respectful, meaningful and two-way consultation requires a high degree of cultural awareness, understanding of cultural protocol and capacity to conduct consultation in a culturally appropriate and effective manner. Whilst this will be different between communities, it is important that proponents, at a minimum, engage with First Nations people and communities by doing the following:

1. Ensure cultural customs and protocols are followed, including in relation to the observance of Sorry Business, gender restricted information, the collective nature of storytelling, any issues that can't be discussed in open forums and similar customs;
2. Identify and adhere to any established protocols for consultation;
3. Ensure that, where needed, interpreters are made available;
4. Ensure that all members of a relevant community have adequate opportunity to participate in the process

It is likely that a proponent will need to seek out appropriate expertise, whether through community organisations, community leaders or other relevantly qualified experts.

It is critical that people and communities be appropriately resourced to participate in consultation processes, including remuneration for their time and expertise.



**Recommendation 8:** The Guideline should include that when consulting with First Nations people and communities, the consultation process should be culturally safe and appropriate and that titleholders, at a minimum, should:

1. Ensure cultural customs and protocols are followed, including in relation to the observance of Sorry Business, gender restricted information, the collective nature of storytelling, any issues that can't be discussed in open forums and similar customs;
2. Identify and adhere to any established protocols for consultation;
3. Ensure that, where needed, interpreters are made available;
4. Ensure that all members of a relevant community have adequate opportunity to participate in the process

**Recommendation 9:** The Guideline should include that when consulting with First Nations Peoples, titleholders may be required to seek out appropriate experts such as community groups, community leaders and other relevantly qualified experts.

**Recommendation 10:** The Guideline should provide that First Nations people should be properly resourced to participate in the consultation process, including remuneration for their time and expertise.

## Section 2: Relevant persons outside Australian jurisdiction

We submit that NOPSEMA should update the Guideline to clarify that, in consulting a “relevant person” pursuant to reg 11A(1)(d) of the Environment Regulations, the titleholder must consult with all relevant persons, regardless of whether they or their functions, interests, or activities lie within or beyond Australia’s jurisdiction. As explained below, this interpretation of the regulations is consistent with Australian case law, existing NOPSEMA policies and Australia’s international obligations.

**Recommendation 11:** The Guideline should clarify that a ‘relevant person’ under reg 11A(1)(d) may include a person located beyond Australian jurisdiction.

### Decision of the Full Federal Court in *Tipakalippa*

Updating the Guideline to recognise that relevant persons may be located beyond Australian jurisdiction is consistent with the Full Federal Court’s broad interpretation of the terms “relevant person” and “environment” under the Environment Regulations.

1. First, in the *Tipakalippa* case, the Full Court found that the term ‘functions, interests or activities’ “should be broadly construed.”<sup>5</sup> The Full Court reasoned that this approach best promotes the purpose of the Regulations, which is to ensure ecologically sustainable development, and to reduce the environmental impacts and risks of the activity to “as low as reasonably practicable” and to an acceptable level.<sup>6</sup> The Full Court stressed that a broad definition is also needed to ensure that titleholders do not exclude from consultation those who “might self-evidently be affected by its proposed offshore activity.”<sup>7</sup>
2. Second, the Full Court also clarified that “environmental risks and impacts” should account for the “expansive definition” of the term “environment,” as set out in reg 4 of the Environment Regulations.<sup>8</sup> The Full Court concluded that “the range of matters falling for consideration [under reg 11A] is broad and diverse, including the social and cultural features of people and communities within the relevant ecosystem,”<sup>9</sup> and noted that the titleholder must consider effects “on people and communities, on equitable concerns (including the principle of inter-generational equity) as well as on the natural world.”<sup>10</sup>

Considering these broad definitions together with the fact that offshore gas projects often have potential impacts beyond Australian waters, NOPSEMA should recognise that relevant persons may be located beyond Australia’s jurisdiction.

### Other relevant case law

Updating the Guideline to recognise that relevant persons may be located beyond Australian jurisdiction is also consistent with Australian case law on the transboundary impacts of offshore activities. Courts have previously recognised that offshore activities in Australian waters may have transboundary impacts and that titleholders could owe legal duties to persons affected by impacts beyond Australian territory. For example, in the *Tipakalippa* case at first instance, the Federal Court emphasised that the titleholder had recognised the presence of Indonesian traditional fishers within the environment that may be affected.<sup>11</sup> The Court then raised the question whether “Indonesian fishing activities” were considered in defining the relevant persons to be consulted.<sup>12</sup> In its reasoning, the Court assumed that the interpretation of relevant persons under reg 11A(1)(d) could include persons with affected functions, interests or activities beyond Australia’s jurisdiction.

More broadly, there are cases involving transboundary harm where it is recognised that offshore gas companies operating within Australian jurisdiction can owe duties to persons outside Australia

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<sup>5</sup> *Santos v Tipakalippa* [2022] FCAFC 193, para. 51.

<sup>6</sup> *Santos v Tipakalippa* [2022] FCAFC 193, para. 51.

<sup>7</sup> *Santos v Tipakalippa* [2022] FCAFC 193, para. 52.

<sup>8</sup> *Santos v Tipakalippa* [2022] FCAFC 193, para. 54.

<sup>9</sup> *Santos v Tipakalippa* [2022] FCAFC 193, para. 55.

<sup>10</sup> *Santos v Tipakalippa* [2022] FCAFC 193, para. 52.

<sup>11</sup> *Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority (No 2)* [2022] FCA 1121, para. 114(v).

<sup>12</sup> *Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority (No 2)* [2022] FCA 1121, para. 154.

who may be impacted by the companies' operations. In the case concerning the Montara oil spill,<sup>13</sup> the Federal Court found that the company breached its duty of care to Indonesian fishers by negligently failing to seal a well and causing reasonably foreseeable oil spill harms to those fishers. The fact that the Indonesian fishers resided outside Australia and that the project impacts extended beyond Australian waters did not preclude the company from owing a duty of care towards those individuals.<sup>14</sup> Even though the company's oil spill modelling concluded that there was no risk to Indonesian shorelines, the court held that the company's failure to model the actual risk posed by its negligent conduct did not mean that this risk was not "reasonably foreseeable" and found that the company was liable for harm to the Indonesian claimants.<sup>15</sup>

Considering the way in which Australian courts have recognised the need to consider impacts to those affected by transboundary harm, NOPSEMA should update its guideline to recognise that relevant persons may be located beyond Australia's jurisdiction.

### Consistency with existing guidelines

Recognising that relevant persons may be located beyond Australian jurisdiction is consistent with NOPSEMA's other existing guidance on consultation. NOPSEMA has recently recognised that where an offshore activity may have an "impact on waters outside of Australia's maritime jurisdiction" or may impact "foreign individuals or governments," a titleholder may need to consult with the Department of Foreign Affairs and Trade and, most relevantly, the foreign individuals or entities affected.<sup>16</sup>

Additionally, NOPSEMA requires "effective consultation."<sup>17</sup> For consultation to be effective, it must be conducted with all relevant persons who may be affected by a proposed activity.<sup>18</sup> As noted above, in some circumstances, affected individuals may be located beyond Australia's jurisdiction, and in those cases they must be consulted.

### Australia's international obligations

The consultation requirements under the Environment Regulations should be read consistently with Australia's international obligations to avoid transboundary harm.

Under international law, Australia has obligations to prevent, reduce, and control transboundary harm, including pollution from marine activities within its jurisdiction.<sup>19</sup> Due diligence requires

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<sup>13</sup> *Sanda v PTTEP Australasia (Ashmore Cartier) Pty Ltd (No 7)* [2021] FCA 237.

<sup>14</sup> *Sanda v PTTEP Australasia (Ashmore Cartier) Pty Ltd (No 7)* [2021] FCA 237, para. 1040.

<sup>15</sup> *Sanda v PTTEP Australasia (Ashmore Cartier) Pty Ltd (No 7)* [2021] FCA 237, para. 1039-1040, 1050-51.

<sup>16</sup> NOPSEMA, *Consultation with Commonwealth Agencies with Responsibilities in the Marine Area*, Document No. N-04750-GL1887 A705589, p. 17-18, 20 Jan. 2023,

<https://www.nopsema.gov.au/sites/default/files/documents/Consultation%20with%20agencies%20with%20responsibilities%20in%20the%20Commonwealth%20marine%20area.pdf> (2023 Consultation Guideline).

<sup>17</sup> NOPSEMA, *Environment Plan Decision Making*, Guideline No. N-04750-GL1721 A524696, p. 19, 10 Jun. 2021, <https://www.nopsema.gov.au/sites/default/files/documents/2021-06/A524696.pdf>.

<sup>18</sup> See, e.g., *Santos v Tipakalippa* [2022] FCAFC 193, para. 52.

<sup>19</sup> See, e.g., United Nations Convention on the Law of the Sea (1982) 1833 UNTS 397, entered into force on 1 Nov. 1994, Article 194 (States "shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does

notifying other States of potential harm,<sup>20</sup> consulting with those States,<sup>21</sup> and reviewing environmental impact studies that, among other things, take into account the harm to those affected by transboundary harms.<sup>22</sup>

Consulting with foreign individuals who may be affected by a proposal would better inform titleholders and NOPSEMA of potential transboundary harms.

Further, Australia has an obligation under international law to consult all First Nations Peoples who may be affected by an activity.<sup>23</sup> This obligation is particularly important in the context of extractive industries, and may extend to coastal or island communities affected by offshore activities, regardless of where they reside.<sup>24</sup>

NOPSEMA should clarify the requirement that a titleholder must consult with all affected First Nations Peoples, including those outside Australia, in order to ensure that Australia meets its international obligations on First Nations consultation.

Finally, recognising that relevant persons may be located beyond Australian jurisdiction is consistent with setting a workable standard for consultation. Titleholders have previously objected to “unworkable” definitions of relevant persons that would result in an overwhelming “magnitude of the classes of persons who might need to be individually consulted.”<sup>25</sup> The Federal

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not spread beyond the areas where they exercise sovereign rights in accordance with this Convention”); Rio Declaration on Environment and Development (1992) United Nations Conference on Environment and Development, Río de Janeiro, entered into force on 14 Jun. 1992, A/CONF.151/26/Rev.1 (Vol. 1) (**Rio Declaration**), Principle 2 (states have the “responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction”); United Nations Framework Convention on Climate Change, entered into force on 21 Mar. 1994, Preamble (recalling that States have “the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of...areas beyond the limits of national jurisdiction”).

<sup>20</sup> Rio Declaration, Principle 19 (States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith).

<sup>21</sup> Rio Declaration, Principle 19; See also, ICJ, *Case concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, Judgment, para. 112., 25 Sept. 1997.

<sup>22</sup> Inter-Am. Ct. H.R., Advisory Opinion OC-23/17, Human Rights and the Environment, para. 142, 145-169, 15 Nov. 2017.

<sup>23</sup> Art. 32(2), UN Declaration on the Rights of Indigenous Peoples (**UNDRIP**) (adopted by Australia on 3 Apr. 2009) (“States shall consult and cooperate in good faith with the indigenous peoples concerned”); *id.* at Art. 36 (international borders shall not limit Indigenous peoples’ activities or relationships). UN Human Rights Council, “Free, prior and informed consent: a human rights-based approach, Study of the Expert Mechanism on the Rights of Indigenous Peoples,” A/HRC/39/62, Annex para. 11, 10 Aug. 2018 (“States should engage broadly with all potentially impacted Indigenous peoples”); Office of the High Commissioner for Human Rights, “The Corporate Responsibility to Respect Human Rights,” HR/PUB/12/02, p. 8, 2012 (defining a stakeholder of a project as “any individual who may affect or be affected by an organization’s activities” and an affected stakeholder as an “individual whose human rights have been affected by an enterprise’s operations, products or services”).

<sup>24</sup> UN Human Rights Commission, A/HRC/39/62, *supra* n. 20 at para. 32 (“Indigenous peoples’ consent may also be required when extractive activities otherwise affect indigenous peoples (outside their territories), depending upon the nature of and potential impacts of the proposed activities on their rights”).

<sup>25</sup> *Santos v Tipakalippa* [2022] FCAFC 193, para. 86.

Court has addressed this concern by noting that it saw “no particular difficulty with the proposition that the First Nations peoples who have a traditional connection to the sea, and to the marine resources it holds... are reasonably ascertainable.”<sup>26</sup> By extension, where persons beyond Australia’s jurisdiction, whose functions, interests or activities may be affected, are reasonably ascertainable, those persons must be consulted in accordance with existing law and guidance.<sup>27</sup>

## Conclusion

*Thank you for the opportunity to make this submission.  
Please do not hesitate to contact our office should you have further enquiries.*

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<sup>26</sup> *Santos v Tipakalippa* [2022] FCAFC 193, para. 90.

<sup>27</sup> See, e.g., NOPSEMA, 2023 Consultation Guideline, p. 17-18.



**EDO Briefing Paper: Principles to inform NOPSEMA's approach to operationalising the  
*Tipakalippa* Appeal Judgment**

13 December 2022

**Background**

1. We have been advised that NOPSEMA intends to imminently release an interim guideline on the consultation requirements under Div 2.2A of Part 2 of the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009 (OPGGs Regulations)* in light of the Full Court's decision in *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193 (**Tipakalippa Appeal Judgment**).
2. We set out briefly below, a number of key matters in relation to the development of the new guidance, which we intend to discuss further with you when we meet, in the following sections:
  - a. Process: importance of engagement with First Nations Peoples
  - b. Content: Australia's obligations under international law
  - c. Underwater/submerged cultural heritage
3. It is important to highlight that this briefing has been prepared at short notice. We were first advised of NOPSEMA's intention to develop a guideline on 8 December, when a third party provided us with a copy of an invitation they had received to a stakeholder briefing to be held by NOPSEMA on 15 December 2022. We have requested in correspondence to be provided with a copy of the draft guidance, but that request has been refused. It is not clear when it is intended that the guideline will be released and when it will enter into force. We reiterate concerns previously expressed in correspondence on 7, 8 and 9 December about the process to date in developing the guideline and that First Nations People would have a reasonable expectation to be heard about the guidance before it is released. Notwithstanding that NOPSEMA has indicated that the guideline to be released shortly will be an interim guideline and that further consultation will be undertaken by NOPSEMA, the interim guideline will apply for a period of at least 3 months and has the capacity to significantly impact on the conduct of consultation with affected individuals and communities in that period.
4. At the outset it is important to acknowledge that we are in no position to give a view on behalf of First Nations Peoples about the appropriate way for these communities to be consulted. Such expertise can only be obtained through consultation with First Nations leaders, organisations and affected communities (including, but certainly not limited to, that of Mr Tipakalippa). This is particularly the case where, as the *Tipakalippa* Appeal Judgment makes clear, consultation must be appropriate and adapted to the nature of the interests held by the relevant person. There is likely to be significant diversity in the nature of the relevant interests and who they are held by across potentially affected First Nations Peoples, underscoring the importance of consulting widely before formulating guidance on consultation.

5. Further, we trust that you have given deep and careful consideration to the Tipakalippa Appeal Judgment and so have not directly addressed it in this briefing note. In the event that you would be assisted by our views, we would be happy to provide them.
6. In this context, the focus of this briefing paper is to set out principles relevant to consulting with First Nations Peoples that stem from Australia's international legal obligations and from recent research concerning underwater cultural heritage. We consider that this is where the Environmental Defenders Office can best add value to NOPSEMA's consideration of how to operationalise the Tipakalippa Appeal Judgment in the present circumstances.

**Process: importance of engagement with First Nations Peoples**

7. We first turn to the appropriate process for developing the guideline. Critically, NOPSEMA must engage First Nations Peoples, communities and organisations in any guidance developed by NOPSEMA about consultation obligations with respect to First Nations Peoples. The process for developing this guidance will be integral to informing the quality of the guidance and the acceptance of the guidance by First Nations Peoples.
8. the *Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* by Professor Graeme Samuel AC (**The Samuel Review**) highlights the importance of the Engagement and participation of First Nations Peoples in decision-making concerning the environment and cultural heritage. Relevantly, it highlights that (with respect to decision-making under the EPBC Act, which is comparable to the present circumstances):<sup>1</sup>
  - a. Indigenous Australians should be involved in the design, implementation, monitoring and reporting aspects of an activity;
  - b. Indigenous Australians should be adequately supported and resourced via their representative organisation to engage in participation;
  - c. Indigenous Australians have the right to initiate their engagement and participation in decision-making;
  - d. The engagement and participation of Indigenous Australians should commence early;
  - e. Enabling engagement and participation of Indigenous Australians in decision-making should be conducted in a way that demonstrates cultural awareness and competency;
  - f. Consideration should be given to the importance of developing respectful and meaningful relations with Indigenous Australians to provide opportunities for Indigenous Australians to be fully involved in the protection and management of the environment.
9. Whenever a government agency establishes a method and process for consultation, it should do so in consensus with potentially affected First Nations Peoples.<sup>2</sup> This ensures First Nations

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<sup>1</sup> See appendix B2: Recommended National Environmental Standard for Indigenous Engagement and Participation in Decision-making (October 2020): <https://epbactreview.environment.gov.au/resources/final-report/appendix-b2-indigenous>.

<sup>2</sup> UN Human Rights Commission, A/HRC/39/62, supra n. 2, para. 20(d); UN Human Rights Commission, A/HRC/12/34, supra n. 32, para. 50-51, 68; AHRC, "We have a right to participate," supra n. 49, p. 16 (Appendix 1, principle 2); Australian Heritage Commission, "Ask First: A guide to respecting Indigenous heritage places and

Peoples can contribute to defining methods, timelines, locations and evaluations of the consultation process.<sup>3</sup> The UN Expert Mechanism on the Rights of Indigenous Peoples has noted that “the extent to which Indigenous peoples were involved in the design of the practice and their agreement to it” is “[t]he most significant indicator of good practice.”<sup>4</sup> In ensuring the consultation requirements are properly operationalised, NOPSEMA should engage with First Nations Peoples, particularly those in coastal and island communities, when developing guidelines on consultation.

### **Content: Australia’s obligations under international law**

10. The development of new guidance on consultation, should be informed by Australia’s international legal obligations, including in relation to consultation with First Nations Peoples.
11. United Nations (**UN**) bodies have held that consultation must occur on “any project affecting” Indigenous people’s interests,<sup>5</sup> even if those interests are not legally recognised.<sup>6</sup> Further, consultation with First Nations Peoples is not limited only to activities taking place on Indigenous traditional lands considering that a project may affect lands, waters, and resources (including use and cultural value) beyond its immediate footprint.<sup>7</sup> The UN Permanent Forum on Indigenous Issues has emphasised that extraction of seabed resources is a type of activity that requires consent of affected Indigenous people.<sup>8</sup>
12. The Australian Government has ratified several binding international treaties that recognise the right to participation in decision-making and underlie the State’s duty to consult First Nations Peoples in good faith about matters that affect them.<sup>9</sup> The Government has also adopted the

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values,” p. 10 (2002)

[https://www.wipo.int/export/sites/www/tk/en/databases/creative\\_heritage/docs/ask\\_first.pdf](https://www.wipo.int/export/sites/www/tk/en/databases/creative_heritage/docs/ask_first.pdf) (recommending involving the community in setting terms of reference and selecting any consultants).

<sup>3</sup> UN Human Rights Commission, A/HRC/39/62, supra n. 2, para. 20(c)-(e).

<sup>4</sup> UN Human Rights Council, “Final report of the study on indigenous peoples and the right to participate in decision-making,” A/HRC/18/42, para. 13 (17 Aug. 2011).

<sup>5</sup> Art. 32(2), UNDRIP; UN Human Rights Council, A/HRC/39/62, supra n. 2, Annex para. 11 (“States should engage broadly with all potentially impacted Indigenous peoples”).

<sup>6</sup> UN Human Rights Commission, Special Rapporteur James Anaya, “Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights Including the Right to Development: Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People,” A/HRC/12/34, para. 44 15 (Jul. 2009) (“The duty to consult is not limited to circumstances in which a proposed measure will or may affect an already recognized right or legal entitlement”).

<sup>7</sup> UN Human Rights Commission, A/HRC/39/62, supra n. 2, para. 32 (noting, in the context of extractive activities, that consent may be required for a project “outside their territories” depending on the project’s impacts).

<sup>8</sup> UN Permanent Forum on Indigenous Issues, “Study on the relationship between indigenous peoples and the Pacific Ocean” E/C.19/2016/3, para. 8 (19 February 2016) (“any activity that takes place within indigenous peoples’ traditionally owned or otherwise occupied and used lands, such as seabed mining, requires their free, prior and informed consent (articles 19 and 32)”) (citing UNDRIP).

<sup>9</sup> See, e.g., Art. 25(a), International Covenant on Civil and Political Rights (ICCPR), 999 UNTS 171 (entered into force 23 Mar. 1976) (ratified by Australia 13 Aug. 1980) (right to participate in the conduct of public affairs); Art. 19(2), ICCPR (right to freedom of expression); Art. 5(c), International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), 660 UNTS 195 (entered into force 4 Jan. 1969) (ratified by Australia 30 Sep. 1975) (right to



UN Declaration on the Rights of Indigenous Peoples (**UNDRIP**), which clearly sets out the duty to consult First Nations Peoples “in order to obtain their free, prior and informed consent (**FPIC**).”<sup>10</sup> UNDRIP enshrines the fundamental rights of Indigenous peoples.<sup>11</sup> The importance of UNDRIP and FPIC were recently highlighted in the Samuel Review. Any NOPSEMA guidance on consultation with First Nations Peoples must take into account its central principles.

13. Although the NOPSEMA regulations do not provide for a consent process for First Nations Peoples, the FPIC principles in UNDRIP provide clear and relevant guidance to how the consultation obligations in OPGGS Regulations can be interpreted consistently with Australia’s international legal obligations.
14. FPIC is grounded in the fundamental rights to self-determination and to be free from racial discrimination guaranteed by at least three treaties that Australia is a party to: the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the International Convention on the Elimination of All Forms of Racial Discrimination.<sup>12</sup>
15. Obtaining FPIC is an ongoing process by which decision-makers seek input through the decision-making process.<sup>13</sup> Through FPIC, First Nations Peoples should be able to “influence the outcome of decision-making processes affecting them.”<sup>14</sup> This means that consultations must have the ability to alter the decision at issue or to develop accommodations of the interests at stake.

### **Underwater cultural heritage**

16. Informed consultation requires disclosure of the full range of a projects’ impacts. For Indigenous peoples, “the scope of their rights to their lands, territories and oceans is not limited

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be free from racial discrimination in taking part in the Government and in public affairs). *See also* UN Human Rights Commission, A/HRC/12/34, supra n. 32, para. 38-42.

<sup>10</sup> Art. 32(2), UNDRIP (adopted by Australia on 3 Apr. 2009) (“States shall consult and cooperate in good faith with the [I]ndigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories[ ] and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.”). *See also* Australian Government, Department of the Environment, “Engage early: Guidance for proponents on best practice Indigenous engagement for environmental assessments under the Environmental Protection and Biodiversity Conservation Act 1999,” p. 3 (2016) (The Department of Environment “recognise[s] the importance of consulting with Indigenous peoples on decisions affecting them and that respect for Indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment”).

<sup>11</sup> UN Human Rights Council, “Situation of human rights and fundamental freedoms of Indigenous peoples,” A/65/264, para. 62-63 (9 Aug. 2010); *See also*, A/HRC/12/34, supra n. 32, para. 38.

<sup>12</sup> UN Human Rights Commission, A/HRC/39/62, supra n. 2, para. 3.

<sup>13</sup> *See, e.g.*, Committee on the Elimination of Racial Discrimination, “Concluding Observations of the Committee on the Elimination of Racial Discrimination: Mexico,” CERD/C/MEX/CO/16-17, para. 16-17 (4 Apr. 2012) (“effective” consultations must be carried out “at each stage of the process”).

<sup>14</sup> UN Human Rights Commission, A/HRC/39/62, supra n. 2, para. 15.

to the orthodox perception of a sea boundary but extends to the seabed.”<sup>15</sup> In the context of offshore extractive industries, it is possible that offshore activities can impact historic properties connected to Indigenous peoples’ interests that were once part of a terrestrial landscape that have been inundated by global sea level rise during the Late Pleistocene and Holocene.<sup>16</sup> Accordingly, impacts on Indigenous peoples’ submerged sacred sites or other subsea resources should be considered.

17. Research indicates that the scale of underwater cultural heritage of the coast of Australia is vast, and also that Australia has fallen behind international best practice in locating, recording and protecting submerged Indigenous cultural places.<sup>17</sup> In northern Australia specifically, there is evidence that submerged archaeological landscapes spanning significant geographic areas exist off the coast, and that Aboriginal people continue to have cultural relationships to this “underwater country”.<sup>18</sup> Recent studies have concluded that off the coast of the Northern Territory is an area that has clear potential for further discovery of submerged cultural heritage.<sup>19</sup>
18. However, with the exception of this preliminary study of the Northern Territory study there are no regional Australian baseline studies of submerged archaeological landscapes. This creates a ‘blindspot’ that has been identified by researchers who have highlighted the need for further studies to address a legacy of under-representation in research in order to inform a wide range of stakeholders, including Traditional Owners, policy makers, proponents and regulators.<sup>20</sup>
19. In the *Tipakalippa* proceeding for example, Tiwi witnesses submitted evidence that there are subsea sites of significant cultural importance, such as caves, that could be impacted by proposed offshore petroleum activities.<sup>21</sup> Other subsea sites potentially affected in that case included underground water systems connecting freshwater and salt water that are connected to dreaming stories and song lines.<sup>22</sup> Evidence was also given about the existence of many sacred underwater dreaming sites in the deep ocean and near islands.<sup>23</sup>

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<sup>15</sup>UN Permanent Forum on Indigenous Issues, “Study on the relationship between indigenous peoples and the Pacific Ocean,” E/C.19/2016/3, para. 7 (19 Feb. 2016), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/044/03/PDF/N1604403.pdf?OpenElement>.

<sup>16</sup> US Department of the Interior, Bureau of Ocean Energy Management Office of Renewable Energy Programs, Developing Protocols for Reconstructing Submerged Paleocultural Landscapes and Identifying Ancient Native American Archaeological Sites in Submerged Environments: Geoarchaeological Modeling (March 2020) (Geoarchaeological Modeling Report), [https://espis.boem.gov/final%20reports/BOEM\\_2020-024.pdf](https://espis.boem.gov/final%20reports/BOEM_2020-024.pdf).

<sup>17</sup> See: <https://theconversation.com/australias-coastal-waters-are-rich-in-indigenous-cultural-heritage-but-it-remains-hidden-and-under-threat-166564>.

<sup>18</sup> McCarthy, Wiseman, Woo, Steinberg, O’Leary, Wesley, Brady, Ulm and Benjamin, “Beneath the Top End: A regional assessment of submerged archeological potential in the Northern Territory, Australia”, *Australian Archeology* (2022) Vol 88(1), pp65-83.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Affidavit of Paulina Puruntatameri, para. 28 (23 June 2022), submitted in *Tipakalippa v. National Offshore Petroleum Safety and Environmental Management Authority*, VID 306 of 2022.

<sup>22</sup> *Id.* at para. 34-39.

<sup>23</sup> *Id.* at para. 43-46.

20. In the United States, though in different contexts, agencies regulating offshore energy have policies on how to identify subsea resources and consult with Indigenous people about impacts to them.<sup>24</sup> These policies recognise that the processes to identify areas of cultural sensitivity in submerged environments differ significantly from those utilised in terrestrial environments.<sup>25</sup> These policies have therefore developed guidance on best practices for modelling where subsea cultural resources may be located,<sup>26</sup> as well as guidance on how to conduct surveys for subsea sites and resources.<sup>27</sup>

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<sup>24</sup> See, e.g., US Department of the Interior, Bureau of Ocean Energy Management Office of Renewable Energy Programs, Geoarchaeological Modeling Report; US Department of the Interior, Bureau of Ocean Energy Management Office of Renewable Energy Programs, Guidelines for Providing Archaeological and Historic Property Information Pursuant to 30 CFR Part 585 (May 27, 2020) (Archaeological and Historic Property Information Report) <https://www.boem.gov/sites/default/files/documents/about-boem/Archaeology%20and%20Historic%20Property%20Guidelines.pdf>.

<sup>25</sup> US Department of the Interior, Geoarchaeological Modeling Report, p. 143-44.

<sup>26</sup> See generally, US Department of the Interior, Geoarchaeological Modeling Report.

<sup>27</sup> See generally, US Department of the Interior, Archaeological and Historic Property Information Report.