Submission: Protecting the Spirit of Sea Country Bill 2023

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ANTAR is proud to acknowledge and pay our respects to First Nations Peoples as the traditional owners of the lands on which we work across the continent.

About ANTAR

ANTAR is a national advocacy organisation working for Justice, Rights and Respect for Australia's First Nations Peoples. We do this primarily through campaigns, advocacy, and lobbying.

ANTAR is campaigning for the implementation of the Uluru Statement from the Heart, now focused on the establishment of a Makarrata Commission to oversee national agreement making and truth-telling as well as processes that promote the agency of First Nations peoples. We actively support State and Territory-based voice, treaty and truth-telling processes.

We also engage in national advocacy across various policy and social justice issues affecting Aboriginal and Torres Strait Islander communities, including cultural heritage protection; justice reinvestment, over-incarceration and raising the age of criminal responsibility; anti-racism campaigns, native title and land rights, and closing the life equality gap.

ANTAR is a foundational member of both the Close the Gap Campaign and Change the Record Campaign Steering Committee, and an organisational and executive committee member of Just Reinvest NSW. ANTAR has been working with Aboriginal and Torres Strait Islander communities, organisations and leaders on rights and reconciliation issues since 1997. ANTAR is a non-government, not-for-profit, independently funded and community-based organisation.

Introduction

Thank you for the opportunity to provide commentary on the Protecting the Spirit of Sea Country Bill 2023 which seeks to amend the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* so that First Nations people are adequately consulted on the preparation of environmental plans for proposed offshore energy projects.

As a non-partisan advocacy organisation working for justice, rights and respect for First Nations peoples, ANTAR is particularly concerned about the lack of adequate consultation with and consent from First Nations custodians, Traditional Owners and knowledge holders of the lands and waters, which are both directly and indirectly impacted by energy projects, and further by the disregard of their fundamental and inalienable human rights which are set out in the United Nations Declaration on the Rights of Indigenous Peoples.

In May 2020, much outrage both nationally and internationally followed the destruction of Juukan Gorge in which a Puutu Kunti Kurrama and Pinikura sacred rock shelter containing a cultural sequence spanning over 40,000 years was legally blasted by mining company Rio Tinto. Despite the many claims of 'never again', it would appear that basic lessons on the protection of First Nations cultural heritage, and respect for First Nations self-determination more broadly, have yet to be learned. One of the most devastating parts is this: Rio Tinto acted **within** the law.

It stands to reason that legislative change such as the Protecting the Spirit of Sea Country Bill 2023 (hereafter referred to as 'the Bill') is not only necessary, it is long overdue. The Federal government's final report from the Senate Inquiry into the Juukan Gorge tragedy, A Way Forward, clearly states that it was legislative failings that allowed the destruction of the Juukan Gorge sites and

similar sites around the nation.[1] The report goes on to say that the Juukan Gorge disaster is just one example of countless instances where cultural heritage has been the victim of the drive for development and commercial gain.[2] Where does it stop?

Context: Santos' Barossa Gas Project

One such instance provides context for the amendments put forward in this Bill, and underscores the importance of its main principles of robust consultation and cultural heritage protection.

In June 2022, Dennis Tipakalippa, senior lawman of the Munupi clan, the Traditional Owners of the northern Tiwi Islands, brought a case against energy company Santos, claiming that the company failed to consult Traditional Owners about the impact of their Barossa Gas Project. The Project, an $AU5.7 billion dollar undertaking, will extract gas from five deep-sea wells in the Bonaparte Basin, 300 kilometres north of Darwin, to be compressed into liquefied natural gas (LNG) and shipped to Asia.[3] Part of the 262 kilometre underwater gas pipeline project involves drilling and construction in Tiwi Sea Country.[4] Santos claimed it sent the Tiwi Land Council – who do not have jurisdiction over sea country – a consultation package by email on 11 June 2021 and followed up with a second email on 2 July and an unanswered phone call.[5]

In September, Federal Court Judge Mordecai Bromberg set aside approval for the drilling and gave Santos two weeks to shut down and remove its rig from the sea north of Melville Island. Judge Bromberg said the offshore oil and gas regulator NOPSEMA failed to assess whether Santos had consulted with everyone affected by the proposed drilling, as required by law.[6]

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[1] A Way Forward - Final report into the destruction of Indigenous heritage sites at Juukan Gorge, Joint Standing Committee on Northern Australia, 2021.
[2] ibid
[3] Adam Morton, 'Santos has scored a legal victory in the battle over its $5.8bn Barossa pipeline. But how significant is it?', The Guardian, 17 January 2024.
[4] For more on Tiwi Sea Country, please see 'Tiwi Islands Sea Country', Tiwi Land Council (2021).
[5] Ben Butler and Lisa Cox, 'Tiwi Islanders win court battle with Santos over drilling in traditional waters', The Guardian, 21 September 2022.
[6] ibid

In October 2023, Jikilaruwu traditional owner Simon Munkara, joined by Carol Puruntatameri of the Munupi people and Maria Tipuamantumirri of the Malawu people, launched a case in the Federal Court to stop the installation of the same underwater gas pipeline until Santos did more to protect underwater cultural heritage.

Munkara's case was based on concern that the pipeline route would affect Tiwi Islanders' spiritual connection to the area's sea country, what has been described as 'intangible' cultural heritage (including but not limited to customs, traditions, beliefs, knowledge and language), as well as pose a risk to artefacts showing human occupation on the land before sea levels rose about 20,000 years ago.

In November 2023, Munkara won an emergency injunction, temporarily stopping Santos from beginning work on the southern section of the pipeline.[7] In mid January 2024 after hearing the full case, the Federal Court revoked the injunction, allowing construction of the pipeline to resume. The pipeline is slated to pass within mere kilometres of the Tiwi Islands and could disrupt the Songline of the Crocodile Man as well as objects of archaeological significance, sacred dreaming places and other intangible cultural heritage.[8]

Following the ruling, Australian Energy Producers chief executive Samantha McCulloch stated that "vague and ambiguous regulations cannot be allowed to continue holding up important energy projects, postponing new supply that is needed to deliver energy security, emissions reduction, and substantial economic returns for Australians."[9] It is ANTAR's position that this statement encapsulates the logic of the status quo and keeps us on the path of making and remaking the same devastating mistakes: prioritising economic return over the protection of cultural heritage and the rights of First Nations peoples.

[7] Federal Court rules in favour of Tiwi traditional owner Simon Munkara, Santos Barossa pipeline blocked again, ABC News, 15 November 2023.
[8] 'Traditional Owners opposed a major gas pipeline. The federal court just gave it the green light', NITV, 15 January 2024.
[9] Santos wins legal battle against Tiwi Islands elders over $5.7b Barossa gas project's underwater pipeline, ABC News, 15 January 2024.

Current cultural heritage legislation is weak. It not only ignores the wisdom of Traditional Owners and knowledge holders – in some cases excluding them entirely from the category of 'relevant persons' to consult – but plunges us deeper into an extractive settler colonial project that speaks nice sounding words about honouring Country and recognising First Nations peoples, and in the same breath blatantly disregards their rights to any meaningful participation in and influence over the projects and processes that take place on and in their lands, waters and skies.

ANTAR wholeheartedly supports the amendments put forward in the Protecting the Spirit of Sea Country Bill 2023 which seek to legislate three main principles established in the case of *Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority (No 2)* [2022] FCA 1121 and the appeal heard by the Full Court of the Federal Court (*Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193).

These principles are:

1. Including Traditional Owners and knowledge holders in First Nations communities in the definition of 'Relevant Person';
2. The requirement for standards of consultation to be created; and
3. Ensuring that underwater and intangible cultural heritage is identified in offshore project proposals and environment plans, alongside an evaluation of the impacts and risks that this project might pose and any potential alternative options.[10]

As the explanatory memorandum to the Bill states, First Nations Peoples have cared for this country, land and sea for tens of thousands of years.[11] It is unconscionable that fossil fuel companies can submit offshore project proposals and environment plans for offshore projects without consulting Traditional Owners, and that they can proceed with offshore energy projects regardless of the risks to cultural heritage and without the free prior and informed consent of First Nations individuals and groups.

[10] Protecting the Spirit of Sea Country Bill 2023 Explanatory Memorandum, The Parliament of the Commonwealth of Australia.
[11] ibid

Summary of Recommendations

1. ANTAR fully supports the Protecting the Spirit of Sea Country Bill 2023 and the three main principles on which it is formed, and recommends these principles be legislated through the proposed amendments to the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* as well as the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009*;
2. ANTAR recommends the Australian Government ratify the United Nations Educational, Scientific and Cultural Organisation (UNESCO) Convention for the Safeguarding of the Intangible Cultural Heritage 2003 as a matter of urgent priority, and that all relevant legislation is aligned with the Convention;
3. ANTAR recommends the Australian Government endorse and implement Dhawura Ngilan: A vision for Aboriginal and Torres Strait Islander Heritage in Australia, and in particular adhere to the Best Practice Standards in Indigenous Cultural Heritage Management and Legislation as set out in Dhawura Ngilan;[12]
4. ANTAR recommends the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is upheld and incorporated into domestic federal legislation, policy and practice as a matter of urgent priority, and in particular that the right to self-determination as well as the principle of free, prior and informed consent (FPIC) are prioritised and adhered to during consultations regarding energy projects. As per recommendation 2 of the Inquiry into the application of UNDRIP in Australia, this should begin with development of a National Action Plan, co-designed and led with First Nations Peoples;[13] and

[12] Heritage Chairs of Australia and New Zealand 2020, Dhawura Ngilan: A vision for Aboriginal and Torres Strait Islander heritage in Australia, Canberra, September. CC BY 4.0.
[13] Inquiry into the application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia, Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia (November 2023): xix.

5. ANTAR urges the Australian Government to turn the proposals for stand-alone legislation to better manage and protect First Nations cultural heritage that emerge from the established partnership between the Commonwealth of Australia and the First Nations Heritage Protection Alliance into decisive action.

The Bill is organised into three main parts which will be discussed below, along with other pertinent commentary on the main principles underpinning the Bill and their connection to relevant international human rights instruments.

Part 1: Minimum requirements for consultation

New proposed subsections to substitute the repealed provision 782(2) (to be ss782(2) to (6) of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*), provide for the requirement for what constitutes consultation with relevant persons in preparing an environment plan to be prescribed in regulation.

These changes have been guided by the Tipakalippa Decision in respect of the consultation obligations that are required to be satisfied in order for environment plans to be accepted.

From the outset, reg 11A of the Regulations provides that, in relation to consultation, a relevant person is given sufficient information to allow the relevant person to make an informed assessment of possible consequences of the applicable petroleum activities on the relevant person's functions, interests or activities; and allow the relevant person a reasonable period for the consultation. It should also be noted that there is no 'one size fits all' approach to consultation. Rather, the design of the consultation process should include relevant persons who may be affected, and the process must be adapted to each relevant person and organisation.[14]

The requirements of i) sufficient information and ii) a reasonable time period for consultation are consistent with the best practice standard regarding the

[14] Ensuring effective stakeholder consultation following Santos v Tipakalippa', Corrs Chambers Westgarth, 21 December 2022.

development proposal consideration process as established by the Heritage Chairs and Officials of Australia and New Zealand. A central component of the principle of Free, Prior and Informed Consent under UNDRIP is that the affected First Nations community ('relevant person') has adequate information and adequate time to consider that information in making any decision that may affect their cultural heritage. More specifically, decisions regarding First Nations cultural heritage management cannot be left to be the last consecutive approval required in the assessment of a development proposal.[15] Instead, consideration of cultural heritage must be integrated as early as possible into development proposal assessment time frames. In reality, cultural heritage considerations with First Nations communities are often treated as the 'last impediment' to development proposal approval.

Federal Court Judges Kenny, Mortimer and Lee provided a number of statements in their reasons behind their final determination in the Tipakalippa Decision that will be useful in understanding consultation obligations as follows:

i. The titleholder will have some decisional choice in determining how to fulfil its consultation obligations;[16]
ii. The consultation undertaken by the titleholder must be genuine, and affected authorities, organisations and individuals must be given a reasonable period to identify the effect of the proposed activities on their functions, interests or activities and to respond to the titleholder with concerns;[17]
iii. The purpose of the consultation is to ensure that the titleholder has ascertained, understood and addressed all the environmental impacts and risks that might arise from its proposed activities and the titleholder should use the consultation as an opportunity to receive information that it might not otherwise have received from others affected by its proposed activities;[18]

[15] Heritage Chairs of Australia and New Zealand 2020, Dhawura Ngilan: A vision for Aboriginal and Torres Strait Islander heritage in Australia, Canberra, September. CC BY 4.0 (2020): 36.
[16] *Santos NA Barossa Pty Ltd v Tipakalippa [2022] FCAFC 193*, paragraphs 47 to 48.
[17] Ibid, paragraph 56.
[18] Ibid, paragraph 89.

iv. The consultation required will vary with the particular circumstances - consultation that is superficial or token will not be sufficient and a titleholder should not assume that sending an email with an information package attached, and following up with one or more further emails, will be sufficient[19]; and

v. Where interests are held communally, in accordance with tradition, the method of consultation will need to reasonably reflect the characteristics of the affected interests (and, in this regard, properly notified and conducted meetings by the titleholder may be sufficient).[20]

Of the many relevant takeaways from this decision, a key theme is that all types of onshore and offshore projects should review their approaches to consultation and implement a robust consultation process which should include Aboriginal and Torres Strait Islander community members. As the Federal Court, as well as others, have demonstrated their willingness to recognise First Nations Peoples' cultural connection in the absence of statutory human rights protections or other legally recognised interests, a continued lack of adequate consultation will likely result in many more litigated matters in the future such as that of *Santos NA Barossa Pty Ltd v Tipakalippa*.[21]

The new subsections to the repealed ss782 are also to include free, prior and informed consent from Traditional Owners, and the relevant Minister must consult with Traditional Owners and knowledge holders from First Nations communities about these regulations.

Free, prior and informed consent

The Bill under consideration is centred around the principle of free, prior and informed consent (FPIC) and advances the rights of Traditional Owners to be:

a) consulted with and;

[19] Ibid, paragraphs 94, 104 and 153.
[20] Ibid, paragraph 104.
[21] 'Ensuring effective stakeholder consultation following Santos v Tipakalippa', Corrs Chambers Westgarth, 21 December 2022.

b) to provide their free, prior and informed consent with regards to proposed activities on their Country.

FPIC is a key principle of the United Nations Declaration on the Rights of Indigenous People (UNDRIP), articulated in Article 19 and 32 of the Declaration.

Article 19 stipulates that 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.

Article 32(2) provides that States shall consult and cooperate in good faith with the Indigenous 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, utilisation or exploitation of mineral, water or other resources.

Article 32(2) in particular sets out the important relationship between consultation and FPIC. The FPIC principle moves beyond token consultation; that is, First Nations Peoples being sent an email by large multinational companies who have already designed plans for projects on their lands and waters, given minimal information in often technical or complicated language, with little to no time granted to secure proper consensus and consent. Instead, it explicitly establishes the right for First Nations Peoples to give or withhold consent to laws, policies, and projects which may affect them, their community or their lands and waters. This consent must be the objective of consultation and given without coercion, intimidation or manipulation.[22]

FPIC articulates the right of First Nations Peoples to be presented with a range of comprehensive information regarding the proposed activities on their lands and waters *before* they make a decision on whether to provide or withhold consent. This information must necessarily include a preliminary assessment of the likely economic, social, cultural and environmental impact of the planned

[22] 'Consultation and free, prior and informed consent', United Nations Human Rights Office of the High Commissioner, undated.

activities, including potential risks.[23] It is critical that informed consent is sought sufficiently in advance of the commencement of any plans or activities, with respect given to the requirements of First Nations consultation and consensus processes, which can differ from Western processes.[24] FPIC also gives First Nations Peoples the right to negotiate conditions under which projects, laws and measures are designed, implemented, evaluated and progress monitored.

With respect to the scope of FPIC, UNDRIP does not envision a single moment or action but a process of dialogue and negotiation over the course of a project, from planning to implementation and follow-up.[25] In practical terms, this means that First Nations peoples possess the right to *influence* the outcome of proposed offshore energy projects which affect them, not a mere right to simply have their views heard. Former UN Special Rapporteur on the Rights of Indigenous Peoples James Anaya underscored that UNDRIP suggests consultations should take the form of negotiations towards mutually acceptable arrangements prior to decisions on proposed measures, rather than mechanisms for providing First Nations peoples with information about decisions already made or in the making.[26]

Furthermore, it is critical that Aboriginal and Torres Strait Islander peoples have the freedom and power to direct and co-design processes of consultation. This means that consultation processes are conducted in culturally safe and relevant ways, through decision-making processes and with representatives that are perceived to be legitimate by the community. Such processes operate based on definitions of consultation and consent that are determined by and have meaning to those First Nations individuals and communities themselves.

We can see from the arguments put forth by Santos in *Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority (No 2)* [2022] FCA 1121 as well as from countless other examples of cultural heritage destruction occurring during resource development that current processes of

[23] ibid
[24] ibid
[25] Free, prior and informed consent: a human rights-based approach Study of the Expert Mechanism on the Rights of Indigenous Peoples, United Nations General Assembly, 10 August 2018: 5.
[26] ibid

consultation are inadequate. Not only do they fail to include all relevant individuals, they also operate on limited and inadequate understandings of consultation (for example, unanswered phone calls and by sending one or two emails). These bare minimum processes of simply informing First Nations peoples about activities being carried out on their land and sea country are unacceptable, and contrary to their rights as set out in international law.

Importantly, FPIC should be understood as a fundamental component of First Nations self-determination, as opposed to simply an extension of the Duty to Consult.[27]

Self-determination

According to a UN Study of the Expert Mechanism on the Rights of Indigenous Peoples, FPIC is grounded in the fundamental right to self-determination.[28] FPIC is a manifestation of First Nations peoples' right to self-determine their political, social, economic and cultural priorities and constitutes three interrelated and cumulative rights:

- the right to be consulted;
- the right to participate; and
- the right to their lands, territories and resources.

Free, prior and informed consent cannot be achieved if one of these components is missing. As the UN Study points out, the international legal framework that conceptualised the right to self-determination paid particular attention to peoples and nations recovering control over their lands and natural resources as an important constituent element of the right to self-determination.[29] It is for this reason that FPIC is of particular relevance to both on and offshore energy projects being carried out on the lands and waters of First Nations peoples in Australia.

[27] 'Participation in decision making', Aboriginal and Torres Strait Islander Social Justice, Australian Human Rights Commission, no date.
[28] Free, prior and informed consent: a human rights-based approach Study of the Expert Mechanism on the Rights of Indigenous Peoples, United Nations General Assembly, 10 August 2018: 3.
[29] ibid

Further, the UN Study states that FPIC also has the potential to improve the gross power imbalance between First Nations peoples and states, with a view to forging new partnerships based on rights and mutual respect between parties.[30] This is consistent with the stated principles and outcomes of the National Agreement on Closing the Gap which has been committed to by all levels of government in Australia, in particular the commitment to empower Aboriginal and Torres Strait Islander peoples to share decision-making authority with governments through full and genuine partnership, grounded in the principle of self-determination.[31]

ANTAR wishes to stress that the principles of self-determination, genuine partnership, and nation-to-nation shared decision making with First Nations peoples and communities cannot be compartmentalised, selectively applied or committed to in word but not deed. These principles are based on inalienable rights possessed by Aboriginal and Torres Strait Islander peoples in Australia, and these rights apply in all areas which affect the lives of First Nations peoples, from cultural heritage protection to health equity and beyond.

It has been both proven and exhaustively stated in countless reports, evidence based studies and policy submissions that the health and wellbeing of Aboriginal and Torres Strait Islander peoples cannot be separated from their connection to, relationship with, and access to land, culture and Country.[32] As such, the principles of cultural heritage protection, adequate consultation, FPIC and self-determination set out in the Bill are inextricably connected to the protection and advancement of First Nations peoples' social and emotional wellbeing, and to their physical and mental health.

It is ANTAR's view that all levels of Australian government, having committed to the principles and outcomes of the National Agreement on Closing the Gap, are thus obligated to remedy the flaws of the current legislative framework that

[30] Free, prior and informed consent: a human rights-based approach Study of the Expert Mechanism on the Rights of Indigenous Peoples, United Nations General Assembly, 10 August 2018: 4.
[31] National Agreement on Closing the Gap, Australian Government (July 2020): 4.
[32] Gee G, Dudgeon P, Schultz C, Hart A and Kelly K (2014) 'Social and emotional wellbeing and mental health: an Aboriginal perspective' in Indigenous Health and Wellbeing, Australian Institute of Health and Welfare, Australian Government, 7 July 2022.

fails to adequately protect the rights and self-determination of First Nations peoples with respect to their lands, waters and the tangible and intangible cultural heritage therein.

Part 2: Meaning of 'relevant person'

Currently, subregulation 11A(1) of the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* provides for 'consultation with relevant authorities, persons and organisations, etc' in the course of preparing and revising environment plans. However, from sub paragraph 1(a) to (e), a relevant person is described as either Departments or agencies of the Commonwealth, state or Northern Territory, state and Northern Territory Ministers, a person or organisation whose functions, interests or activities may be affected, or any person or organisation that the titleholder considers relevant. No explicit reference had yet been made in these regulations to the Aboriginal and Torres Strait Islander community to be considered as 'a relevant person' until the introduction of the proposed Bill.[33]

After subregulation 11(A)(1), the following is proposed to be inserted as subsection 1(A): "*To avoid doubt, a person or organisation whose functions, interests or activities may be affected by the activities carried out under the environment plan, or the revision of the environment plan, includes traditional owners and knowledge holders within First Nations communities.*" This proposed insertion was drafted in response to the Full Court's decision of the Federal Court of Australia in the case of *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193.

The explanatory memorandum of the Bill states that there are eight clan groups in the Tiwi Islands. With respect to consultation for the Barossa Gas Project, Santos sent two emails and one unanswered phone call to one of the eight groups.[34] Santos argued in court that they were not legally required to consult

[33] *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009*.
[34] Protecting the Spirit of Sea Country Bill 2023 Explanatory Memorandum, The Parliament of the Commonwealth of Australia.

with the Traditional Owners as they do not fit the definition of 'relevant person',[35] as provided for under reg 11(A)(1) of the Regulations.

However, Judges Kenny, Mortimer and Lee of the Federal Court determined that Santos' narrower construction of 'a relevant person' undermined the achievement of the objects of the Regulations, and agreed that rather 'functions, interests or activities' pursuant to reg 11(A)(1) should be construed broadly. This construction serves "more than one purpose", allowing persons affected to make an informed assessment of possible consequences, as well as ensure that titleholders can adopt appropriate measures to address concerns.[36]

All three judges placed significant weight on references to "people and communities", "the heritage value of places" and "social, economic and cultural features". They further found that references to "interests" should not be confined to legal interests, and Judges Kenny and Mortimer opined that case law has demonstrated that there is nothing unworkable about a construction of "interests" in reg 11A(1)(d) of the Regulations which means that First Nations peoples who have a traditional connection to the sea and marine resources that may be affected have "interests".[37] Judges Kenny and Mortimer further considered that the available material supported that the Munupi people had, and continues to have, an immediate and direct interest through their traditional connection to their sea country, for which Santos was required to consult with them accordingly.[38]

Though the the Court held that statutory obligations to consult must be understood in a practical and reasonable way so as to be capable of performance, they further advised that there is no particular difficulty with the proposition that the First Nations peoples who have traditional connections to the sea, and to marine resources, may be affected by the Santos' activities and was reasonably ascertainable.[39]

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[35] ibid
[36] Nicholas Baum, 'Who must be consulted? The Full Federal Court on environment plans for offshore petroleum projects', the Commercial Bar Association of Victoria, 24 February 2023.
[37] Santos v Tipakalippa: Judicial Guidance on the Requirements for Offshore Petroleum EP Consultation, Energy Resources Law, 3 October 2023.
[38] Above n34.
[39] Santos NA Barossa Pty Ltd v Tipakalippa [2022] FCAFC 193, paragraphs 90 - 95.

Part 3: Protection of Cultural Heritage

Aboriginal and Torres Strait Islander cultural heritage is currently inadequately served by multiple pieces of national legislation including the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act), the *Protection of Movable Cultural Heritage Act 1986* (Cth), the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), and the *Underwater Cultural Heritage Act 2018* (Cth).[40]

It should be noted, for example, that while the *Underwater Cultural Heritage Act 2018* protects all underwater cultural heritage, there is a discrepancy in the treatment of non-Indigenous and Aboriginal and Torres Strait Islander cultural heritage.[41] Shipwrecks and aircraft are granted automatic protection under section 16, but under section 17 Aboriginal and Torres Strait Islander cultural heritage requires the Minister to be satisfied that the cultural material is of heritage significance.[42] This double standard is unacceptable, and is evidence of a general and systemic disregard toward First Nations underwater cultural heritage. Under the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage, all underwater cultural heritage sites over 100 years old are to be automatically protected.[43]

At the state and territory level, cultural heritage legislation is inconsistent and, in some instances, outdated and inadequate.[44] For example, Victoria is currently the only Australian jurisdiction to have legislation that specifically protects the intangible elements of Aboriginal and Torres Strait Islander heritage (more on this below).[45]

[40] Heritage Chairs of Australia and New Zealand 2020, Dhawura Ngilan: A vision for Aboriginal and Torres Strait Islander heritage in Australia, Canberra (2020): 13.
[41] A Way Forward - Final report into the destruction of Indigenous heritage sites at Juukan Gorge, Joint Standing Committee on Northern Australia (2021): 174.
[42] ibid
[43] A Way Forward - Final report into the destruction of Indigenous heritage sites at Juukan Gorge, Joint Standing Committee on Northern Australia (2021): 175.
[44] Dhawura Ngilan (2020): 14.
[45] ibid

Part 3 of the Bill seeks to strengthen cultural heritage protection by amending the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* in the following main ways:

i. Inserting a definition of 'intangible cultural heritage' into the regulations;

ii. Inserting a definition of 'underwater cultural heritage' with specific references to First Nations underwater cultural heritage;

iii. Inserting the requirement for any underwater cultural heritage to be described in an environment plan;

iv. Adding a reference to 'an area containing underwater cultural heritage' in the note to subregulation 5A(5) which signposts that a proposal will not be capable of being accepted if an activity or part of an activity will be undertaken in any part of a declared World Heritage property or an area containing underwater cultural heritage;

v. Adding two additional sub-regulations that require the offshore project proposals to include details of cultural heritage and intangible cultural heritage that may be impacted by the project, an evaluation of the impacts and risks to the heritage and alternative options to ensure preservation and avoid destruction of the cultural heritage;

vi. Adding a new paragraph 5D(6)(f) which requires NOPSEMA to refuse to accept a proposal unless NOPSEMA are reasonably satisfied that the project does not involve an activity or part of an activity being undertaken in an area containing underwater cultural heritage;

vii. Inserting a new paragraph 10A(fa) which sets out that NOPSEMA cannot accept an environment plan unless it demonstrates that the activity or any part of the activity is not being undertaken in an area that contains underwater cultural heritage.

ANTAR is in full support of these proposed amendments and believes they would strengthen cultural heritage protection in ways that are consistent with the Best Practice Standards in Indigenous Cultural Heritage Management and Legislation, and in particular that will better safeguard intangible cultural heritage.

Furthermore, ANTAR urges the Federal Government to heed the recommendations in the Final Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act) which lays out a clear pathway to reform. In particular, action should be taken on the key reforms in Chapter 2 on First Nations culture and heritage, including the adoption and implementation of a National Environment Standard for First Nations engagement and participation in decision-making, developed through a First Nations-led process.[46]

Intangible Cultural Heritage

In her decision to remove the legal barrier to Santos' construction of the Barossa Gas Project, Justice Natalie Charlesworth stated that the evidence put forward by the Tiwi Elders in opposition to the project was rooted in "personal beliefs" and may not be more broadly held by First Nations people in the area.[47] Further, Justice Charlesworth ruled that the risk of damage to cultural heritage must be "significant" in terms of both the chances of it occurring and the nature and gravity of the consequences in order for these claims to be legitimate.[48]

Underlying this ruling to allow construction of Santos' pipeline at the expense of the Tiwi Elders' concerns is a worldview that characterises and pervades Australia's relationship to and (dis)respect of Aboriginal and Torres Strait Islander peoples and their epistemologies, stories and ways of being. This worldview not only prioritises economic gain over environmental, spiritual and community wellbeing, but is also deeply suspicious of First Nations wisdom and ways of knowing. In relying on Western values of 'evidence' and 'experts' in

[46] Professor Graeme Samuel AC, Final Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act), October 2020: 57.
[47] 'Made up': Judge slams green activists in Santos gas case, Financial Review, 15 January 2024.
[48] ibid

order to establish what is and is not significant, Western legal systems fundamentally undermine First Nations knowledges as simply 'myth' or 'storytelling', inferior to Western interpretations.

It is also a worldview that cannot properly grasp that which is not tangible and concrete by Western standards, and claims to be the arbiter of what counts as 'significant' or 'sufficient'. This is evident in Justice Charlesworth's decision in which she states, "*I have concluded that the evidence asserting that the songlines relate to or extend into the area of sea country through which the pipeline will pass is insufficient.*"[49] It is frankly insulting that First Nations Elders have to submit to the Western colonial legal system to struggle for their right to be consulted on billion dollar energy projects carried out on their stolen lands and waters, only to have their evidence deemed insufficient and their perception of risk deemed insignificant.

Part 3 of the Protecting the Spirit of Sea Country Bill 2023 seeks to remedy this legal blindness to less tangible forms of cultural heritage by inserting a definition of 'intangible cultural heritage' into the regulations. This definition is based on the definition contained within the UNESCO International Convention for the Safeguarding of the Intangible Cultural Heritage, an international instrument that Australia is not yet a party to.

The UNESCO Convention defines 'intangible cultural heritage' as the practices, representations, expressions, knowledge, skills, as well as the instruments, objects, artefacts and cultural spaces associated therewith, for which communities, groups and, in some cases, individuals recognize as part of their cultural heritage.[50] These can be manifested as:

> (a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage;
> (b) performing arts;
> (c) social practices, rituals and festive events;

[49] Santos wins legal battle against Tiwi Islands elders over $5.7b Barossa gas project's underwater pipeline, ABC News, 15 January 2024.
[50] Text of the Convention for the Safeguarding of the Intangible Cultural Heritage, UNESCO, no date.

(d) knowledge and practices concerning nature and the universe;

(e) traditional craftsmanship.[51]

Under this definition, the Tiwi knowledge, beliefs and practices (including song, dance and ceremonies) relating to the songline of the Crocodile Man and Ampiji, the rainbow serpent, can be considered intangible cultural heritage.

Further, the Convention recognises the deep seated interdependence between intangible and tangible forms of cultural heritage, and acknowledges that intangible cultural heritage faces grave threats of deterioration, disappearance and destruction, in part due to a lack of resources for safeguarding such heritage. The Convention recognises that First Nations groups and individuals, in particular, play an important role in the production, safeguarding, maintenance and re-creation of intangible cultural heritage.[52]

Best practice principles in Indigenous Cultural Heritage (ICH) Management and Legislation, as developed in 'Dhawura Ngilan', outline that while physical artefacts provide an important ongoing physical representation of Indigenous Peoples' connection to their country over time, ICH legislation must also comprehend the importance of the intangible aspects of physical places.[53] Legislation must reflect the understanding that for many First Nations peoples, physical landscapes are living places inhabited by ancestors and creators.[54] Likewise, intangible cultural heritage that is not necessarily immediately connected to physical places must also be recognised in legislation.

In light of this, ANTAR unequivocally supports the Bill's attempts to amend the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* in order to ensure that underwater and intangible cultural heritage is identified in offshore project proposals and environment plans, alongside an evaluation of the impacts and risks that this project might pose and any potential alternative options. Further, it is crucial that any evaluation of impacts

[51] ibid
[52] ibid
[53] Heritage Chairs of Australia and New Zealand 2020, Dhawura Ngilan: A vision for Aboriginal and Torres Strait Islander heritage in Australia, Canberra (2020): 33.
[54] ibid

and risks involved with offshore project proposals is inclusive of risks as perceived by the relevant First Nations individuals and communities, according to definitions that have meaning to them. In other words, an assessment of reasonable risk that is rooted exclusively in Western worldviews, to the disregard of First Nations understandings and concerns, is not adequate.

For example, Tiwi Elder and Songwoman Calista Kantilla explains:

> 'Our Elders tell us, don't go Mangatu kilimraka. Don't go near the lake, don't pull out the waterlilies. Try not to disturb that water. The serpent might come out. Mostly she is quiet and calm in the waterhole or the creek, but if something disturbs the water she might get angry and make the water dangerous.'[55]

Similarly, Simon Mukara's case outlined an ancient oral tradition that told of two creatures – a rainbow serpent named Ampiji and a Crocodile man – which could be disturbed by the pipeline, potentially leading to calamity and harm for the clans represented.[56] This is not an interpretation of risk that Justice Charlesworth's decision necessarily allows for when considering the nature and gravity of the consequences.

These oral traditions articulated by Simon Mukara and Calista Kantilla are teachings that Western legal frameworks tend not to understand or respect, and certainly that energy companies like Santos have not been prepared to prioritise in their environment plans. Still, as we collectively hurtle further into a climate crisis and begin slowly to grapple with the fact that First Nations communities worldwide hold knowledge of land and water practices that are key to sustainable management of natural resources, protection of biodiversity and environmental health, it is crucial that our systems and legislation are urgently amended to reflect First Nations knowledges and ways of being – including definitions of risk – and to protect cultural heritage in all of its forms.[57]

[55] Interweaving Voices: Ampiji the Rainbow Serpent, University of Sydney, 7 July 2021.
[56] Adam Morton, 'Santos has scored a legal victory in the battle over its $5.8bn Barossa pipeline. But how significant is it?', The Guardian, 17 January 2024.
[57] Why protecting Indigenous communities can also help save the Earth, The Guardian, 13 October 2020.

Human rights-based approach

Despite officially endorsing UNDRIP in 2009, Australia is yet to implement its obligations under the Declaration into domestic law, policy and practice. Since 2007, Australian laws and policies have been criticised in international forums for going against the fundamental right of self-determination for First Nations peoples, as well as other key rights contained in UNDRIP.[58]

First Nations peoples have legally enforceable rights with respect to any developments proposed on their traditional lands and waters. By giving effect to the principle of FPIC outlined in UNDRIP, the Bill is consistent with a human rights-based framework.

Importantly, under this framework, it is unremarkable that different sections of the Traditional Owner community may have different perspectives on matters associated with the future development of both land-based and offshore energy projects.[59] The principle of FPIC, and a human-rights based approach more broadly, is intended to empower and enable Traditional Owners and other relevant First Nations individuals who both do and do not wish to engage with energy development projects.

Conclusion

Protecting the Spirit of Sea Country Bill 2023 seeks to strengthen the protection of First Nations cultural heritage as well as to establish minimum standards of consultation with First Nations peoples driven by FPIC, including their right to be considered 'relevant persons' in the development of environment plans for offshore energy projects. It should go without saying that any Commonwealth government truly committed to First Nations rights and respect – not to mention to the protection of 60,000+ years of continuous

[58] Kishaya Delaney, Amy Maguire and Fiona McGaughey, 'Australia's Commitment to 'Advance the Human Rights of Indigenous Peoples around the Globe' on the United Nations Human Rights Council', *Adelaide Law Review* (2020): 368.
[59] National Native Title Council, 'Australian Government Future Gas Strategy Consultation' Submission 171123 (November 2023): 2.

culture – should begin by grounding their approach in legislative changes such as the ones set out in this Bill.

First and foremost, the policies and legislation that underpin and drive action should recognise Aboriginal and Torres Strait Islander peoples as deserving of a seat at the table so that they might actively shape the decisions being made about their lives, communities, wellbeing and cultures.

It cannot be overstated that international conventions and declarations such as UNDRIP, the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage and the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage should guide national law and policy making with respect to the rights of Aboriginal and Torres Strait Islander peoples and their heritage. In particular, the right to consultations based on free prior and informed consent for First Nations peoples should be the bare minimum in establishing requirements for on and offshore energy projects.

Extensive consultation with First Nations peoples has proven that First Nations heritage protection reform is urgent and necessary. Three initial reform options are presented in the Options Paper on First Nations cultural heritage protection reform, developed in partnership between the First Nations Heritage Protection Alliance and the Australian Government and currently undertaking a second stage of national engagements.[60] ANTAR urges the Government to continue this work in genuine partnership with First Nations peoples, and to commit to concrete and meaningful actions in order to advance reform via the model agreed upon following Stage two consultations.

A Way Forward notes that Aboriginal and Torres Strait Islander peoples have suffered the loss of their cultural heritage sites at the hands of development – by many industries – for generations, and these losses are ongoing.[61] Thus far, state and Commonwealth governments have failed in their duty to protect First Nations cultural heritage. Time and time again, Australia has prioritised

[60] Options Paper: First Nations cultural heritage protection reform, Australian Government and First Nations Heritage Protection Alliance (2022)
[61] A Way Forward - Final report into the destruction of Indigenous heritage sites at Juukan Gorge, Joint Standing Committee on Northern Australia (2021): 185.

‘development’ over the protection of cultural heritage.[62] It is well past time to correct these failures with proper legislative change.

We thank the Senate Standing Committees on Environment and Communications for the opportunity to provide these comments and recommendations.

[62] ‘A Way Forward’, 186.