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Why Are Cultural Rights over Sea Country Less Recognised than Terrestrial Ones?

Rhetti Hoskins [1], Gareth Ogilvie [1], Matthew Storey [2,3,4,5,*] and Alexandra Hill [1]

[1] Sea Country Alliance, Subiaco, WA 6008, Australia; eo@bardijawi.org.au (G.O.); alexandra@storeyward.com.au (A.H.)
[2] Melbourne Law School, University of Melbourne, 185 Pelham Street, Carlton, VIC 3053, Australia; matthew@storeyward.com.au
[3] Thomas More Law School, Australian Catholic University, 115 Victoria Parade, Fitzroy, VIC 3065, Australia
[4] Dilin Duwa Centre for Indigenous Business Excellence, Melbourne Business School, University of Melbourne, Parkville, VIC 3010, Australia
[5] Asia Pacific School of Business and Law, Charles Darwin University, Ellengowan Drive, Brinkin, NT 0810, Australia
* Correspondence: seacountry@nntc.com.au

Abstract

This article identifies the nature of Traditional Owners' interests in Sea Country and addresses issues associated with all offshore energy projects—gas and wind. Exploring the impacts of offshore development on First Nations' cultural heritage, the article proposes integration of free, prior and informed consent (FPIC) and the United Nations *Declaration on the Rights of Indigenous Peoples* (UNDRIP), into the regulatory and legislative offshore environment. In the Australian context, this particularly regards administrative and regulatory reforms to overcome uncertainty arising from recent decisions in the Federal Court. The international focus on new energy has fast-tracked many processes that sideline First Nations' rights, hitherto understood within the onshore minerals extraction regimes. The reforms proposed in this article recognise an international commitment to enact the principles contained in the UNDRIP and other relevant international law.

Keywords: first nations; cultural heritage; rights; FPIC; UNDRIP; offshore

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1. Introduction

Cultural heritage does not stop at the water's edge. Across the world, First Nation [1] communities experience cultural heritage in the offshore environment—whether these are songs and stories, submerged artefacts and locations, or totemic plants and animals. The extent of the exercise of Fist Nations rights in these environments is set at international law through the UNDRIP, jurisdictionally through national legislation and regulation and, more frequently, through jurisprudence. The global commitment to slow climate change and realise the Paris Agreement [2] has placed increasing pressure on the offshore environment. The ocean covers 70% of the earth's surface, meaning the potential activation for oil and gas extraction and wind generation projects is enormous.

The impact of traditional "dirty" and new "clean" energy minerals extraction and generation share the same attitudes of relative disregard for First Nations' responsibilities, rights and relationship to their Country, be it water or terrestrial. Across the world, First Nation communities are expressing similar concerns and showing both the commonality and uniqueness of the Australian experience.

Common to these discussions are three central questions:

- How are First Nations' rights under the UNDRIP being recognised?
- How are First Nation communities engaged in the process of energy project development and how is FPIC being implemented in these consideration processes?
- Are the new energy regimes any different to the old ones regarding recognition of First Nations' rights?

In answering these questions, we will look at specific Australian examples of offshore use and regulatory processes, the nature of First Nation connections to Sea Country and the offshore environment, and the rights of directly affected and indirectly affected communities.

2. The Nature of Traditional Owner Interests in Sea Country

In the same way that cultural heritage and the associated rights for care and use exists on land, it also exists in the marine environment, albeit in a less regulated way.

Much recent commentary on First Nations and offshore energy projects has focused on the issue of potential impact on the First Nations' cultural heritage within the offshore environment. The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) defines the manifestation of cultural heritage in areas and objects as being "of particular significance to Aboriginals [sic] in accordance with Aboriginal tradition" [3]. It is important to continue to bear in mind that Traditional Owner interests in Sea Country are broader than this and extend to rights in respect of commercial, economic and social activities and the rights that First Nation peoples derive as the Traditional Owners of their Sea Country.

The 2002 National Oceans Office South-East Regional Marine Plan, *Sea Country an Indigenous Perspective* [4] (the Plan), notes the connectedness of land and sea for Traditional Owners in that region:

> Together they form people's "Country"—a country of significant cultural sites and "Dreaming Tracks" of the creation ancestors. As a result, coastal environments are an integrated cultural landscape/seascape that is conceptually very different from the broader Australian view of land and sea [4].

The impact of offshore infrastructure and its necessary relationship to onshore infrastructure is therefore more inclusive, relating to both tangible and intangible cultural heritage (ICH). Citing archaeological records, the Plan identifies the extraordinary amount of time for which today's Traditional Owners' families have had responsibility for caring for this multi-faceted Country:

> Aboriginal people occupied, used and managed coastal land and sea environments within the Region for many thousands of years before the current sea level stabilised about 5000 years ago. Aboriginal people's cultural and economic relationship with the Region begins before the current coastal ecosystems were established.
>
> This relationship includes knowledge and use of lands that now lie beneath the ocean all around the coast, and between mainland Australia and Tasmania [4].

Injudiciously considered offshore infrastructure poses a significant threat to Traditional Owner rights to live their cultural connections to their Country. Potential impacts are far more diverse than damage to submerged physical sites, they also include the visual interference on the cultural landscape and effect on cultural species.

However, much legislation prioritises the physical manifestation of cultural heritage. The *Underwater Cultural Heritage Act 2018* (Cth) goes further and, at s 16, automatically protects only vessels and their associated materials [5]. Not only ICH but the entirety of Indigenous physical cultural heritage is then relegated to discretionary protection.

At risk are the marine plants and animals that play a significant role in the cultural landscape, providing more than just trade and food outcomes but spiritual relationships through totems and songlines. The use of these marine resources to this end has perhaps been considered more within the *Native Title Act 1993* (Cth) (NTA) than other offshore rights, but it is still limited and does not assist those Traditional Owner communities without a positive native title determination.

Consideration of these rights in Australian Commonwealth Waters has been identified by Parks Australia through the Australian Marine Parks Engagement Principles. Principle Two states that "*management of Australian Marine Parks should be undertaken on the basis that native title [6] exists in sea country within Commonwealth waters [7].*"

Principles such as these support the establishment of culturally safe and inclusive processes, requiring support and time, as part of broader environmental and cultural marine plans. Work such as this must be undertaken prior to both identifying an area for offshore project suitability and, subsequently, the relevant authority proposing an area for public consultation [8]. Once areas have been declared, Traditional Owners must be involved at all stages of design, construction and project life on a regulatory level. This must include the provision of cultural consent in accordance with rights afforded for FPIC under UNDRIP.

3. Australian Jurisprudence Around Offshore First Nations' Interests

As mentioned, the Australian legislative and regulatory systems provide some protections for Traditional Owner rights in Sea Country, including through the over 30-year-old NTA. In the offshore environment, however, the realisation of rights that may be recognised under statute is often practically progressed only after successful litigation by Traditional Owners. Three critical decisions of note are considered in this regard in the following section.

3.1. Commonwealth v Yarmirr

Less than ten years after the establishment of the NTA, the High Court considered the existence of native title rights and interests in offshore areas in *Commonwealth v Yarmirr* [2001] 208 CLR 1; HCA 56. The majority of the Court also expressed the recognition of ICH in Sea Country:

> What has been established is the existence of traditional laws acknowledged, and traditional customs observed, whereby the applicant community has continuously since prior to any non-Aboriginal intervention used the waters of the claimed area for the purpose of hunting, fishing, and gathering to provide for the sustenance of the members of the community and for other purposes associated with the community's ritual and spiritual obligations and practices. Members of the community have also used, and continue to use, the waters for the purpose of passage from place to place and for the preservation of their cultural and spiritual beliefs and practices [9].

What is abundantly clear from this judicial authority and associated administrative practice is that Traditional Owners have interests which intangible dreaming lines, tangible manifestations of cultural heritage and cultural connection to the relevant marine environment.

These interests have also been described as:

> Hunting, fishing and gathering to provide for the sustenance of the members of the community and for other purposes associated with the community's ritual and spiritual obligations and practices [10].

3.2. Akiba v Commonwealth

Subsequently to the decision in *Commonwealth v Yarmirr*, the High Court considered the nature of native title rights and interests in the specific context of Sea Country in *Akiba v Commonwealth* [11]. In this matter the High Court made clear that a native title right to take resources for any purpose could include commercial purposes.

The basis for native title rights including commercial rights is best described by one of the Traditional Owner witnesses who gave evidence in the Federal Court in Akiba. Justice Finn in his judgement quotes Traditional Owner, Walter Nona, as saying:

> We always used things from the sea for trade or exchange for things we didn't have . . . [W]hen money came we sold things from the sea for money to get things we needed. Selling things for money is new because money is new; but we always exchanged and traded things for what we needed. In that way, selling things for money is no different [12].

This judicially endorsed statement from Mr Nona makes quite clear that rights and interests based in tradition can today have also a tangible contemporary commercial manifestation.

3.3. Santos NA Barossa Pty Ltd. v Tipakalippa

As we have seen, the concept of the existence and recognition of Traditional Owner rights offshore is not new. So much so that what might be seen as surprising about the Australian Federal Court decision, *Santos NA Barossa Pty Ltd. v Tipakalippa* [2022] FCAFC 193 (Tipakalippa), is not the outcome but the surprise with which that outcome was received.

In December 2022, the Australian Full Federal Court [13] confirmed a decision [14] to overturn an approval by the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA). The approval was of an offshore drilling Environment Plan (EP), under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) (OPGGS), submitted by Santos and relating to the "Barossa Basin" which lies offshore from the Kimberley and Northern Territory Coasts.

The relevant *Offshore Petroleum and Greenhouse Gas (Environment) Regulations 2023* (Cth) (OPGGS Reg's) required a process of consultation with all people who have interests ("function, interest or activity") in both the immediately affected area of operations, and within the environment that may be affected (EMBA). The decision was based on the finding that Santos had not undertaken any or sufficient consultations with Traditional Owners who had interests in the area.

The Court at first instance found that the interests of Mr Tipakalippa included interests arising from his cultural association with the EMBA. These included intangible dreaming lines, tangible manifestations of cultural heritage, his cultural connection to the relevant marine environment, interests in coastal areas that may be affected by any environmental incident (spill) and interests as someone who used the marine environment for fishing and other traditional and contemporary purposes.

The judgements (both at first instance and on appeal) [15] refer to and accept the following extract from Appendix C of the EP as a summary description of those interests:

> Marine resource use by Aboriginal and Torres Strait Islander peoples is generally restricted to coastal waters. Fishing, hunting and the maintenance of maritime cultures and heritage through ritual, stories and traditional knowledge continue as important uses of the nearshore region and adjacent areas. However, while direct use by Aboriginal and Torres Strait Islander peoples [of] deeper offshore waters is limited, many groups continue to have a direct cultural interest in decisions affecting the management of these waters. The cultural connections Aboriginal

> and Torres Strait Islander peoples maintain with the sea may be affected, for example, by offshore fisheries and industries. In addition, some Indigenous people are involved in commercial activities such as fishing and marine tourism, so have an interest in how these industries are managed in offshore waters with respect to their cultural heritage and commercial interests [16].
>
> Their Honours later note in relation to those interests that:
>
> Mr Tipakalippa's and the Munupi clan's interests in the EMBA and the marine resources closer to the Tiwi Islands are immediate and direct. Furthermore, they are interests of a kind well known to contemporary Australian law. Thus, interests of this kind, which arise from traditional cultural connection with the sea, without any proprietary overlay, are acknowledged in federal legislation, such as, for example, the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), and have been considered by the courts [17].
>
> Their Honours further pursue the matter:
>
> By these references to the Heritage Protection Act, we are not intending to suggest that the Heritage Protection Act was applicable to Santos' proposed drilling activities. Rather, we refer to that Act to make it clear that the law recognises the kind of interests that Mr Tipakalippa contends required Santos to consult with him and the Munupi clan. Reference to the Heritage Protection Act demonstrates that by this Act the federal Parliament has expressly contemplated the protection of areas of the sea from activities harmful to the preservation of Aboriginal tradition. The Parliament has done so without requiring the existence of particular proprietary interests; rather requiring only the existence of a connection by Aboriginal tradition [18].

It is this broad class of interests, unique to Traditional Owners amongst the broader community, that is universal to First Nation communities globally and articulated in the UNDRIP. As such, Traditional Owners must be afforded appropriate recognition under any regulatory and policy frameworks.

4. Affecting Recognition

After considering First Nation peoples' connections to cultural heritage in the marine environment, and how rights for that cultural heritage are respected, it is appropriate to consider how UNDRIP and FPIC are being implemented.

The Australian legislative and regulatory environment affecting Traditional Owners' Sea Country rights operate within two key domains. This recognition is associated with the differing impact levels of projects upon Traditional Owner communities. In the first domain are Traditional Owner communities whose Sea Country is intended to be directly affected by a proponent's operations (directly affected communities). In the second domain are those Traditional Owner communities whose Sea Country may be affected by a proponent's operations (EMBA communities). Overall, such impact experienced by EMBA communities are through oil and gas extraction rather than wind generation projects, fishing or tourism initiatives. Each of these domains contain several elements, a number of which are common to both.

4.1. Relevant Persons, Collective Rights and Representative Institutions

Common to both domains is identification that Traditional Owners' rights and interests, in land and Sea Country, are collective rights. These are rights collectively held by a people; the individual rights of the person can only exist as an element of the collective right. This principle is well recognised in international law, and UNDRIP clearly sets out Traditional

Owner rights as collective rights in Articles 18 [19] and 26 [20]. UNDRIP also provides, in Article 18, that it is through *representative institutions* that collective rights are exercised.

The foregoing section of this paper identified the broad scope of the legal rights of Traditional Owners in respect of their Sea Country. It demonstrated that these rights are cultural, economic and social in character. Comprehensive, legally recognised and enforceable rights of this nature must be appropriately incorporated into any offshore regime.

However, the shape of that consultative regime must be determined not just by the *existence* of these rights but by their *nature*. It is for this reason that the nature of Traditional Owners' rights, as both individual and collective, is crucial to the shape of the offshore consultative regime.

4.1.1. Relevant Persons

The foregoing assertion (regarding the dual character of Traditional Owner interests) may require some supporting analysis. The starting place for this analysis is again *Tipakalippa* and Santos FFC. However, in this context the focus of inquiry is on the consultation process, rather than the nature of Traditional Owner rights that gave rise to the consultation requirement. It is useful to commence briefly describing the regulatory framework that gave rise to the *Tipakalippa* litigation.

Under the OPGGS Reg's, regulation 10A (g) (i) and (ii), 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 are (relevantly) specified in the OPGGS Reg's at Regulation 11A (1) (d). 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) [21].

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.

Santos had in fact attempted to conduct (at least some type of) consultation (sending emails which were not responded to) [3] with the Tiwi Land Council (TLC) as statutory authority representative of Tiwi Island Traditional Owners for the purposes of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALRA).

4.1.2. Collective Rights

At issue was whether Santos' attempts at consultation were sufficient and whether there was a requirement to consult directly (and essentially individually) with Mr Tipakalippa. This issue goes to the essential issue of whether Mr Tipakalippa was *himself* a "relevant person" or whether he was a member of a group which as a collective were relevant persons (the Tiwi Islander Traditional Owner community). A subsidiary point was that if it was the collective that comprised a group of relevant persons, could that collective

be represented by the TLC, given its limited statutory functions and, if so, whether the attempts at consultation were sufficient for the purposes of the regulations.

His Honour Justice Blomberg considered (and the Full Court agreed) that it was the first point that was most pertinent. He states:

> Is an interest in land not an "interest" because it is held in common or as a joint tenant? Would an activity. . . not be an "activity" because it was being conducted as a joint venture? Nor was there anything suggested by Santos, peculiar to the sea country functions, interests or activities of Aboriginal or Torres Strait Islander peoples that would suggest some basis for any such limitation.

His Honour here is not suggesting it is not a communal interest. However, he is very definitely saying that NOPSEMA should have been alert to at least the possibility that individual Traditional Owners have an "interest" in Sea Country for the purposes of regulation 11A (1) (d) (see, e.g., [242]).

The fact that Traditional Owner rights arise and exist collectively but can be enjoyed individually is a well-established concept in Australian jurisprudence. The most authoritative statement in the issue is that of Justice Brennan in *Mabo No 2* [22] when his Honour states at [68]:

> . . . so long as the people remain as an identifiable community, the members of whom are identified by one another as members of that community living under its laws and customs, *the communal native title* survives *to be enjoyed by the members* according to the rights and interests to which they are respectively, respectively entitled under the traditionally based laws and customs, as currently acknowledged and observed. (Emphasis added.)

The point regarding rights under traditional law and custom arising from the collective identity, but taking a form as both individual and collective rights, is made quite explicit by his Honour in the following paragraph:

> [69] Thirdly, where an indigenous people (including a clan or group), as a community, are in possession or are entitled to possession of land under a proprietary native title, their possession may be protected or their entitlement to possession *may be enforced by a representative action brought on behalf of the people or by a sub-group or individual who sues to protect or enforce rights or interests which are dependent on the communal native title.* Those rights and interests are, so to speak, carved out of the communal native title. A sub-group or individual asserting a native title dependent on a communal native title has a sufficient interest to sue to enforce or protect the communal title. A communal native *title enures for the benefit of the community as a whole and for the sub-groups and individuals within it* who have particular rights and interests in the community's lands. (Footnotes omitted, emphasis added.)

It is not suggested here that Traditional Owner rights in Sea Country necessarily equate directly to native title rights. Rather, as identified in the Tipakalippa jurisprudence, that rights in Sea Country have a similar character as rights which enure "for the benefit of the community as a whole and for the sub-groups and individuals within it".

It is worthwhile at this point to note that the decision in the matter of *Munkara v Santos No 3* [23] is (with respect) consistent with this analysis. That matter turned on a conclusion that the existence of a matter of cultural significance giving rise to cultural rights, could not be determined on the basis of the (questionable) assertions of an individual. Rather, the existence of the matter of cultural significance could only be established through evidence led by a sufficient number of members of the relevant community to support a conclusion

that the existence of the matter of cultural significance was a communal view. The decision did not consider the issue of, once the existence of the cultural matter was confirmed, whether an individual had standing to bring an action to enforce and protect that.

In this way it can be seen why it is that Traditional Owner rights in Sea Country have a dual character as both collective and individual rights. This "dual character" is not just of jurisprudential interest, it underlines the fundamental deficiency in most offshore regulatory structures.

4.1.3. Traditional Owner Representative Institutions

The relevant consultation regulations in much offshore regulation [24] require a proponent to consult with 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. The dual character of the legal rights of Traditional Owners in effect requires a proponent to (or at least seek to) undertake effective consultation with both every individual Traditional Owner and with each affected community (or in the offshore gas context, each Traditional Owner and community in the EMBA).

Clearly, this is a task that cannot be undertaken (within acceptable levels of operational certainty) without some form of statutory structure surrounding the process.

An example can be seen in the NTA. As discussed above, native title rights have the same dual (collective and individual) character. The process of managing the process of granting rights that may affect the collective and individual rights of native title holders, as explored above in *Munkara v Santos No 3*, is prescribed in the NTA, specifically the NTA future act regime.

The essence of the NTA future act regime is that a proponent is required to follow the correct process under the NTA and engage (in a post-determination environment) with the relevant Prescribed Body Corporate (PBC). In turn, the PBC is required to engage in a prescribed process of gaining approval for a "native title decision" with individual native title holders. However, were it not for the legislative prescription and subsequent statutory authorisation that flows from the NTA, all future acts would be caught in the "*Tipakalippa* dilemma".

Outside of the NTA, the dual nature as both individual and collective rights of Traditional Owners to their land and sea Country is clearly recognised in UNDRIP.

In UNDRIP land and sea Country rights are the rights of a people. Individual rights can only exist as an element of the collective rights. This principle is well recognised in international law. UNDRIP clearly sets out Traditional Owner rights as collective rights in, for example, Articles 18 and 26. UNDRIP also provides, in Article 18, that it is through *representative institutions* that collective rights are exercised.

In current Australian law there are a range of representative institutions of the nature described in UNDRIP Article 18. Within the native title regime, these are the PBCs established under the NTA. However, there are other existing organisation that would satisfy the definition of *Representative Institutions* for Traditional Owner rights.

Beside PBCs, other statutory organisations or organisations currently created or recognised by jurisdictional statute include:

- Aboriginal Land Councils under the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth);
- Anangu Pitjantjatjara Yankunytjatjara;
- Maralinga Tjarutja Council;
- Noongar Regional Corporations;
- Victorian Registered Aboriginal Parties;
- The Aboriginal Land Council of Tasmania;

- Native Title Representative Bodies.

Similarly, the International Council on Monuments and Sites (ICOMOS) has defined in its International Charter and guidance on Sites with Intangible Cultural Heritage, that whilst "[c]ommunities have customary rights to and responsibilities for their intangible cultural heritage . . . [i]n some communities, key groups or individuals are identified by those communities as the particular custodian or custodians of objects, sites, practices or memories [25]."

It is through these bodies that the collective nature of Traditional Owner rights in land and sea Country can be recognised and given effect to. The individual rights that exist because of the collective rights are then managed within the process of the representative institution. It is this process of the collective entity being empowered to have agency with respect to the rights of its members and with respect to its relations with external forces that is the fundamental basis of a right to self-determination.

Springing from the language of UNDRIP Article 18, in Australia these organisations are described as Traditional Owner Representative Institutions (TORIs).

4.2. Streamlined Negotiations—Grant of Title and Operational Approvals

A further element common to both domains is the need for practicality in any negotiation framework. One consequence of the litigation described above is that it has focused attention on operational processes within an overall project, rather than on the overall project itself. In the specific context of offshore energy projects (both wind and gas), this is manifested in the attention given to the approval of operational proposals rather than project proposals. The result is a risk that parties' negotiation resources are focused upon relatively minor operational minutiae.

There is a useful comparison with land-based hard minerals approvals. In this context the point of negotiation between proponent, Traditional Owners and government around the terms of a project proceeding, is often the point of contemplation of grant of title to the proponent. It is at this point that Traditional Owners will negotiate processes for appropriate involvement in operational matters, rather than making each operational decision the subject of an independent negotiation process.

Fortunately, the existing Australian offshore energy legislative regime is founded upon a similar distinction to that in onshore hard minerals regime. The point for the current purpose is that any regulatory reform must identify the contemplated grant of project title (licence) as the point where the terms of the grant of title are negotiated with Traditional Owners. The negotiations at this point should include within their scope attention to the processes by which Traditional Owners have appropriate input to operational decisions over the life of the tenure. There should also be an opportunity at the point of declaration of a zone for Traditional Owners to consider the conditions of areas that must be excluded due to cultural reasons.

5. Requirements for Change

As detailed above, many offshore energy projects (particularly gas) require a distinction to be recognised between First Nation communities directly affected by a proposal and those that lie within the broader EMBA. Largely this is the area that would be affected by a spill event and could include many hundreds of individual communities.

The distinction is based not on the physical fact of geographic proximity to the project activities but rather upon the question of the distinction between an actual and a possible impact on the rights and interests of Traditional Owners. In the case of a directly affected community, the activity of the proponent will have an impact upon the Sea Country of Traditional Owners. In the case of a Traditional Owner community within the broader

EMBA, the impact of the activity upon Sea Country rights is only possible, albeit that possibility is a real one. Whilst it is only a possibility that EMBA communities may be affected, that possibility may pose a catastrophic threat to their offshore cultural heritage. Whilst in Australia, the EMBA communities are almost exclusively within Australian maritime boundaries, this is not the case internationally. In most other parts of the world, a spill may affect communities across country as well as cultural borders.

This distinction between the affected and EMBA communities suggests a difference in approach is necessary.

5.1. Directly Affected Community

In the case of a directly affected community there is a known certainty of an impact (at least to some extent) on the Sea Country of relevant Traditional Owners and therefore their rights and interests. There is also a known certainty that the proponent and the government will, as a result of this impact on Traditional Owners' rights and interests, derive an economic return. These facts give rise to the necessary application of the fundamental expectations derived from international law and the principles underlying Australia law.

Relevantly these demand that the project proceed only on terms agreed with Traditional Owners following their free, prior and informed consent. They also demand that these terms can legitimately include a requirement for commercial and other benefits defined by the affected communities, to be received by Traditional Owners. In this way, offshore projects could begin to seek parity with onshore extraction projects regarding agreement making with Traditional Owners.

5.2. FPIC and Consent

Many of the necessary components of the principle of FPIC have already been addressed in this article, however, it is useful to articulate them specifically in this context.

- Traditional Owners must be consulted as a necessary preliminary step, ahead of the grant of any statutory right that will involve interference with their rights and interest. This is the requirement of Prior in FPIC.
- FPIC also requires the project proponent to provide full information about the project, how the proponent intends to carry it out and any alternative ways of carrying out the project. This is the requirement of Informed in FPIC.
- If new information is received after initial approval is given the proponent must go back to the Traditional Owners and discuss this.
- The views of affected Traditional Owners must be articulated through representative institutions (as understood in UNDRIP) that are provided with adequate resources to participate in discussions with proponents on an equal basis. Resources may appropriately be sourced from government funding and fees for service imposed on proponents.
- The Consent requirement within the principle of FPIC demands that the agreement of Traditional Owners is freely given. Relevantly this is usually understood as meaning that consent is given without the threat that a failure to give consent will be simply ignored by the relevant decision maker. If this is the case it gives rise to the possibility that consent is given to seek a "least-worst outcome". Consent in this context cannot be seen as "free".

UNDRIP (from which the principle of FPIC is derived) is a statement of the fundamental human rights of all people expressed within the particular context of First Nation peoples. As with all human rights, there will be circumstances where one set of rights can conflict with the expression of other equally legitimate rights.

In the context of offshore energy projects, it must be accepted that the ultimate arbiter of any such conflict of rights is the nation-state whose sovereign rights, with respect to the resource in question, is recognised under international law. This is accepted within the terms of UNDRIP (Article 46).

At a practical level, the application of these principles would require that the proponent should have obtained the consent of Traditional Owners to the proposed grant of rights. Specifically, in determining whether or not to grant to a proponent a set of statutory rights that interfere with the rights and interests of Traditional Owners, a decision maker would commence with the proposition that consent needs to have been obtained.

In the event consent is not demonstrated, the decision maker would be required to ascertain the basis for the absence of consent both in terms of adherence to procedural requirements and the reasonableness of proposed outcomes. It would only be in circumstances whereby the decision maker could be confident that the grant of the conflicting statutory rights represented a fair and legitimate infringement on the rights of Traditional Owners, that the grant should proceed. In the absence of consent from the affected Traditional Owners, such grants would be limited.

As is the case with all administrative decision making in Australia, the decision would be susceptible to judicial review if an error of law, including an error in the application of the statutory principles outlined above, could be made out by an aggrieved party.

On a procedural level, the process of confirming consent by relevant Traditional Owners should be the equivalent as for a "native title decision" under the NTA or the grant of an Exploration Licence under the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA) [26].

5.3. Engagement with Traditional Owner Communities Within the EMBA

The fact that Traditional Owners within the EMBA may only be *possibly* impacted by the activities of the proponent does not in any way lessen their legitimate role. In the process of consideration and approval of the grant of statutory rights, which may lead to such an outcome, this role must be recognised. However, it does suggest though that the involvement of these Traditional Owners in this process should be concomitant to the potential impacts they may experience.

The contingent nature of the impacts upon these Traditional Owners rights and interests suggest that the main focus of their involvement is in the area of the management of these contingencies. That identified, it may also extend to involvement in the development of the regular operational procedures that give rise to these contingencies.

At a practical level, these considerations would suggest that the involvement of these Traditional Owners would be in the form of a "right to comment" on the proposals contained within the project. To give real effect to such a procedural right it is important that the elements of prior consultation (which is early in the decision making process) and the provision of full information are satisfied. To be meaningful it is necessary that the ultimate decision maker has full oversight of the process. In a manner not dissimilar to the current regulatory arrangements, this would require a proponent to detail:

- With whom consultation had occurred (and the evidence based upon which this selection was made);
- The structure and content of the consultations;
- The outcomes of those consultations and how those outcomes had been incorporated into the proposal;
- If they had not incorporated why this was the case.

Unlike the current arrangements, the consultation would be conducted through the relevant TORI. Both a proponent and ultimate decision maker will therefore have confidence

of the comprehensiveness and accuracy of the outcomes of the process. In many respects then, this process reflects that for consultation described in the NTA [27] and ALRA [28].

6. Economic Opportunities and Pathways

The onshore minerals extraction regime is long established, and proponents understand the relationship of projects to the exercise of native title rights. That is not to say that this older regime is without flaws. However, the entry level position of projects regarding recognition of Traditional Owner rights is higher than in the emerging offshore environment. Part of this recognition is the development of benefit sharing agreement with Traditional Owners.

Natural resource development is often portrayed as a public–private partnership. The government asserts ownership of the resource and provides the regulatory infrastructure necessary to support development of the resource. Proponents provide the capital and bear the risk of the project. Both parties share in the returns from the development.

Resourcing the processes associated with First Nation communities' involvement in offshore energy projects should also adopt this model. Resources to support such involvement should come from both government and proponent as described in broad terms below.

6.1. The Role of Government

The government's key function is to provide the regulatory infrastructure necessary to support resource development. In the context of Traditional Owner involvement in offshore energy projects, this principle is given effect through government providing the necessary resources to TORIs to maintain a *standing capacity* to engage effectively with proponents in a timely fashion and as the need arises. Practically, this means that Traditional Owner organisations have the standing administrative, logistical and technical expertise capacity to engage with a proponent when needed. Situations where Traditional Owner organisations need to develop these capacities in response to the needs of proponents have been shown (over decades of experience) to lead to costly delays for proponents and sub-optimal outcomes for Traditional Owners.

A feature unique to the offshore energy environment stems from the relatively recent focus on the specifics of the interests of Traditional Owners in their Sea Country. In the Australian context, many decades of *land* claims under the specific regime of the NTA has meant that there is a significant body of knowledge regarding Traditional Owners' cultural and other interests, particularly in areas of high minerals prospectivity. In large part, the resources necessary to develop this body of knowledge have been provided over time through the Commonwealth Government's resourcing of the native title system.

The level of accessible knowledge relating to the interests of Traditional Owners in their Sea Country is not anywhere near this level. This accessible knowledge deficit inevitably leads to project approval delays stemming from the need to acquire the necessary information on a project-by-project basis. These project approval delays carry negative cost consequences for both proponents and governments.

To remedy this situation, it is important that the government provides project funding to TORIs, delivered over several years. This funding would support them to develop the level of accessible knowledge relating to cultural and other interests in their Sea Country and could usefully be targeted to areas of current or potential future high offshore energy project prospectivity.

6.2. The Role of Proponents

The resourcing responsibilities of proponents must include all Traditional Owner organisations' costs incurred for consideration of the proponent's proposal. The elements

of this principle are well explored in the context of the NTA regime with the PBC Fees Regulations [29]. Providing an existing regulatory example, this manifests both in their content and the practice developed by proponents and Traditional Owners influenced by them. Similar regimes are in place in other comparable contexts [30].

The principle is also utilised in the plethora of government fee for service arrangements. Such arrangements exist where an agency discharging a statutory function, on behalf of a particular private individual, will recover the cost of the provision of the service from the beneficiary of that service.

One practical manifestation of this principle relates to the initial approach by a proponent to a Traditional Owner organisation seeking assistance in the progress of their project. Usually, this approach will involve the provision of extensive technical and expert material requiring assessment and subsequent engagement with the Traditional Owner organisation's members. Even the process of developing an estimate of the costs associated will involve the allocation of significant resources from the Traditional Owner organisation for the benefit of the proponent. To accommodate this, the required practice should ensure that a proponent provides initial resources to the Traditional Owner organisation to allow an accurate assessment of their costs in undertaking the desired engagement with the proponent.

6.3. Benefits to Traditional Owners Within the EMBA

The contingent nature of impacts upon EMBA community Traditional Owners' rights and interests does not suggest a conclusion that these Traditional Owners are to be denied access to benefits stemming from a proposal. It does suggest though that the structure of these benefits needs to reflect this circumstance.

Two possible approaches may be to negotiate access to benefits based upon realisation of the happening of the contingency; in essence, benefits would only be paid if an environmental incident in fact occurred. Another approach would be to discount the value of the benefit based upon a calculation of the likelihood of the occurrence of the contingency. It should be apparent that neither of these options are feasible or desirable.

A preferred approach is to aggregate the potential benefit on a national basis and develop a distribution mechanism that would maximise outcomes from the benefit on both a social (and cultural) and economic basis.

In this approach, this national aggregation could take the form of an independent fund.

6.4. Economic Empowerment Fund

Many First Nation and non-First Nation communities across the world have developed financial structures to secure long term economic development from mineral resource extraction opportunities. In development, considerations are placed on the nature of investment and allocation of revenue often determining the form of the fund itself.

Long-term economic stability for Traditional Owner entities, facilitating connection to Country and protection of culture, and community prosperity should be the purpose of any self-sustaining fund built on the extraction of resources from Country. Social investment capacity is required for disbursements to entities to develop programmes and functions whilst ongoing investment management is required to ensure the longevity of this support.

The proposed fund identified above would receive payments from proponents which would be aggregated for the benefit of EMBA community Traditional Owners. The payments could:

- Either be statutorily required (although this may raise Constitutional issues);
- Form a component of an agreement with directly affected Traditional Owners;

- Be based in existing arrangements such as those pursuant to Good Standing Agreements in the context of work bids in the current offshore gas regime.

In a manner similar to the "Good Standing Agreement" [31] arrangements under the Australian *Petroleum (Submerged Lands) Act 1967* (Cth); *Petroleum (Submerged Lands) Acts 1982* (SA, WA, NT, Qld, NSW, Vic, Tas), the structure would still be one of "a voluntary policy mechanism available for the titleholder and their directors, to maintain 'good standing' with the Joint Authority" [32]. However, unlike the current Good Standing Agreements arrangements, payments would not necessarily be dependent upon default of expenditure under a work bid.

Similar funds operate internationally, providing valuable insights into establish-ment and ongoing management. Looking to Canada's Indigenous Growth Fund and the Norwegian Sovereign Wealth Fund (Statens Pensjonsfond), we can see international examples of Fund creation and management. To develop such a mechanism, the fund could take the form of a trust managed by a company limited by guarantee and established specifically for the purpose of managing the fund. The members of a corporation so established would be both Traditional Owner organisations as well as organisations representative of relevant industry and government. The Board would reflect this tripartite basis and ensure relevant high level fund management expertise.

Access to the benefits of the fund would be restricted to Traditional Owner organisations. It would be on an application basis with allocation based on the demonstration of satisfaction of (social, cultural and economic) merit criteria. Such criteria would be determined by the Board and published. The arrangement is not dissimilar in concept and operation to the recently established Northern Territory Aboriginal Investment Corporation (NTAIC), although NTAIC is established pursuant to a statutory regime.

7. Conclusions

As can be seen from the above analysis, respect for Traditional Owner rights recognised in FPIC and UNDRIP are consistently overlooked in the offshore environment. This raises several key concerns.

The first is that ICH and place-based cultural heritage is at risk of both damage and destruction under existing regimes. This is inevitable without early consultation and implementation of FPIC for all projects in the offshore environment.

Secondly, intangible cultural heritage is not being respected or protected. This can be seen most clearly in the acknowledgement of First Nations' rights applied almost universally on the same level as commercial fishers.

Finally, the economic development opportunities for First Nations peoples are not prioritised. These should be considered both at the initial project development stages and project equity should be implemented at a licencing and regulatory level.

In answer to our initial questions, we can see that First Nations' rights are generally not recognised as comprehensively as they are defined in UNDRIP. Contributing to this is a loose understanding of FPIC and an even more sparse implementation of it within regularity and legislative regimes. In this regard, the new energy regimes are no different to the old regimes regarding recognition of First Nations' rights.

To develop culturally safe offshore projects that benefit communities culturally and financially, a number of reforms are proposed.

- Affected Traditional Owner communities must be supported through the full provision of FPIC. Proponents and government entities proposing offshore projects areas must conduct the following:
    - Establish a rigorous processes to support communities to understand projects;

  - Ensure that consultation with those communities is through their self-determined representative structures;
  - Undertake engagement in a timely manner that is set through a process of co-design with the affected communities;
  - Understand that consent is both a respected outcome and a process.
- Agreement making with tangible financial agreement, which may include equity and a range of supported outcomes, is fair and not a last minute consideration.
- EMBA communities have the right to be informed and financially supported to respond to events should they arise.

In exploring an international perspective and shared concerns, it is hoped that work undertaken in Australia to ensure First Nations' rights and responsibilities are recognised in energy projects and can be strengthened and secured.

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Acknowledgments: The Sea Country Alliance members represent Traditional Owners with responsibilities for most of the Australian shoreline. Speaking with one voice for rights to Sea Country, the Alliance is the single most comprehensive perspective on Traditional Owner responsibilities for Sea Country. All coastal state and territories of Australia are represented on the 55 member Alliance, ensuring that the complexity of our diverse seas, oceans and coastal areas is recognised. The Alliance has 46 Traditional Owner member corporations with statutory responsibilities for Sea Country and nine associate members who also assume offshore responsibilities.

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Abbreviations

The following abbreviations are used in this manuscript:

ALRA	*Aboriginal Land Rights (Northern Territory) Act 1976* (NT)
EMBA	Environment that may be affected
EP	Environment Plan
FPIC	Free, prior and informed consent
ICH	Intangible cultural heritage
NOPSEMA	National Offshore Petroleum Safety and Environmental Management Authority
NTA	*Native Title Act 1993* (Cth)
NTAIC	Northern Territory Aboriginal Investment Corporation
OPGGS	*Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth)
OPGGS Reg's	*Offshore Petroleum and Greenhouse Gas (Environment) Regulations 2023* (Cth)
PBC	Prescribed Body Corporate
Plan	2002 National Oceans Office South-East Regional Marine Plan, *Sea Country an Indigenous Perspective*
Tipakalippa	*Santos NA Barossa Pty Ltd. v* Tipakalippa [2022] FCAFC 193
TLC	Tiwi Land Council
TORIs	Traditional Owner Representative Institutions
UNDRIP	United Nations Declaration on the Rights of Indigenous People

Cited Legislation and Case Law

Legislation

- *Aboriginal Land Rights (Northern Territory) Act 1976* (NT)
- *Native Title Act 1993* (Cth)
- *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth)
- *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth)
- *Offshore Petroleum and Greenhouse Gas (Environment) Regulations 2023* (Cth)
- *Petroleum (Submerged Lands) Act 1967* (Cth)
- *Petroleum (Submerged Lands) Acts 1982* (SA, WA, NT, Qld, NSW, Vic, Tas)

Case Law

- *Akiba v Commonwealth (2013)* 250 CLR 209
- *Akiba v Queensland (No 3) (2010)* 204 FCR 1, 527
- *Commonwealth v* Yarmirr [2002] HCA 56; 208 CLR 1
- *Mabo & Ors v Queensland & Ors (No 2) (1992)* 175 CLR 1
- *Munkara v Santos NA Barossa Pty Ltd. (No 3*) [2024] FCA 9
- *Santos NA Barossa Pty Ltd. v* Tipakalippa [2022] FCAFC 193
- *Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority (No 2*) [2022] FCA 1121

References and Notes

1. Note on the use of terms First Nations and Traditional Owner. In referring to Indigenous Peoples internationally, and respecting a locally held preference by those communities, the term First Nations has been used. In instances where collective rights are in use, managed through a formally identified First Nations structure, Traditional Owner has been used.
2. On 12 December 2015, world leaders at the UN Climate Change Conference (COP21) in Paris ratified the Paris Agreement on climate change. The Agreement is a legally binding international treaty, entered into force on 4 November 2016. At time of writing, 195 Parties (194 States plus the European Union) have joined the Paris Agreement. The Agreement includes commitments from all countries to reduce their emissions and work together to adapt to the impacts of climate change. Available online: www.un.org/en/climatechange/paris-agreement (accessed on 20 March 2025).
3. *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)* s 3 (1).
4. National Oceans Office. Sea country—An Indigenous perspective. In *The South-East Regional Marine Plan Assessment Reports*; National Oceans Office: Kingston, Australia, 2002.
5. Storey, M. Indigenous Underwater Cultural Heritage Legislation in Australia: Still Waters? *Herit. J.* **2025**.
6. Native Title is the recognition in Australian law that some Aboriginal and Torres Strait Islander people continue to hold rights and interests in land and water. This is legislated under the *Native Title Act 1993* (Cth).
7. Australian Marine Parks. Indigenous Engagement Principles. Available online: https://parksaustralia.gov.au/marine/management/programs/indigenous-engagement/principles/ (accessed on 18 March 2025).
8. In the Australian offshore regulatory environment, these would be considered Priority Areas for Assessment and the federal government Minister for Resources.
9. *Commonwealth v Yarmirr* [2001] 208 CLR 1; HCA 56 ("Yarmirr") per Gleeson CJ, Gaudron, Gummow, and Hayne JJ at [87].
10. *Yarmirr* per Gleeson CJ, Gaudron, Gummow, and Hayne JJ at [87].
11. *Akiba v Commonwealth* [2013] 250 CLR 209 ("Akiba").
12. *Akiba* at [527].
13. *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193 ("*Santos FFC*").
14. *Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority (No 2)* [2022] FCA 1121 ("*Tipakalippa*").
15. *Santos FFC* per Kenny and Mortimer at [39].
16. Santos NA Barossa Pty Ltd Environment Plan, Appendix C.
17. *Santos FFC* per Kenny and Mortimer at [68].
18. *Santos FFC* per Kenny and Mortimer at [74].
19. Article 18: Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, *through representatives chosen by themselves in accordance with their own procedures*, as well as to maintain and develop their own indigenous decision-making institutions. (Emphasis added).

20. Article 26: *Indigenous peoples* have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. (Emphasis added).
21. *Offshore Petroleum and Greenhouse Gas (Environment) Regulations 2023* (Cth), Regulation 11A(1)(d).
22. *Mabo & Ors v Queensland & Ors (No 2)* (1992) 175 CLR 1 ("*Mabo No 2*").
23. *Munkara v Santos NA Barossa Pty Ltd (No 3)* [2024] FCA 9.
24. For example, in the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth).
25. International Council on Monuments and Sites. *International Charter and Guidance on Sites with Intangible Cultural Heritage*; International Council on Monuments and Sites: Charenton-le-Pont, France, 2024.
26. *Aboriginal Land Rights (Northern Territory) Act 1976* (NT) ("ALRA") s 42(2)(a).
27. *Native Title Act 1993* (Cth) s 24HA(7).
28. ALRA s 42(2)(b).
29. *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth).
30. For example, Registered Aboriginal Party fee arrangements under the *Aboriginal Heritage Act 2006* (Vic).
31. Noting these arrangements are currently under review.
32. Good Standing Agreement. Available online: https://www.nopta.gov.au/application-processes/good-standing-agreement.html (accessed on 15 April 2025).