From: Matthew Storey

Sent: Tue, 28 Nov 2023 01:48:32 +0000

To: Weeks, Cliff; Alister Trier Cameron Grebe

Cc: Jamie Lowe

Subject: Notional Sea Country Summit - Post Summit Report

Attachments: Summit Report_20231122.pdf

Good afternoon

On behalf of the National Native Title Council (NNTC) I want to thank you for your involvement in the recent National Sea Country Alliance Summit. The NNTC and the newly formed Sea Country Alliance are pleased to be able to provide you with a copy of the Post Summit Report. The NNTC and the new Sea Country Alliance look forward to working with you into the future to achieve the Traditional Owner aspirations as set out in the Report.

Please feel free to get in touch with either myself or Jamie Lowe to discuss any of the issues raised in the Report.

Best wishes

Matt Storey



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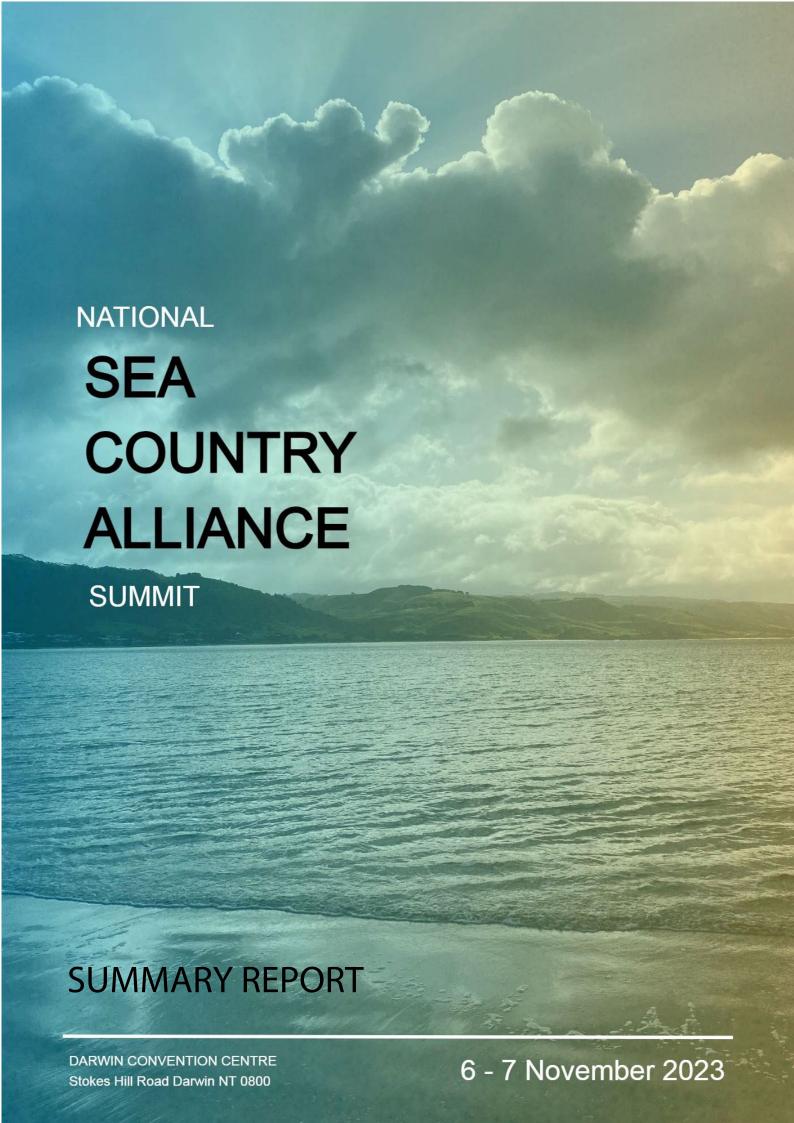
We acknowledge the Wurundjeri people as the Traditional Owners of this land, and pay our respects to their Elders past, present and emerging.

Always Was, Always Will Be, Aboriginal Land.

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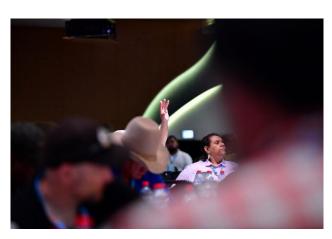


National Sea Country Alliance Summit Summary Report

6-7 November 2023 Darwin Convention Centre, Darwin NT







1 INTRODUCTION

The National Sea Country Alliance Summit (NSCAS or Summit) was held at the Darwin Convention Centre in the Northern Territory of Australia over the 6th and 7th of November 2023. The Summit was convened by the National Native Title Council (NNTC) with the financial support of the members of the Australian Energy Producers (AEP) industry body. The NSCAS was prompted by the need to redevelop the structures around Traditional Owner involvement in the offshore energy industry in light of the decision of the Full Federal Court in Santos NA Barossa Pty Ltd v Tipakalippa ([2022] FCAFC 193) (Tipakalippa) and subsequent related litigation.

The Summit involved approximately 120 Traditional Owners and other representatives from Traditional Owner Representative Institutions (**TORIs**) from around Australia with responsibility for Sea Country. Over eighty TORIs were represented.

The Summit also involved approximately thirty representatives of various government agencies, industry bodies and industry itself. These representatives participated in the morning of Day One of the Summit (6 November).

The Summit proceedings can be broadly divided into five sections:

- Opening and industry and regulator contribution
- Discussion of consultation and agreement making process
- Discussion of the content of agreements
- Discussion of next steps and implementation mechanisms
- Closing, thanks and final media.

2 SUMMIT OPENING AND INDUSTRY AND REGULATOR CONTRIBUTIONS

The Summit was opened by Jamie Lowe, CEO of the NNTC and Tyronne Garstone, CEO of the Kimberley Land Council. Both Mr Lowe and Mr Garstone spoke to the audience about the;

- litigation that gave rise to the current discussion of Traditional Owners Sea Country rights,
- inseverable connection between land and sea country and the responsibilities attached to both, and
- need to ensure Traditional Owner involvement in any development that took place on their Country.

Larrakia Traditional Owner Amber Shepherd provided the Summit participants with a welcome to her country.

Following the formalities of opening the Summit, the first session heard from several industry and government representatives. This session was facilitated by Matthew Storey. Dr Storey contextualised the session by drawing parallels and noting distinctions between the land based hard minerals experience of many in the native title sector with the offshore energy sector.

Some of the distinctions he noted went to;

- the fact that there was only one manifestation of the Crown asserting ownership of the resource (outside of 3 nautical miles at least),
- that the existence of National Offshore Petroleum Safety and Environment Management Authority (NOPSEMA) drew a distinction between the Crown as resource "owner" and the role of regulator, and
- that many of the firms operating in the area were quite different from those in the land based hard minerals sector and had limited experience in working with First Nations.

Dr Storey noted that despite these differences, the essential elements of a development proposal that impacted upon Traditional Owner rights that was the core of native title resources sector experience over the last several decades remained consistent.

Following this introduction there were contributions from:

- Samantha McCulloch CEO, AEP
- Sue McCarry CEO, NOPSEMA
- Norelle Laucher General Manager Oil and Gas Division, Offshore Strategy Branch, Department of Industry, Science, Energy and Resources (DISR).

The key themes coming through from each of these presenters related to the uncertainty faced in light of the outcomes of *Tipakalippa* and subsequent similar litigation, and the desire to involve Traditional Owners in the resolution of this uncertainty. Ms McCulloch emphasised the need for certainty and timeliness in any effective consultation process. Ms McCarry spoke to the independent statutory function of NOPSEMA as a regulator, and NOPSEMA's commitment to ensure effective consultation structures. Ms Laucher addressed the Government's shared commitment to putting in place appropriate consultation structures.

Larrakia Traditional Owners, Trent Lee and William Hewitt, performed a Smoking Ceremony for participants during morning teatime. Following morning tea, industry and government representatives departed the Summit.

3 DISCUSSION OF CONSULTATION AND AGREEMENT MAKING PROCESS

This section of the Summit commenced with two presentations from Canadian First Nations leaders speaking about international and land-based extraction experience. Chief Sharleen Gale and Ms Alicia Dubois both spoke on the Canadian First Nations experience of developing equity participation in significant energy projects and the various statutory and private sector structures and vehicles that were utilised to give effect to this. Discussion also traversed how these initiatives had taken place outside of a statutory framework in the nature of the Australian *Native Title Act 1993*(C'th) (NTA).

Following the international presentation, Summit delegates commenced discussion of 'what constituted good consultation'. This discussion took place in the first instance at individual tables. This was followed by a 'table report back' and subsequent general discussion. The discussion process was led by Shirley McPherson. This process led to distillation of the following themes.

There was a need to shift the conversation from consultation to agreement making. In this context there was consideration of similar 'future act' processes under the NTA which can be broadly categorised as either consultation processes or agreement making processes (under the Right to Negotiate). While delegates were clear that the offshored regime is not a duplication of the NTA, the parallels were unavoidable. In this context the 'future acts' under consideration were of such consequence and significance as to warrant an agreement making process.

Similarly to NTA Agreements, delegates saw it as essential that offshore agreements were entered into with TORIs. This requirement gave effect to the communal nature of the Traditional Owner rights that gave rise to the agreement. It was noted that (again as with the NTA) this requirement would require legislative foundation. It was also noted that this requirement and its legislative foundation gave proponents the certainty of knowing they were 'dealing with the right people'.

In the particular context of the offshore petroleum industry, it was also noted that mechanisms would have to be put in place to ensure that agreement making focussed on the 'directly affected' Traditional Owner community in distinction to the Traditional Owner communities within the broader Environment that May be Affected (EMBA). In the EMBA communities, an engagement process may be more appropriate. Despite this distinction there was also strong feeling that industry wide structures, that ensured benefits also for the overall Traditional Owner community, should be explored. The potential role of the current Good Standing Agreement was mentioned as a possibility in this regard.

Procedurally, delegates considered it as axiomatic that agreements were based on the principle of Free Prior and Informed Consent (**FPIC**). They noted that FPIC was a foundational principle of the United Nations Declaration on the Rights of Indigenous People (**UNDRIP**), under which the Australian Government had acknowledged obligations.

In the context of offshore energy, the application of FPIC was seen to involve the following aspects.

Prior

It was seen as crucial that the conversation was moved 'upstream'. It was considered that the current consultation at the point of Environment Plans (for the purposes of NOPSEMA) approval was both burdensome on Traditional Owners and also created uncertainty for proponents. It was considered that undertaking negotiations at the point of grant of title was a preferable course. Agreements reached at this point of the process could include provisions to address ongoing operational consultation processes. This process could potentially be supported by the imposition of conditions around a requirement for agreements with Traditional Owners as part of the acreage release process.



Informed

Under this heading delegates emphasised that the need for agreement making, and the overwhelming benefit of agreements lay with proponents and, to a lesser extent the Commonwealth. From this it was apparent that proponents (or alternatively the Commonwealth if it saw fit) must resource the agreement making process. The need for agreement making resources included resourcing meetings, logistics, administration, technical experts, and cultural heritage surveys and consultations.

Free and Consent

The point that was made here by delegates was that, as far as possible, consent (or not) by Traditional Owners must be respected by decision makers. There was some discussion of a presumption of FPIC in this regard. In this context this meant that a decision maker would require a proponent to demonstrate to them why a project should proceed in the absence of consent by Traditional Owners; in particular what matters prevented the attainment of Traditional Owner consent and why these could not be resolved. These matters could include consent (agreement) as to the way a project as undertaken as well as whether the project proceeded. The potential significance of the acreage release process was also emphasised in this regard.

The discussion of consultation and agreement making process comprised the balance of Day One. Delegates adjourned for a reception also attended by industry and government delegates in the evening.



4 DISCUSSION OF THE CONTENT OF AGREEMENTS

As with the previous session, this discussion took place in the first instance at individual tables. This was followed by a 'table report back' and subsequent general discussion. The discussion process was again led by Ms McPherson.

The Summit considered those aspects of the content of agreements that were considered as mandatory for inclusion in any agreement. Matters explored in this regard included mechanisms to monitor and protect aspects of cultural and spiritual heritage and sites, and the need for resourcing, not only of the pre-negotiation and negotiations stage but also the costs attached to Traditional Owners undertaking ongoing monitoring and review processes. In a similar fashion, the need to incorporate ongoing review mechanisms within any agreement was emphasised. So too was the need for associated structures and structures for Traditional Owners to be informed and involved in the ongoing operational monitoring of the project. Finally, it was identified that all agreements must incorporate provisions to recognise and protect any Indigenous Cultural and Intellectual Property (ICIP) associated with the project or its approval process.

Aspects of agreements that Summit delegates considered may be more dependent on the particular priorities of the relevant Traditional Owner groups went to matters such as the timeframes for implementing review and the particular structures associated with this.

There was considerable discussion around the elements of agreements that related to the benefits to Traditional Owners. This was recognised as clearly an area that was influenced by the particular priorities of the relevant Traditional Owner groups. Matters discussed included the structuring and timing of benefits. There was particular interest in developing benefit structures to create mechanisms for achieving equity interest in energy projects and also to foster Traditional Owner economic participation through mechanism such as targeted procurement activities and joint venture development.

The discussion also encompassed consideration of training and Ranger programs. In the area of Ranger programs two aspects were identified. The first was in resourcing Rangers to act as First Responders in the event of a project related environmental incident. The second was in developing Rangers as an economic, cultural and intellectual resource contextually independent of any associated energy projects.

The session on the content of agreements covered a significant number of topics and there was general agreement that considerable further research and policy development work in the area needed to occur. This work was seen as particularly necessary in the area of developing national, or potentially regional, shared benefit structures with the resources to involve Traditional Owners in a greater number of larger projects.

The discussion of the content of agreements took the Summit up until the lunch break on Day Two.

5 DISCUSSION OF NEXT STEPS AND IMPLEMENTATION MECHANISMS

The post-Summit work plan was discussed and agreed in the final session of the Summit.

The following steps were agreed by delegates:

- That the Sea Country Alliance (SCA) should be established as a formal (unincorporated) body with the NNTC functioning as the Secretariat.
- That the SCA should produce a *Post Summit Information Pack* containing:
 - The materials presented at the Summit.
 - A SCA Governance Charter.
 - A background legal briefing containing a summary of the legal regime(s) relevant to offshore energy.
- That SCA members that wished to do so be invited to participate in a Working Group to assist and guide the operations of the Secretariat and that an on-line meeting of the Working Group be convened in early December 2023.
- That an approach should be made to DISR to secure necessary funding for the ongoing operation of the SCA and its Secretariat.
- That the Secretariat arrange discussions with industry and government (NOPSEMA, National Offshore Petroleum Titles Administrator (NOPTA), DISR, Minister King) either separately or in conjunction to commence discussions around the process and content of regulatory and other reforms necessary.

- That the Secretariat produce a Sea Country Alliance Mandate document with the following sections:
 - Background to the NSCAS (*Tipakalippa* decision)
 - The evolving offshore energy and other activities environment
 - Description of Traditional Owner rights, interest and cultural connections to Sea Country
 - The International Sea Country Environment, First Nations experiences and international law
 - The need for regulatory reforms in offshore areas: recognising TORIs; agreement making; collective benefit sharing structures; and Sea Country cultural heritage protection
 - Elements of agreements; local application of collective structures
 - Call to action / Conclusion.
- That the Secretariat convene a further meeting of the full SCA to report on initial discussions with industry and government. That this meeting be tentatively scheduled in Sydney in early 2024.

6 CLOSING, THANKS & FINAL MEDIA

Mr Lowe officially closed the Summit at 3.30 pm on Tuesday 7 November. In closing, Mr Lowe extended his thanks to all the Summit delegates for their active and positive participation in what he described as a nationally historic moment in the recognition of Traditional Owner rights in Sea Country. He stated he looked forward to working with all those present into the future as the SCA took shape and evolved its advocacy campaign. He committed the NNTC to continuing to support the important work of Alliance.

Mr Lowe thanked all those involved in organising the Summit, in particular Matthew Storey and Alix Hill of Storey & Ward Lawyers and Nadia Kentera and Claudine Hidalgo of KE Creative. He paid as special thanks to Ms McCulloch and Victor Violante of AEP and to all the members of AEP whose financial support had made the NSCAS possible.

Mr Lowe concluded by stating he looked forward to seeing all the delegates again at the planned next meeting in early 2024. His remarks were met with applause.

Closing Media Conference

After the conclusion of the NSCAS, Mr Lowe, Mr Garstone and Natalie Rotamah (CEO, NSW Native Title Service) represented the NSCAS at a media call held at the conference venue. Several media outlets attended the event. The resultant coverage (links below) was generally useful and positive.

The Guardian

https://www.theguardian.com/australianews/2023/nov/10/sea-country-alliance-couldpush-traditional-owners-closer-to-mining-industrycritics-say

Business News

https://www.businessnews.com.au/article/TOswon-t-be-rushed-on-offshore-approval-reform

NT News (Pre-Summit)

https://www.ntnews.com.au/business/ntbusiness/exercise-our-rights-offshore-resourceprojects-in-the-frame-at-summit/newsstory/371b3a82a6d445ce44c3c3f923c9bfa1

NITV/SBS

https://www.sbs.com.au/ondemand/watch/227463 7891917