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Aboriginal Areas Protection Authority
protecting sacred sites across the territory

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Via email – Catherine.Kesteven@industry.gov.au

Dear Catherine

Re: AAPA Submission on the Clarifying consultation requirements for offshore oil and gas storage regulatory approvals

Thank you for the opportunity to comment on the consultation paper on potential amendments to the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2023*.

The Aboriginal Areas Protection Authority (the Authority) is a statutory body established under the *Northern Territory Aboriginal Sacred Sites Act 1989 (NT)* (Sacred Sites Act) and is responsible for overseeing the protection of Aboriginal sacred sites on land and sea across the Northern Territory.

The Sacred Sites Act applies to Northern Territory Coastal Waters. About 85 per cent or 6050 kilometres of the Northern Territory's coastline is freehold Aboriginal land, covered by the *Aboriginal Land Rights (NT) Act 1976*. There are significant and considerable Aboriginal cultural values and sacred sites within NT coastal waters which are the domain of coastal Aboriginal people around the NT coastline.

The protection of Aboriginal sacred sites is an important element in the preservation of the Territory's cultural heritage for the benefit of all Australians. The Authority seeks to strike a balance between the protection of sacred sites and development in the Northern Territory and achieves this through the statutory provision of information about sacred sites.

The Sacred Sites Act provides the Authority with a central role in protecting sacred sites in the NT. Unlike other Aboriginal heritage protection regimes across the country, the Sacred Sites Act mandates consultation with Aboriginal people in respect of how, and the extent to which, sacred sites are to be protected. In particular:

- s 19F requires the Authority to consult with custodians in relation to applications for an Authority Certificate.
- s 22(1)(d) ensures that the conditions of an Authority Certificate are imposed in accordance with wishes of custodians; and
- s 42 requires the wishes of Aboriginal people generally to be taken into account when exercising a power under the Act, including the extent to which any sacred site should be protected.

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For section 19F, the Authority maintains detailed records of traditional Aboriginal land tenure across the NT, and consultation occurs on country with custodians of sacred sites whose authority to make decisions in respect of those sites is established in Aboriginal law and custom.

Principles of consultation that the Authority engages in are as follows:

1. **Consulting the appropriate people**

Prior to consultation, the Authority undertakes extensive documentary research to identify the Aboriginal land interests that apply to a subject land. This is not a tenure search, but an anthropological research exercise to identify traditional land-owning groups irrespective of underlying land tenure. The Authority has over four decades of records relating to Aboriginal land interests across the NT, including NT coastal waters, that are drawn upon in the process of identifying relevant groups and individuals who must be consulted.

The Authority's focus is sacred sites, and on-site consultation focusses on custodians of sacred sites who have the authority to make decisions about sacred sites. The process of ensuring that those consulted have appropriate authority is also subject of a detailed research process and consultations with the broader Aboriginal land-owning group. Typically, decisions about sacred sites, and cultural matters relating to land and sea will not be made by an individual, but collectively amongst people who have different culturally ascribed responsibilities for sacred sites, and the land and sea that they exist within.

It is incumbent on any development to take reasonable steps to identify First Nations interests in the area of their development. The first step in doing so is to approach a relevant organisation that has the expertise and capacity to identify relevant groups and people for the purpose of consultation. In the Northern Territory this is typically the four NT Land Councils who also have representative functions under the *Northern Territory Aboriginal Land Rights Act (NT) 1976* and the *Native Title Act 1993*. These organisations, like the Authority, have extensive expertise in consultation.

Elsewhere in Australia Aboriginal organisations that have a representative function, administer the *Native Title Act 1993* or state-based heritage regimes should be approached.

2. **Ensure representation and resourcing of consultative processes.**

Based on the complexity of a proposed development the Authority will dedicate significant time and resources to the process of consultation. This is to ensure that all matters of interest to Aboriginal people arising from a development proposal can be understood and considered. In the case of complex proposals – explanation and understanding of technical aspects of a proposal, anticipated impacts, and mitigation techniques is of paramount importance.

In the NT the four land councils are typically the legal representatives of their constituents in relation to land and sea matters. It is important that Aboriginal people be given the opportunity for their own legal and other expert representation in any consultation. In many instances, a proponent may be required to fund a group to obtain their own independent representation so that they can adequately participate in consultation. This is currently a best practice model in the NT.

Providing resources for independent representation is preferable to development proponents consulting directly with Aboriginal people about their development proposals. In instances where such representation is not provided the consultative process is at risk of contestation and subsequent challenge. This is primarily on the basis that such an approach is vulnerable to perceived or real conflicts of interest, allegations of a lack of independence or inappropriate advocacy.

Where cultural information arises from a consultative process, the intellectual property rights of those being consulted must be upheld. This rarely occurs in instances where independent representation is not provided and is a key consideration in the maintenance of appropriate consultative records.

3. Free Prior and Informed Consent

Concepts of cultural heritage, including Aboriginal sacred sites, and their inherent value have enjoyed formal international recognition and protections for many decades. Instruments of particular relevance include:

- the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) which enshrines the principles of Free Prior and Informed Consent (FPIC), particularly in relation to the development of indigenous peoples' lands, territories or resources;
- article 27 of the International Convention on Civil and Political Rights;
- articles 6(2), 13(1) and 14(1) of the International Labour Organisation's Indigenous and Tribal Peoples Convention 169;
- the Convention on Biological Diversity (CBD).
- the Akwé: Kon Guidelines,[1] born out of the CBD, which provide a collaborative framework for ensuring the full involvement of indigenous and local communities in the assessment of cultural, environmental and social impacts of proposed developments on sacred sites and traditionally occupied lands and waters.

Combined, these instruments and their supporting material provide a compelling argument to Australian governments about the significance of Aboriginal peoples' rights to cultural heritage protection and practice. They highlight that any proposed interference with these rights results in a heightened duty to conduct consultation, accommodate Indigenous peoples' concerns and seek FPIC at each stage of a project.

Notwithstanding the above, Australia's federal and various State/Territory development approval and heritage protection regimes remain divergent in their approaches to Aboriginal and Torres Strait Islander consultation and consent requirements. It is the Authority's strong view that Australian Aboriginal and Torres Strait Islander peoples should not be bundled into ill-defined 'cultural' or 'community' stakeholder categories but should be afforded the right to FPIC in respect of any use or works on or in the vicinity of their sacred sites and/or their traditionally occupied lands and waters more generally. Any consultative regime that

[1] Secretariat of the Convention on Biological Diversity, *Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities* (Montreal, 2004).

does not uphold these principles falls short of international standards and best practice minimum standards for consultation.

4. Conclusion

The Authority is an interested party in relation to current offshore consultative processes, despite the jurisdiction of the Sacred Sites Act only extending to NT Coastal Waters. Under current provisions the Authority has been consulted on offshore petroleum and greenhouse gas storage projects outside its jurisdiction. Typically, onshore elements of these projects are considered through the normal process of the Sacred Sites Act. However, an emerging issue from these consultations is the potential for unintended consequences from offshore projects to impact sacred sites within NT coastal waters.

Proponents have typically advised the Authority that risk mitigation strategies for potential coastal contamination events are adequate, and that the consequence is at best unlikely. This may be the case, but the Authority is unaware of any proponent that has adequately engaged in active mitigation strategies for the protection of sacred sites within NT coastal waters in relation to unintended consequences. In addition, these consultations occur at an organisational level and without engagement in the formal processes of the Sacred Sites Act. The consequence is that custodians of sacred sites are not provided the opportunity to be consulted in this context. Without ongoing engagement arising from the consultative process there is a strong sense of consultation occurring for the sake of consultation.

The recent decision in *Munkara v Santos NA Barossa Pty Ltd (No 3) [2024] FCA 9* and preceding court cases, highlight the need for adequate consultation of First Nations people in relation to offshore development. Despite the outcome of that court case, it is arguable that an adequate consultative process at the outset of the development process may have mitigated extended litigation and associated costly project delays. Notably, the Authority's consultative process for the Barossa project as it intersects with NT coastal waters, resulting in the issuing of an Authority Certificate, has not been subject of such contestation. This is a testament to a demonstrable, legislatively based consultative process that engages the principles outlined in this submission.

The Authority retains a keen interest in regulatory amendments arising from this process and looks forward to further engagement. The contact at the Authority is Secretariat.AAPA@nt.gov.au or on 08 8999 4303.

Yours sincerely

Dr Benedict Scambary
Chief Executive Officer
11 March 2024