NOPSEMA | Australia's offshore energy regulator

The role of the regulator

National Sea Country Alliance Summit, 6–7 November 2023

nopsema.gov.au

NOPSEMA recognises the First People of this nation and their ongoing connection to culture and country. We acknowledge First Nations people as the Traditional Owners, Custodians and Lore Keepers of the world's oldest living culture. We pay our respects to the Elders past, present and emerging.

Who we are

We are the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA) – Australia's independent offshore energy regulator.

- Established in 2012 under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* to regulate the offshore petroleum and greenhouse gas storage industries.
- In 2014, our processes were endorsed under the *Environment Protection and Biodiversity Conservation Act 1999*; streamlining environmental approvals in Commonwealth waters.
- In 2019, we were given regulatory responsibility for carbon capture and storage activities.
- In 2021, we were named the Offshore Infrastructure Regulator (the OIR) under the *Offshore Electricity Infrastructure Act 2021* to regulate Australia's emerging offshore renewables industry.

The National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA) is an independent statutory authority established under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (OPGGS Act).

Our jurisdiction

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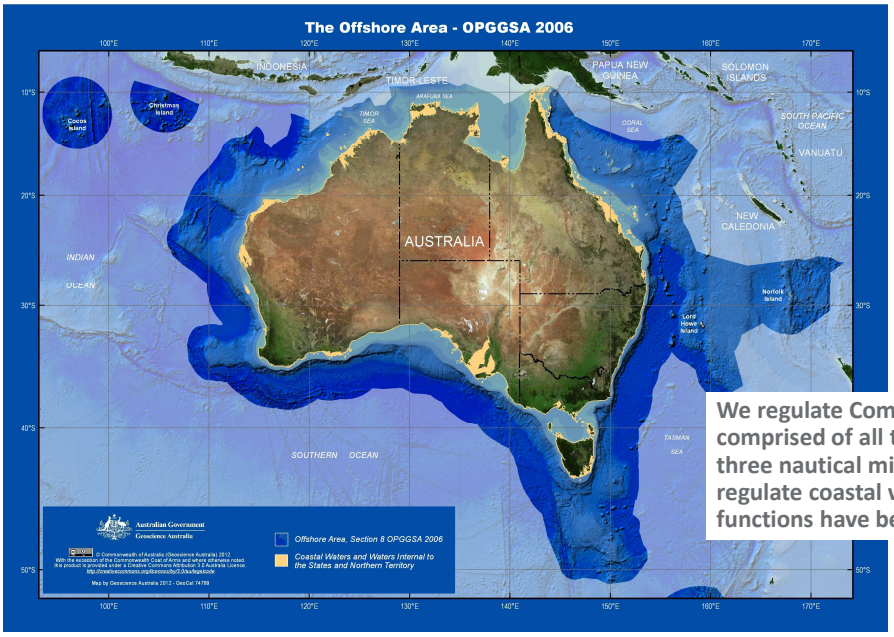

We regulate Commonwealth waters which is comprised of all the offshore areas beyond the first three nautical miles of the territorial sea. We also regulate coastal waters where regulatory powers and functions have been conferred.

- NOPSEMA jurisdiction includes all offshore areas beyond the first three nautical miles of the territorial sea. We also regulate coastal waters where regulatory powers and functions have been conferred by the states or the Northern Territory.

- To date, only Victoria has conferred regulatory powers and functions to NOPSEMA for health and safety, and well and structural integrity.

What we do

We regulate occupational health and safety, well and structural integrity, and environmental management of all offshore petroleum and GHG storage industries in Commonwealth waters.

In regards to environmental management:

- We assess offshore project proposals for any new development project and environment plans for every proposed offshore petroleum and greenhouse gas storage activity.
- We undertake inspections to ensure titleholders are operating in compliance with the legislation and their accepted environment plan.
- We investigate suspected non-compliance and take proportionate enforcement action where necessary to deter recurrence.
- We provide advice and promote continuous improvement in the industry's environmental management outcomes.

As the OIR, we (will) regulate the work health and safety, infrastructure integrity, and environmental management of all offshore infrastructure activities.

- NOPSEMA's functions are prescribed in the OPGGS Act under s646 with our legislated remit broadly consisting of four functional areas underpinned by continuous improvement – assessment, inspection and investigation (compliance monitoring), enforcement and promotion and advice.
- Regulatory activities are yet to commence for the OIR as we await regulations.

Our regulatory approach

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We administer an objectives-based, risk-focused, regulatory regime – those that create the risk must own the risk.

An objectives-based, risk-focused, regulatory regime:

- Is adaptable, flexible and scalable to the particular circumstances of individual activities, as well as the environments in which they take place.
- Provides the opportunity to adopt advances in technology and apply control measures that are best suited to the individual circumstances of the activity.
- Encourages the adoption of best practice management systems and continuous improvement in all aspects of performance.
- Is recognised internationally by regulatory authorities, risk management professionals and academics as being the most appropriate regulatory framework for high-hazard industries.

Further comments:

- In practice, what an objectives-based, risk-focused, regulatory regime does is place the responsibility for identifying, mitigating and minimising risk with those wishing to undertake activities that will create risk. This means that while NOPSEMA does not prescribe how risks must be managed, we so regulate to ensure a consistently high threshold must be met.

The legislative regime

For environmental management, we administer the *Offshore Petroleum Greenhouse Gas Storage Act 2006* and the Offshore Petroleum Greenhouse Gas (Environment) Regulations 2009.

- The objectives of the legislation are that all activities must be carried out in a manner that is:
  - consistent with the principles of ecologically sustainable development as set out in section 3A of the *Environment Protection and Biodiversity Conservation Act 1999.*
  - by which the environmental impacts and risks of the activity will be reduced as low as reasonably practicable (ALARP); and
  - by which the environmental impacts and risks of the activity will be of an acceptable level

- NOPSEMA assesses and authorises the environmental management of projects and activities under the Environment) Regulations and in accordance with Part 10 of the *Environment Protection and Biodiversity Conservation Act 1999* under an endorsed program.
- Titleholders must demonstrate, among other things, that all potential environmental impacts and risks that may arise as a result of their proposed activity will be reduced to as low as reasonably practicable and will be of an acceptable level.

Definition of “environment”

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Under the Environment Regulations, the “environment” includes cultural features of people and communities and heritage values of places.

environment means:

(a) ecosystems and their constituent parts, including people and communities; and

(b) natural and physical resources; and

(c) the qualities and characteristics of locations, places and areas; and

(d) the heritage value of places;

and includes

(e) the social, economic and cultural features of the matters mentioned in paragraphs (a), (b), (c) and (d).

- I want to stress here that the definition of “environment” in the regulations includes the cultural features of people and communities and not just those attached to biological and physical features of the environment.
- Titleholders are required to apply this definition fully and broadly when preparing their environment plan, describing the environment, identifying potential impacts and risks, undertaking consultation, and addressing any objections or claims raised through consultation.

Consultation with relevant persons

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A Traditional Owner's connection to Sea Country is recognised under the Environment Regulation as an "interest" that may be affected and as such must be considered by titleholders.

- Duty to consult is placed on the titleholder while preparing their environment plan.
- It ensures the titleholder has ascertained, understood and addressed all the environmental impacts and risks, including those they may not be aware of.
- All relevant persons whose functions, interests or activities may be affected by the proposed activity must be consulted in the development of an environment plan (before submission to NOPSEMA).
- The environment plan must demonstrate sound processes, meaningful consultation, careful consideration of any objections or claims raised and where necessary how they will be addressed.
- Further information is in our *Consultation in the course of preparing an environment plan guideline.*

Further comments:

- The requirement to consult with relevant persons is not new and up until recently it had not been subject to statutory interpretation through judicial review.
- The full Federal Court decision made on 2 December 2022 in Santos v Tipakalippa set a clear expectation that industry must make **genuine and rigorous efforts to consult with all relevant persons including First Nations peoples**.
- First Nations representative bodies may be relevant persons, but they may also provide advice as to who and how other First Nations groups or individuals should be consulted as relevant persons.
- Methods of consultation must be adapted to the needs of the relevant persons and potential impacts on their functions, interests and activities. These should be developed with input from the relevant persons or organisations.

Consultation with relevant persons

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Recent case law

Recent case law clarified that Traditional Owner's connection to Sea Country is an "interest" that may be affected by a proposed activity and as such must be considered by titleholders.

Santos v Tipakalippa decision

- Set a clear expectation that industry must make genuine and rigorous efforts to consult with all relevant persons including First Nations peoples.
- Interests are not confined to legal interests, may include spiritual and cultural connections to Sea Country, and be held individually or communally.

- The requirement to consult with relevant persons is not new and up until recently it had not been subject to statutory interpretation through judicial review.
- The full Federal Court decision made on 2 December 2022 in Santos v Tipakalippa set a clear expectation that industry must make genuine and rigorous efforts to consult with all relevant persons including First Nations peoples.
- The Court's decision construed the 'interests' of a relevant person to be broad, as not being confined to legal interests, as may include spiritual and cultural connections to Sea Country, and be held individually or communally.

Sticking points

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While the case law has provided clarity around the breadth of consultation required, there is ambiguity in how to comply, it requires significant effort and does not remove the risk of litigation.

Some sticking points include:

- Process for identifying all relevant persons
- Consultation on communal interests with individuals and groups
- Uncertain and significant consultation timeframes
- Resourcing constraints to effectively participate
- Managing non-response, ambit claims and obfuscation
- Ongoing litigation risk from missing any relevant person

- While the case law has provided clarity around the breadth of consultation required, in practice what we have seen is that significant effort is required from both titleholders and relevant persons to achieve the level of consultation now required.
- Even where there a significant level of effort is being made there remains a residual risk of litigation – notably stemming from the ambiguity of who should be consulted.
- Interests may be held individually and communally, which in practice means indeterminate classes of relevant persons must be consulted.
- NOPSEMA is seeking feedback from First Nations groups, on a workable approach

to consultation for First Nations people on communal interests

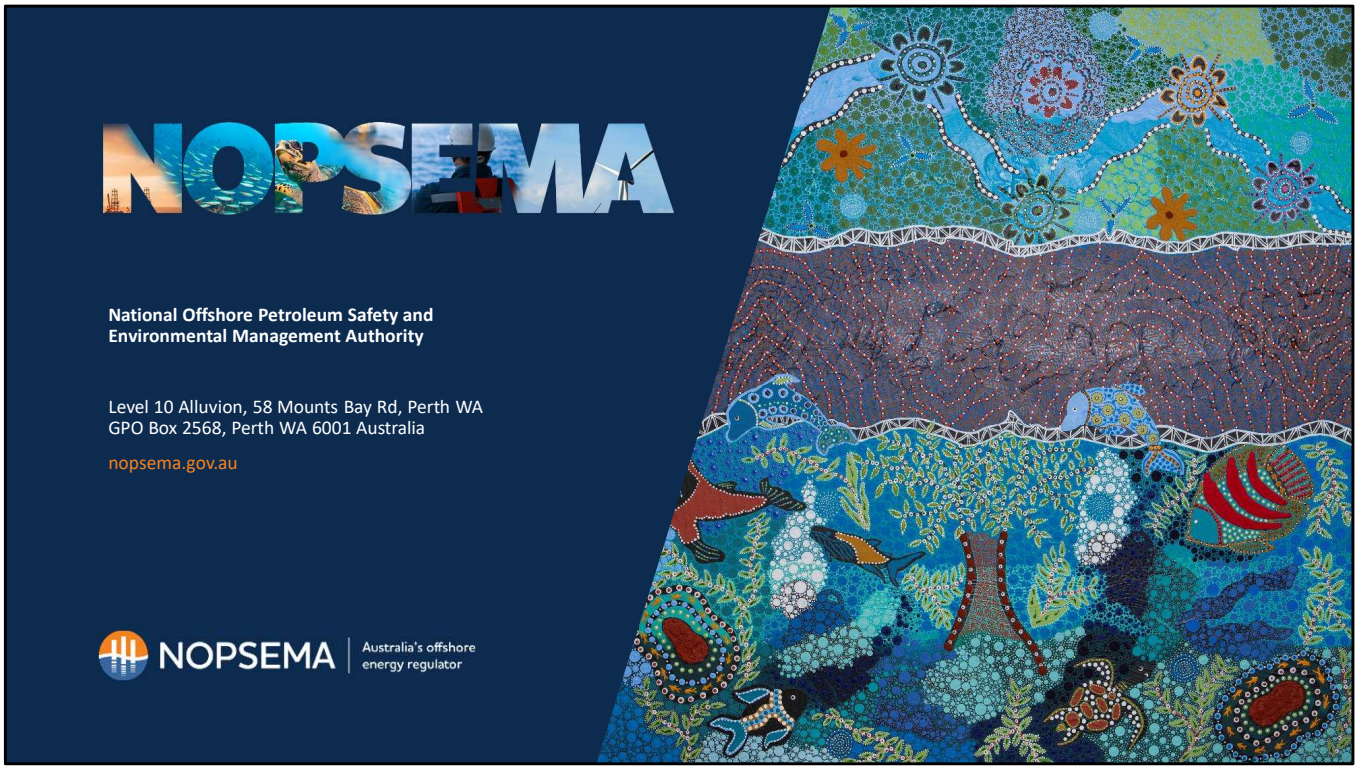
- First Nations groups have noted they would facilitate consultation through reasonable notice to group members to participate in consultation through properly informed/notified meetings (as per Native Title Act framework)

- I look forward to the outcomes of this summit that may inform a workable pathway.

Other workstreams

- Working with other government agencies and counterparts in other jurisdictions.
- Directly engaging with titleholders and First Nations representative groups to advise on the environmental approval process and hear directly from those involved.
- Building on our existing capacity and expertise to further inform regulatory activities and decision-making.
- Continue our RAP journey and the development of a First Nations Engagement Strategy

- We continue to engage with the Cultural Heritage Reform Branch at DCCEEW on national standards including development of standards for consultation with first nations people (DCCEEW taking a co-designed approach with the Cultural Heritage Protection Alliance).
- We engage with other regulators on best practice.
- We engage with titleholder and First Nations representative groups both to provide information and gather information to assist decision making.
- We are building capacity within NOPSEMA and engaging external expertise as required.
- We have updated the *NOPSEMA Research Strategy* to include priorities for cultural heritage features and values.
- We have prioritised the implementation our Reflect Reconciliation Action Plan, to focus on building engagement and relationships through the development of a *First Nations Engagement Strategy*.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