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Submission from the Sea Country Alliance to the Inquiry into the *Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment (Safety and Other Measures) Bill 2024*

1 Introduction

On behalf of the Sea Country Alliance (**SCA**), we are pleased to put forward the following submission. The SCA is an alliance between Australia's Traditional Owners with responsibility for Sea Country that have come together to speak in unison. The formation of the Sea Country Alliance, following a national meeting of Traditional Owners in Darwin in November 2023, represents a step forward in realising our rights and responsibilities offshore.

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

On 29 February 2024, the Senate referred the provisions of the *Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment (Safety and Other Measures) Bill 2024* (**the Bill**) to the Senate Economics Legislation Committee for inquiry and report by 22 March 2024.

The Bill seeks to amend the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (**OPGGS Act**). Overwhelmingly the proposed amendments go to matters relating to Occupational Health and Safety. However, the Bill also seeks to insert a new s 790E into the OPGGS Act.

The function of the proposed new s 790E is described in the Explanatory Memorandum as being:

- amend the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (**OPGGS Act**) to ensure that an approval of taking actions in accordance with a policy,

plan or program remains effective following amendments to environmental regulations.

This submission will exclusively focus on the proposed s 790E and the implications of this proposed provision in the treatment of Traditional Owner rights and interests in their Sea Country under the OPGGS Act and other Commonwealth legislation.

2 Effect of the proposed s 790E

The regulatory authority pertaining to operational approval of offshore gas operations in Commonwealth waters under the OPPGS Act is the National Offshore Petroleum Safety and Environment Management Authority (**NOPSEMA**). Under the current arrangements, when NOPSEMA grants an operational approval (approval of an Environment Plan (**EP**)) under the OPPGS Act and the relevant regulations, it is also exercising a delegated authority to grant an approval under the *Environment Protection and Biodiversity Act 1999* (Cth) (**EPBC**).

Currently, a proponent preparing an EP approval application must also ensure that the application contains sufficient information to satisfy NOPSEMA that the EP also satisfies the relevant EPBC requirements. This arrangement is pursuant to s 146D of the EPBC. This provision allows for the Environment Minister to grant a 'standing delegation' to an entity in relation to EPBC approvals. There is a requirement under s 146D that the delegated approvals are only granted if in accordance with a process and policy approved by the Environment Minister.

In the case of NOPSEMA, the s 146D EPBC approval was granted by the Environment Minister in 2014. The NOPSEMA policy in respect of which the s 146D approval was granted by the Environment Minister, is referred to as the *Offshore Petroleum and Greenhouse Gas Storage Approval* (**2014 NOPSEMA Policy**). In summary therefore, the arrangement means that if NOPSEMA assesses and approves an application under the OPPGS Act and the relevant regulations, then that approval also operates as an approval for the purposes of the EPBC.

The regulations that were in place when the 2014 Policy was approved under s 146D of the EPBC were the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (the **2009 Regulations**). The 2009 Regulations have been replaced with the recently commenced *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations* 2023 (the **2023 Regulations** — see paragraph 309 of the Explanatory Memorandum).

At least at a theoretical level, it is possible that the transition from the 2009 Regulations to the 2023 Regulations could operate to invalidate the approval s 146D EPBC of the 2014 NOPSEMA Policy. This invalidity may arise either in a technical sense (because of reference to the 2009 Regulations in the 2014 NOPSEMA Policy) or more substantively (because the process and criteria of approvals under the 2023 Regulations is different

from that under the 2009 Regulations - therefore undermining the basis of the s 146D EPBC approval).

The 2023 Regulations include extensive transition provisions. There has not been sufficient time since the Bill was introduced, and the SCA has become aware of the existence of provisions going to the proposed new s 790E, to analyse the relevant provision to determine if this theoretical possibility is a reality.

In any respect, the concerns of the SCA do not go to whether the proposed s 790E is intended to safeguard against challenges to NOPSEMA approvals granted subsequent to the commencement of the 2023 Regulations. The focus of the SCA concerns regarding the proposed s 790E go to the potential lack of scrutiny under the EPBC of any future EP approvals that may be granted by NOPSEMA. This concern arises in the context of significant and hugely positive reforms the Government is proposing to the EPBC (collectively referred to as the Nature Positive Plan (**NPP**)).

As the SCA understands the situation, if the proposed s 790E were **not enacted** then any change to the NOPSEMA EP approvals process, including any subsequent amendment to the 2023 Regulations, may take future NOPSEMA EP approvals outside of the scope of the current s 146D EPBC approval. If this were the case, then the new NOPSEMA EP approval process would have to be resubmitted for consideration under s 146D of the EPBC as it stood at that time. One would expect (hope) the EPBC at that time would be amended to reflect the NPP.

However, if the proposed s 79E **is enacted**, then the current 2014 s 146D EPBC approval will apply to all future NOPSEMA EP approvals made in accordance with the OPPGS Act and the 2023 Regulations. This would be the case irrespective of what amendments had at that time been made to the 2023 Regulations.

The question then becomes - is it desirable to have a future NOPSEMA EP approval process considered under the terms of an EPBC as amended under the NPP? In the submission of the SCA. the answer to this question is: yes.

The balance of this submission provides information to the Committee as to why the SCA has reached this conclusion.

3 Traditional Owners and Offshore Regulatory Reform

The impact of the Full Federal Court decision in *Santos NA Barossa Pty Ltd v Tipakalippa [2022] FCAFC 193* (**Tipakalippa**) is, generally, well known. That decision held that an EP approval under NOPSEMA was invalid as it had not been made in accordance with the relevant provisions of the (then) 2009 Regulations. the deficiency in NOPSEMA's process went to failing to consult with relevant persons with a right or interest affected by the EP.

In summary under regulation 10A(g) (i) and (ii) (of the 2009 Regulations), NOPSEMA can only accept a Drill EP if it is “reasonably satisfied” that the Drill EP demonstrates that a

titleholder has carried out "consultations" with "relevant persons" and "the measures [included in the plan] (if any) that the titleholder has adopted, or proposes to adopt, because of the consultations are appropriate".

The required consultations were (relevantly) specified in (2009) regulation 11A(1)(d)[1]. This identifies as a "relevant person" (requiring consultation):

> *a person or organisation whose functions, interests or activities may be affected by the activities to be carried out under the environment plan, or the revision of the environment plan*; (emphasis added).

Regulation 11A continues to specify that each "relevant person" must be provided with *"sufficient information to allow the relevant person to make an informed assessment of the possible consequences of the activity on the functions, interests, or activities of the relevant person"*. They must also be provided with sufficient time to comment.

The applicant (Mr Dennis Tipakalippa) asserted that NOPSEMA 's purported approval of the Drill EP was invalid because the Drill EP could not provide a sufficient basis for NOPSEMA to be "reasonably satisfied" that the required consultations with the relevant persons (which included him as a Traditional Owner of potentially affected sea country) had occurred at all or in the required fashion.

The **Tipakalippa** decision highlighted several issues:

- The *sui generis* and diverse nature of Traditional Owner rights and interests in Sea Country.
- The dual character of Traditional Owners rights as both collective and individual.
- The fact that current NOPSEMA guidance and proponent practice is arrogantly dismissive of the legal rights of Traditional Owners.
- That the current offshore operational approval regime is fundamentally inefficient and incapable of giving adequate recognition to traditional Owner rights and incapable of providing the necessary certainty to proponents.

These issues are explored in detail in the SCA submission to the DISR Consultation Paper: *Clarifying consultation requirements for offshore petroleum and greenhouse gas storage regulatory approvals*. The SCA proposals for Regulatory Reform in this area are also set out in the SCA Discussion Paper: *traditional Owners and Offshore Energy Projects*.

That Discussion Paper was provided to Government recently and recommended the establishment of a Ministerial Working Group comprising representatives of Traditional Owners, Government and Industry to develop appropriate reform proposals. At this stage the Government has not responded to or acknowledged receipt of the SCA Discussion paper.

[1] See r 25(1)(d) for the equivalent provision in he 2023 Regulations.

However, these attempts at practical and timely reform are only contextual to the current consideration of the proposed s 790E. The question then that arises is; whether it is desirable to have the amendments arising from any regulatory reform process outcomes considered in the context of the granting of a new EPBC s 146D approval or not. The answer to this question again must be that scrutiny under the EPBC as amended under the Government's NPP would be desirable.

However, any amendment to the Offshore Regulations (including the update from the 2009 Offshore Regulations to the 2023 Offshore Regulations (see para 309 of the Explanatory Memorandum) would potentially invalidate the 2014 EPBC s 146D approval.

4 The EPBC, Traditional Owners, Marine Areas and the NPP

The *Tipakalippa* proceedings involved consideration of the provisions of the 2009 Regulations not the EPBC.

The EPBC regulates "controlled actions", those being any action that may have significant impact on the *environment* of a Commonwealth marine area (as defined in the EPBC). As discussed above NOPSEMA holds a delegated authority to approve a controlled action in a Commonwealth Marine Area. An "Offshore Area", for the purposes of the OPGGS Act can approve Environment Plans, broadly equates with a "Commonwealth marine area" under s 24 of the EPBC.

The "environment" at s 528 of the EPBC is defined as including:

a) ecosystems and their constituent parts, including people and communities; and
b) natural and physical resources; and
c) the qualities and characteristics of locations, places and areas; and
d) heritage values of places; and
e) the social, economic and cultural aspects of a thing mentioned in paragraph (a), (b), (c) or (d).

Clearly, **the "environment" of a Commonwealth marine area is defined so as to include First Nations cultural heritage aspects in all of its manifestations.** The definition would also extend to include many of the rights and interests of First Nations peoples as described by the Court in *Tipakalippa*.[2]

Through these mechanisms, the EPBC currently provides important protection for Traditional Owner Sea Country rights. This is true despite the absence of identification of these rights in NOPSEMA EPBC approvals information.

The SCA understands that the amendments to the EPBC proposed under the NPP will significantly improve the *procedural* approach to the protection of Traditional Owners'

[2] See for example *Tipakalippa* per Kenny and Mortimer at [39] and [68].

rights and interests already contained in the EPBC. From statements made in various forums by the current Environment Minister, these procedural improvements include:

- Introduction of a *First Nations Engagement and Participation in Decision Making Standard* and a number of other *National Environmental Standards*.
- Introduction of an independent expert statutory decision maker in the form of *Environment Protection Australia* in relation to many environmental decisions.
- Improved environmental decision making through better information. This is to be ensured through a *National Environmental Information Standard* and the creation of an independent statutory body to oversee this process.

The SCA supports the NPP innovations. The SCA welcomes the opportunity to have any reformed regulatory arrangements that give proper recognition to the existence and nature of Traditional Owner rights scrutinised under the new arrangement pursuant to the NPP.

Relevantly, the NPP itself does address the issue of Accreditation Arrangements under the EPBC, subsequent to the introduction of the NPP Reforms. At p 18 of the NPP document, the Government makes the following commitment with respect to Accreditation Arrangements:

> *The government is committed to improving accreditation arrangements and ensuring that robust oversight and clear requirements for decision-making apply to accredited parties. All accredited arrangements will be subject to National Environmental Standards. The EPA will provide assurance and independent oversight of accredited processes, ensuring that environmental outcomes are being met.*
>
> *Existing accredited agreements, arrangements and strategic approaches include assessment bilateral agreements with states and territories, and Commonwealth environmental regulatory and management frameworks including Commonwealth fisheries and the National Offshore Petroleum Safety Environmental Management Authority (NOPSEMA) strategic assessment.*
>
> *The government will work with parties to existing accredited agreements and arrangements to integrate the new standards and requirements.*
>
> *Once the new foundations for accreditation are in place, states, territories, and Commonwealth agencies will be able to apply to become accredited under national environmental law to further streamline decision-making and provide a single decision-maker for projects. Any decision to accredit will be made by the minister under national environmental law. Decision-making by accredited parties and territories will be subject to their compliance with all relevant standards, and full disclosure of environmental performance data.*

The SCA supports the approach of Government towards accreditation arrangements under the NPP as outlined above. However, it would appear that the proposed s 790E would defeat this objective.

Representatives of the Sea Country Alliance would be happy to present further on this submission either in person or via video link.

Yours sincerely,

Dr Heron Loban

Co-Chair
Sea Country Alliance

Gareth Ogilvie

Co-Chair
Sea Country Alliance

A Sea Country Alliance Membership

1 Foundation Members

National Native Title Council

New South Wales

- Bundjalung Of Byron Bay Aboriginal Corporation RNTBC (Arakwal)
- Gumbaynggirr Wenonah Aboriginal Corporations
- NTSCORP
- Yaegl Traditional Owners Aboriginal Corporation RNTBC

Northern Territory

- Aboriginal Sea Company
- Djalkiripuyngnu Aboriginal Corporation
- Indigenous Land and Sea Corporation
- Larrakia Nation Aboriginal Corporation
- Northern Land Council
- Tiwi Land Council
- Top End (default PBC/CLA) Aboriginal Corporation RNTBC

Queensland

- Butchulla Native Title Aboriginal Corporation RNTBC 9145
- Gudang Yadhaykenu Native Title Aboriginal Corporation
- Ngana Malngkanichi Pama (CNCRM) Aboriginal Corporation
- Queensland South Native Title Services
- Uutaalnganu Aboriginal Corporation
- Warrgamay Traditional Owners Aboriginal Corporation RNTBC
- Yuwi Aboriginal Corporation RNTBC

South Australia

- Far West Coast Aboriginal Corporation
- Kaurna Yerta Aboriginal Corporation
- Narungga Nation Aboriginal Corporation
- Nauo Aboriginal Corporation
- Ngarrindjeri Aboriginal Corporation
- Nukunu Wapma Thura (Aboriginal Corporation) RNTBC
- South Australian Native Title Services
- Wirangu Aboriginal Corporation
- Wirangu and Nauo Aboriginal Corporation

Tasmania

- Aboriginal Land Council of Tasmania

Victoria

- Bunurong Land Council Aboriginal Corporation

- Eastern Maar Aboriginal Corporation
- First Nations Legal and Research Services
- Gunaikurnai Land and Waters Aboriginal Corporation
- Gunditj Mirring Traditional Owners Aboriginal Corporation

Western Australia

- Bardi Jawi AC
- Esperance Tjaltjraak Native Title Aboriginal Corporation
- Kariyarra Aboriginal Corporation
- Kimberley Land Council
- Mayala Inninalang Aboriginal Corporation
- Murujuga Aboriginal Corporation
- Nanda Aboriginal Corporation
- Ngarluma Aboriginal Corporation
- Thalanyji/ BTAC
- Wirrawandi Aboriginal Corporation
- Yamatji Marlpa Aboriginal Corporation
- Yamatji Southern Regional Corporation
- Yawuru Native Title Holders RNTBC

2 Associate Members

National

- Environment Protection and Biodiversity Conservation Act Indigenous Advisory Committee

New South Wales

- South Coast People

Northern Territory

- Demed Aboriginal Corporation (Adjumarlarl Rangers)
- Garngi Community Rangers
- Laynhapuy Homelands Aboriginal Corporation - Yirralka Land and Sea Rangers

Queensland

- GIA/Ngaro Traditional Owners Reference Group Aboriginal Corporation

Tasmania

- Melythina Tiakana Warrana Aboriginal Corporation

Victoria

- Federation of Victorian Traditional Owner Corporations

Western Australia

- Ngarluma Yindjibarndi Foundation Ltd

B Traditional Owner Representative Institutions

The existence and recognition of TORIs is essential to give effect to the collective rights contained in the UNDRIP. Collective rights in UNDRIP includes the right self-determination, land rights and the right to protect and enjoy cultural heritage. The Commonwealth Government recognises its obligations as a party to UNDRIP to give effect to these rights.

Statutory recognition of a TORI will also greatly facilitate and expedite the process of approvals for proponents wishing to undertake land based or land-related activities.

The issue is complicated because, in some parts of Australia, there is yet to be established any organisation that can be credibly recognised as a TORI. In this area an authoritative mechanism to identify the relevant Traditional Owners with whom a proponent can engage is necessary. This is discussed further below.

The model described below is being advocated also in the context of proposed reforms to Commonwealth First Nations cultural heritage and environment laws. It may have potential additional application to a range of land based and land related statutory contexts.

At this stage though, the proposal is still a draft policy proposal being advocated by Traditional Owner organisations and has no official status with the Commonwealth Government.

The TORI system would provide statutory recognition for a range of existing Traditional Owner organisations created or recognised by existing statute as described below.

Traditional Owner Representative Institutions include:

a. Prescribed Body Corporate and Registered Native Title Body Corporate under the *Native Title Act.*
b. Other Statutory Organisations or Organisations currently created or recognised by statute:
    - Aboriginal Land Councils under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).
    - Anangu Pitjantjatjara Yankunytjatjara
    - Maralinga Tjarutja Council
    - Noongar Regional Corporations
    - Victorian Representative Aboriginal Parties
    - The Aboriginal Land Council of Tasmania
    - Native Title Representative Bodies.

Where there is no relevant Traditional Owner representative institution in relation to a project, it is proposed that a body comprising First Nations expertise and experience would have a function to provide advice on who the appropriate Traditional Owners are to engage with and provide consent or otherwise for the project. The name First Nations

Cultural Heritage Council is the "working name' for this proposed body. The Council would proceed in the following manner:

c. Where there is no existing TORI but there is a registered Native Title Determination Application over the project area, the Council would identify the registered claimants under that application as the relevant Traditional Owners.

d. Where there is no Registered Native Title Claimant or TORI, the Council could seek advice from:

- Native Title Service Providers (who cover the affected area or object)
- Indigenous cultural heritage councils or committees
- Statutory Aboriginal organisations such as the NSW Aboriginal Land Council and Local Aboriginal Land Councils
- Other relevant state and territory government bodies or entities
- Traditional Owner groups identified in previous assessments.

Having obtained the advice the Council considered necessary; the Council would identify the relevant Traditional Owners for the project area. The Council may identify more than one individual or more than one 'group' for the purposes relevant to any particular project. The identification would only be for the purposes specific to the project in question. The identification of relevant Traditional Owners would not constitute a 'standing determination'.

A proponent engaging with either the relevant TORI or the relevant Traditional Owners as identified by Council would be considered to have engaged with the appropriate Traditional Owners for the purposes of applicable legislation.