Catholic Religious Australia

Catholic Religious Australia Submission to the Inquiry into the Protecting the Spirit of Sea Country Bill 2023

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Submission to the Environment and Communications Legislation Committee inquiry into the Protecting the Spirit of Sea Country Bill 2023

Catholic Religious Australia (CRA) welcomes the opportunity to make a submission to the Environment and Communications Legislation Committee (the Committee) inquiry into the *Protecting the Spirit of Sea Country Bill 2023* (the Bill).

CRA is the peak body representing the Leaders of 150 Catholic Religious Institutes and Societies of Apostolic Life which operate in Australia. Our religious institutes comprise about 4,800 Catholic religious women and men, working in education, health care and social welfare. Australia's Catholic religious congregations are strongly committed to action for justice. Through their justice ministries, they work with and advocate for Australia's most vulnerable, including First Nations Peoples and communities.

Over the last few decades, mechanisms to recognise, evaluate and protect Aboriginal cultural heritage have been incorporated into a patchwork of local, state, and federal legislation, in the form of cultural heritage, native title and environmental legislation. Being so disjointed, as well as being developed ahead of many of the contemporary international legal frameworks,[1] has subsequently resulted in the inadequacy of these laws to protect First Nations' cultural heritage around Australia, and numerous domestic examples illustrate this: Under Western Australia's Aboriginal Heritage Act, between 2001 and 2007, 488 applications for development were considered and permission given to disturb heritage 480 times.[2] The legal destruction at Juukan Gorge in Western Australia by mining company Rio Tinto and the subsequent parliamentary inquiry, demonstrated how the current regulatory system favoured Rio Tinto in their desire to destroy the caves, while disempowering the local First Nations (the Puutu Kunti Kurrama and Pinikura (PKKP)) peoples from being able to prevent it, indicative of wider systemic problems that shun genuine consultation and the Indigenous right of free, prior and informed consent (FPIC).[3]

The proposed Bill specifically deals with underwater, and associated intangible, cultural heritage. There has been growing acknowledgement of First Nations Peoples' traditional connection to Sea Country in Australia, leading to the development of mechanisms to incorporate indigenous participation in marine governance. However, First Nations' recognised legal rights in marine areas of their customary estates are less developed than for the terrestrial components of their estates, with tenure distinctions between land and sea areas made under Australian legislation.[4] The nature of their participation in marine governance is shaped by a matrix of native title rights to sea country and marine places, environmental legislation and policy, human rights and procedural norms, which mostly adopt a co-existence model that privileges settler law over the legal and customary relationships that Aboriginal peoples and Torres Strait Islanders have with marine places,

[1] Lauren Butterly and Lucas Lixinski, "Aboriginal Cultural Heritage Reform in Australia and the Dilemmas of Power," *International journal of cultural property* 27, no. 1 (2020): 126.
[2] Tod Jones, "Separate but unequal: the sad fate of Aboriginal heritage in Western Australia," *The Conversation*, URL: https://theconversation.com/separate-but-unequal-the-sad-fate-of-aboriginal-heritage-in-western-australia-51561, accessed 15 February 2024.
[3] Anirudha Nagar, "The Juukan Gorge Incident: Key Lessons on Free, Prior and Informed Consent," *Business and human rights journal* 6, no. 2 (2021): pp. 378 – 379.
[4] Phil Rist, Whitney Rassip, Djalinda Yunupingu, Jonathan Wearne, Jackie Gould, Melanie Dulfer-Hyams, Ellie Bock, and Dermot Smyth, "Indigenous Protected Areas in Sea Country: Indigenous-driven Collaborative Marine Protected Areas in Australia," *Aquatic conservation* 29, no. S2 (2019): 138–151.

resulting in the prioritisation of government and third-party interests.[5] This was exemplified by the *Santos NA Barossa Pty Ltd v Tipakalippa [2022] FCAFC 193 (Appeal Decision)*, which found that energy company Santos failed to properly consult Tiwi Island traditional owners in the preparation of their environmental plan for their Barossa offshore gas project, as per the *Offshore Petroleum and Greenhouse Gas Storage Act 2006 and the Offshore Petroleum* and *Greenhouse Gas Storage (Environment) Regulations 2009.*

It is therefore commendable that the proposed Bill seeks to enhance Indigenous rights within Sea Country by amending the above legislation to: include Traditional Owners and knowledge holders in First Nations communities in the definition of 'Relevant Person'; require that standards of consultation are created; and 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.

The proposals of the Bill would provide some immediate extra protections for First Nations Peoples regarding underwater cultural heritage being impacted by offshore projects, however, as will be discussed, further strengthening of the Bill is needed to eliminate any doubts over required consultation. Additionally, this Bill precedes the federal review of Indigenous Cultural Heritage Protection currently underway, which currently has no timeline for its completion.[6] It is therefore unclear how the amended Acts would interact with any forthcoming changes to legislation.

Including Traditional Owners and knowledge holders in First Nations communities in the definition of 'Relevant Person'

It is commendable that the Bill clearly stipulates that traditional owners and knowledge holders from First Nations communities will be included in the meaning of 'relevant person' who must be consulted when preparing environment plans to be submitted to NOPSEMA. Presently under the Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009 (Cth), Traditional Owners and knowledge holders within First Nations communities are not explicitly included as a 'relevant person' that must be consulted. Consultation by Titleholders with First Nations Peoples when preparing an environment plan for every offshore petroleum and greenhouse gas storage activity is necessary to identify and protect underwater cultural heritage and uphold the indigenous right of self-determination, consistent with the rights laid out in international legal framework UNDRIP. This states that First Nations Peoples have the right to maintain and strengthen their spiritual relationship with their traditionally owned and/or otherwise occupied and used lands and territories, including waters and coastal seas (Article 25), to 'maintain, control, protect and develop their cultural heritage' (article 31), and to participate in decision-making in matters which would affect these (and other) right(s) (Article 18).

[5] Lee Godden, "The Evolving Governance of Aboriginal Peoples and Torres Strait Islanders in Marine Areas in Australia," in *The Rights of Indigenous Peoples in Marine Areas*, edited by Stephen Allen, Nigel Bankes and Øyvind Ravna (Oxford: Hart Publishing, 2019): 123–148. Accessed January 23, 2024. http://dx.doi.org/10.5040/9781509928675.ch-005.
[6] Jamie Lowe, "How have plans to reform national cultural heritage laws progressed?" *RN Breakfast*,URL: https://www.abc.net.au/listen/programs/radionational-breakfast/heritage-codesign/102359798, accessed 13 February 2024.

This is also supported by other relevant international instruments, such as the UN Compact on Business and Human Rights, the UN Global Compact, and the UN Guiding Principles on Business and Human Rights. These guide businesses to incorporate social, environmental and economic ethical principles into corporate activity, including encouraging corporations to better observe Indigenous Rights.[7]

However, CRA is concerned that the question of 'who speaks for Country?' remains within the Bill. There is no single identifier or legal definition for 'who speaks for Country' within Australian legislation, and various terminologies are used across numerous Commonwealth, State and Territory policy documents and legislation to refer to Indigenous people who should be consulted, including, 'Elders,' 'Traditional Owners,' 'Traditional Custodians,' 'Registered Aboriginal Parties,' 'Aboriginal Owners,' 'Native Title Holders' and 'Native Title Claimants'. Identifying who should serve as representative can be complex.[8]

NOPSEMA's Consultation in the course of preparing an Environment Plan Guideline (Guideline) was developed in response to the *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193 (Appeal Decision) and a critique made by the Court that further policy guidance on consultation requirements may be needed. The Guideline aims to provide clarity on the legal requirements for consultation, however it still give titleholders some "decisional choice" in identifying which natural person(s) are to be approached and how information will be given to them to allow an informed response. This can be difficult to determine for the Titleholder and can have ramifications for planning when opinions amongst local peoples differs. At James Price Point in WA, for example, some Indigenous groups supported the building of an offshore 'gas hub' for economic reasons, while other Indigenous groups opposed the project due to potential environmental damage to places of cultural significance.[9] More recently, in the *Munkara v Santos* case, Traditional Owners gave the court conflicting accounts as to whether the proposed Barossa gas pipeline would have the impact the applicants asserted, including differing accounts given by members of the same clan (Jikilaruwu) and even amongst senior members of the same family group.

Norman Laing and Kellyanne Stanford have thus rightly identified that "the uncertainty surrounding 'who speaks for Country' continues to create or contribute to conflict amongst Aboriginal communities and individuals," while also being a source of "significant confusion amongst those required to consult with Aboriginal communities."[10] It may be beyond the scope of this Bill to solve the dilemma of who speaks for country and establishing a single unifying definition, but it is hoped that the national reform of cultural heritage protection will address this issue, considering terminology, definitions, mechanisms to support Indigenous people to 'choose their own representatives' to 'maintain, control, protect and develop their cultural heritage,' who are legally recognised to do so.

There may also be dispute amongst different categories of 'relevant persons,' and the legislation does not guide the Titleholder in how to manage legitimate competing interests. This highlights the complexities of having Indigenous Cultural Heritage considerations being embedded within environmental legislation, where there is potentiality for environmental conservation to be a legitimate competing interest. For example,

[7] Judith Preston and Donna Craig, "In Plain Sight - from Juukan Caves Destruction to Just Development," *Journal of energy & natural resources law* ahead-of-print, no. ahead-of-print (n.d.): 20.
[8] Lauren Butterly and Rachel Pepper, "Are Courts Colourblind to Country? Indigenous Cultural Heritage, Environmental Law and the Australian Judicial System," *University of New South Wales law journal* 40, no. 4 (2017): 1313 – 1335.
[9] Butterly and Pepper, "Are Courts Colourblind to Country?", 1313 – 1335.
[10] Norman Laing & Kelly Stanford, "Who "speaks for country" in NSW?" *LSJ 18* (2015): 88–89.

conservation might mean closing off an area so that no one can access it, even if the Traditional Owners are wanting to visit important heritage sites. The legislation should make clear that the titleholder must hear and understand the Indigenous voice first and foremost in decisions about Aboriginal heritage, so that environmental values do not trump Indigenous governance rights.[11] CRA therefore proposes that the Bill be amended to place priority on First Nations' consultation, over and above other relevant persons, if their cultural heritage is impacted by the project. Although, ultimately, CRA believes that there should be standalone Aboriginal Cultural Heritage legislation, so that Traditional Owners' concerns are not pitted against competing interests within the broader legislation.

There may also need to be some clarification in the legislation that 'traditional owners and knowledge holders' may have traditional cultural connection with the sea, without any proprietary overlay, such as are acknowledged in other pieces of federal legislation (such as the Aboriginal and Torres Strait Islander Heritage Protection Act 1984) and have been considered by the courts. This was one of the determinations of the Full Court decision of *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193, which fond that although the Tiwi Islanders legal land rights under the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) did not extend to sea country, they still had traditional "cultural and spiritual interests" of a broad meaning in the environment to be impacted, and as such the Tiwi Islanders were "relevant persons" who should have been consulted by Santos.

Prescribing what constitutes 'Consultation'

CRA supports the Bill's directive that the regulations must prescribe what constitutes consultation with relevant persons in preparing an environment plan, and that the regulations must provide for the free, prior and informed consent of traditional owners, consistent with the UNDRIP, as a condition for acceptance of an environment plan.

At present, NOPSEMA's Guidelines for the Preparation of an Environment Plan do not "dictate exactly what each consultation process should entail, nor how a titleholder should conduct the consultation process as the Environment Regulations place these decisions with the titleholders before submission of an Environment Plan to NOPSEMA."[12] Without clear standards for consultation, the exercise can become tokenistic, as warned by Samual Griffiths in his Final Report of the 2020 Review of the Environmental Protection and Biodiversity (EPBC) Act: "There is a culture of tokenism and symbolism. Indigenous knowledge or views are not fully valued in decision-making. The Act prioritises the views of western science, and Indigenous knowledge and views are diluted in the formal provision of advice to decision-makers."[13] To rectify this, the Report called for National Environmental Standards to include specific requirements relating to best-practice Indigenous engagement and participation, to enable Indigenous views and knowledge to be incorporated into regulatory processes. This is consistent with Article 11 of the UNDRIP, which calls for the Free Prior and Informed Consent of Traditional Owners (FPIC) when cultural, intellectual, religious and spiritual property is impacted by a project. CRA supports the Bill's provision that regulations must likewise

[11] Butterly and Pepper, "Are Courts Colourblind to Country?", 1313 – 1335.
[12] NOPSEMA, "Guideline: Consultation in the course of preparing an environment plan," https://www.nopsema.gov.au/sites/default/files/documents/Consultation%20in%20the%20course%20of%20preparing%20an%20Environment%20Plan%20guideline.pdf, accessed 13 February 2024.
[13] Professor Graeme Samuel AC, "Final Report: Chapter 2 - Indigenous culture and heritage," *Independent review of the EPBC Act*, URL: https://epbcactreview.environment.gov.au/resources/final-report/chapter-2, accessed 13 February 2024.

provide for the free, prior and informed consent of traditional owners, *consistent with the UNDRIP*, as a condition for acceptance of an environment plan.

However, Ed Wensing has warned that "while implementing free, prior and informed consent may seem "deceptively simple" at the international level, complexities arise at the practical domestic level."[14] At present, Australian native title laws engage with some elements of FPIC, but do not replicate it as reflected in UNDRIP. Traditional Owners are not really 'free' in the sense that failure to accept developers' terms can mean foregoing the associated royalties, training, employment, and compensation for land impacts. Despite the proviso that if, after six months, no agreement has been reached, the group may ask the Native Title Tribunal to arbitrate, the Tribunal has historically almost always ruled that proposed developments can occur. Furthermore, there is no true iteration of 'consent' as there is no provision granted to Indigenous groups to veto such a decision or raise concerns, and the state or a company does not legislatively have to oblige to Traditional Owners' objections. Consequently, many First Nations peoples are participate in the consultation process under the native title laws on the understanding that the project will proceed regardless of their objections, and are therefore going into consultations to negotiate a cultural or economic outcome as compensation for the likely impacts to their cultural heritage.[15] This is not 'free, prior and informed consent'!

In addition to their inferior bargaining position, Anirudha Nagar argues that the principle of FPIC is hindered in practice because First Nations communities face difficulties in obtaining the resources they need to protect their interests – "from mapping their lands, navigating complex and technical company consultations and consent processes, and monitoring company activities – in large part because they cannot afford it. Meanwhile, mining companies have well-resourced access to legal teams and technical and subject matter experts."[16] An example of this was seen in the *Munkara v Santos* case, whereby the Tiwi applicants relied upon white academics and legal organisation Environmental Defenders Office to proffer tangible evidence of their alleged underwater cultural heritage – evidence which was deemed by Justice Natalie Charlesworth to ultimately be confected. This example flags the issue of litigation activism whereby environmental activist groups fund cultural heritage litigation for their own interests, but upon whose funding and ability to navigate the settler-state court system First Nations communities are reliant.

For the Bill to implement FPIC into the consultation process, as per the UNDRIP, Traditional Owners must be able to approve or reject projects affecting their cultural heritage prior to the commencement of operations,[17] to level out company-community power imbalances presently inherent in consultation. It would also mean that communities have access to the legal or technical support they need, support that allows for a community-prioritised approach. An example within the Australian Native Title Act is the system of government-funded 'native title representative bodies.' Although under-funded, these are able to provide legal and other assistance to help native title groups in negotiating with developers.[18]

[14] Ed Wensing, "Indigenous Peoples' Human Rights, Self-Determination and Local Governance - Part 1," *Commonwealth journal of local governance*, no. 24 (2021): 98–123.
[15] Laing & Stanford, "Who "speaks for country" in NSW?", 88–89.
[16] Nagar, "The Juukan Gorge Incident: Key Lessons on Free, Prior and Informed Consent," 378 – 379.
[17] Ibid., 378 – 379.
[18] Ibid., 378 – 379.

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

CRA commends the Bill's provisos 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. By specifically including these terms, the Bill will clarify that a 'relevant' person's functions, interests or activities that may be affected by the activities to be carried out under the environment plan include underwater and intangible cultural heritage.

However, by only including 'underwater' and 'intangible' cultural heritage in the Bill, the legislation bifurcates the more holistic notion of 'Country' which does not separate the land from the waters, but instead recognises the living connection between them. As the 2002 assessment report of the South-east Regional Marine Plan, *Sea Country: An Indigenous Perspective*, states: "Another common feature of coastal Aboriginal cultures is the connectedness of land and sea: 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."[19] Again, this points to the bigger problem of Indigenous Cultural Heritage legislation being placed into Settler-State categories that attempt to separate out components.

It is also a point of confusion in the Bill that the definition for 'underwater cultural heritage' references a connection between intangible cultural heritage and physical 'archaeological sites and artefacts,' however the definition for 'intangible cultural heritage' makes no reference to the tangible materials associated with the cultural practice. This makes unclear and malleable the nature of the relationship between tangible and intangible, and land and sea heritage, for Titleholders.

This is further complicated by the Bill's proviso that "a proposal will not be suitable for publication or 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," but no equivalent safeguards for 'intangible cultural heritage' are provided. Presumably, as per the Bill's definition of 'underwater cultural heritage,' only that intangible cultural heritage that has associated 'archaeological sites and artefacts' can prohibit the activity of a company. This leaves Traditional owners enmeshed in battles about contested meanings about intangible cultural heritage that has connection to Country, but is without a physical component of the kind recognised by Euro-centric legislation. An example of this could be First Nations' Songlines. Australia has not signed the UN Convention for the Safeguarding of the Intangible Cultural Heritage 2003, which is the main international instrument that promotes the safeguarding of intangible cultural heritage, and this, along with the oversights in the Bill, signifies an overall lack of commitment in Australia to protecting intangible cultural heritage, and understanding of the totality of what constitutes First Nations' Cultural Heritage.

[19] National Oceans Office, "Sea Country – an Indigenous perspective, The South-east Regional Marine Plan Assessment Reports," URL: https://parksaustralia.gov.au/marine/pub/scientific-publications/archive/indigenous.pdf, Accessed 13 February 2024.

Conclusion

CRA believes the Bill has been proposed in good faith, to provide greater protections for First Nations' cultural heritage. However, as noted numerous times, the Bill is only step in the right direction, with further legislative changes needed to truly secure the dignity and rights of First Nations Peoples in Australia. Ultimately, the national reform of the corpus of First Nations Cultural Heritage protections is urgently needed.