

*This is a message to superannuation funds from the Tiwi people.*

*Tiwi people have told the story of how Santos' Barossa gas project will impact us over and over again.*

*They've told the story to environmentalists, to each other, to lawyers, to barristers, to media, to a Federal Court judge who came to the Tiwi Islands, and then again to the Full Federal Court of Australia – 3 more judges and more lawyers.*

*We told it to Ministers and Senators in Parliament in Canberra.*

*We told it directly to Santos when they came here to the Tiwi Islands.*

*Then we told it to more environmental groups and more lawyers.*

*We've told the story to a court in South Korea. To an export credit agency in Japan. To private banks all around the world.*

*We went to Santos' Chair and its Board at the AGM. Now we're telling the superannuation funds investing in this project.*

*It's the same story. It's never changed. And the story is that the majority of Tiwi People do not want this project, or any related project, to go ahead.*

*The story will not change. No is no.*

*So, we ask you, read all the media, the evidence, court transcripts and this letter. Read everything.*

*Tiwi people have been completely transparent. Santos, the government, private banks, export credit agencies, investors and superfunds have not been transparent.*

*Santos' actions make life unsafe for Indigenous people and Traditional Owners. And we need everyone that has heard this story to do something about it now before Santos completely destroys the ancient system that Tiwi people have been living by and maintaining for thousands of years.*


*Without action all people involved in enabling the Barossa project will all be complicit. All of you will have blood on your hands.*

*We want you to listen to our voices the first time and we will keep on telling the same story. It's time to ACT and do the right thing. After the listening happens, there needs to be action. Actions that prove that human rights actually mean something in this country.*

*What you're going to read in the letter that follows is the same story that's already been told for the past two years by Tiwi people.*

*International human rights standards were developed for a reason. To protect people like us. It's abhorrent if you don't abide by them. If you don't, own up to it. Tell us now where you stand.*

**Antonia Burke**

 Indigenous Human Rights Advocate, Campaign Leader

*The Billiga Forest holds both tangible and intangible cultural heritage that needs to be protected for the cultural values held by our Gomeri/Gamilaraay people. We will not allow it to be damaged or desecrated to a point where it will not return to its natural state. With at least 90 cultural sites the most abundant wildlife and biodiversity there is no other place like it in Australia.*

**Karra Kinchela**

Gomeri/Gamilaraay Traditional Owner

*Water/Gali is the source of all life. It is Yinarr/Warringa (Gomeroi women) Lore to hold a spiritual connection with all water. The majority of cultural heritage sites are found within 200 metres of a waterway, maintaining and sustaining our way of life. If Santos gets its way with the Narrabri gas project, invested in by major Australian super funds, they will pollute our sacred water that sustains all life.*

**Miah Wright**

Gomeroi/Gamilaraay Traditional Owner

26 April 2023

Don Russell  
Chair  
AustralianSuper

By email: [drussell@australiansuper.com](mailto:drussell@australiansuper.com) ; [pschroder@australiansuper.com](mailto:pschroder@australiansuper.com);  
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Dear Mr Russell

### **Fund human rights breaches for investments in Santos**

1. We write on behalf of Pirrawayingi (Marius) Puruntatameri, Carol Maria Puruntatameri, Dennis Murphy Tipakalippa and Paulina Jedda Puruntatameri, Munupi clan Elders, leaders and Traditional Owners; Therese Wokai Bourke, Malawu clan leader; Simon Munkara, Jikilaruwu clan member (the **Tiwi Claimants**); Tibby Quall, Larrakia Elder and Traditional Owner (the **Larrakia Claimant**); Karra Kinchela and Miah Wright, Gomeri/Gamilaraay Traditional Owners (the **Gomeri/Gamilaraay Claimants**). Together, they are the **Claimants**.
2. This letter is also written on behalf of fund **member**, [REDACTED]. The member is concerned about the management and financial condition of the fund and wishes to understand particular investments in the fund, in this case **Santos** Limited. The member requests information under section 1017C of the *Corporations Act 2001* (Cth). Given the fund's investment in Santos, and its involvement in the human rights impacts on the Claimants, the member asks that the information requested also be provided to the Claimants.
3. Collectively the Claimants and the member are concerned that the fund is failing to meet international human rights standards with respect to its investment in the companies. The failure arises as a result of Santos' pursuit of major growth projects. Santos' growth strategy is financially questionable. It has been described by analysts as misguided and reckless, and is the cause of the company's underperformance and discounted valuation. Despite sustained and broad criticism, Santos has doubled down on these projects.
4. This letter requests an explanation about the fund's actions with respect to investments in Santos. It also requests action to be taken to remedy deficiencies in accordance with international human rights principles and fiduciary obligations to act in the best financial interests of members and with the requisite degree of care, skill and diligence. A response is requested by **26 May 2023**.

### **I. BACKGROUND**

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5. Fund disclosures confirm the fund is invested in Santos. The fund is a minority shareholder in the company. The investments are made on behalf of fund members.
6. Santos plans the **Barossa project** which includes gas field developments in waters off the Northern Territory in Australia, an offshore processing facility, and 385 kilometres of pipeline that runs to Darwin. The Barossa project is causing and will cause adverse human rights impacts on the Tiwi Claimants and their communities (**Impacted Tiwi Communities**). Adverse human rights impacts will be caused to the Larrakia Claimant from the Darwin Pipeline Duplication Project, part of the Barossa project, and the separate Darwin LNG extension project (**DLNG**). Santos is also proceeding with its **Narrabri** project which is adversely impacting the human rights of the Gomerioi/Gamilaraay Claimants and their communities (**Impacted Gomerioi Communities**).
7. The Impacted Tiwi Communities have a long-standing spiritual and cultural connection with the ocean and the seabed. The sea country, the seabed and the surrounding environments are vital to cultural practices (such as story-telling through song, dance, art, language, camping and dreaming and ancient spiritual beliefs and rituals), economic and social practices (such as fishing and hunting, protecting land and sea), food, health and identity (maintaining ancient kinship systems). The Impacted Tiwi Communities have a responsibility to look after and protect sea country, including its marine life.
8. The Barossa project, including drilling and the construction of pipelines and other infrastructure, threatens several sacred sites (tangible and intangible), marine resources and the seabed. The project's impacts on these sites and the natural environment will have adverse and significant effects on the cultural survival, health and the lives of the Impacted Tiwi Communities. The Barossa project will violate the Impacted Tiwi Communities' economic, social and cultural rights.
9. Since the Barossa project puts at risk natural resources that are fundamental to the Impacted Tiwi Communities' cultural expression and way of life, international human rights law and norms require that the Impacted Tiwi Communities and Claimants grant their free, prior and informed consent (**FPIC**) for the Barossa project to proceed. In the circumstances, consent is a fundamental right. Consent is a cornerstone of the right to self-determination and is a critical safeguard for indigenous peoples to preserve their cultural resources, customs and way of life. It follows that, by proceeding with the Barossa project without consent, Santos is violating the right to FPIC and self-determination, including for relevant aspects of the Barossa project impacting the Larrakia Claimant.
10. Santos had not made a Final Investment Decision for the Narrabri gas project at the date of this letter.<sup>1</sup> However, Santos is progressing with the Narrabri project which includes 850 coal seam gas wells in the Pilliga forest, also known as the Billiga. The Billiga is on Gomerioi/Gamilaraay country. It involves actual and potential adverse human rights impacts as a result of drilling and risks to the Great Artesian Basin. The Impacted Gomerioi/Gamilaraay Communities have not provided FPIC for the Narrabri project to proceed.
11. Institutional investors have a responsibility to adhere to the United Nations Guiding Principles on Business and Human Rights (**UNGPs**). The UNGPs incorporate relevant human rights standards which require Santos to obtain the Claimants' free, prior and informed consent for each respective project.
12. The fund is an institutional investor and Santos shareholder. It therefore has a 'business relationship' with the company and under international human rights principles is 'directly linked' to the adverse human rights impacts of the Barossa, DLNG and Narrabri projects. Pursuant to international human rights principles the fund must exercise its leverage to prevent or mitigate these adverse human rights impacts. In the current circumstances, where the impacts are yet to be fully realised, the appropriate aim is to prevent further adverse impacts. However, there is no evidence of the fund acting in accordance with the human rights principles that we set out below. The fund continues to invest in Santos, and the company continues to adversely impact indigenous communities.

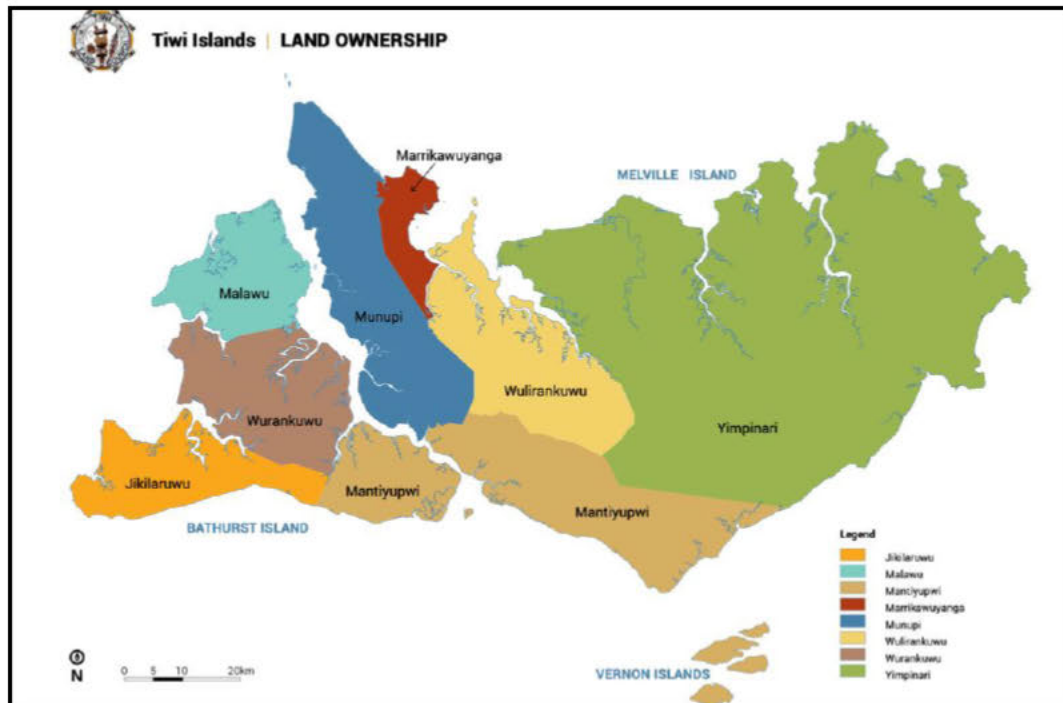
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<sup>1</sup> <https://www.santos.com/news/narrabris-vpa-confirmed-ahead-of-santos-festival-of-rugby/>

## II. SANTOS' BAROSSA PROJECT

### A. The Tiwi Islands and Barossa Project

13. The traditional lands of the Impacted Tiwi Communities are located in the Tiwi Islands in the Timor Sea, approximately 80 km north of Darwin. The traditional lands of the Malawu and Jikilaruwu clan groups are on Bathurst Island and the traditional lands of the Munupi clan are approximately 4.4 km to the north of the northernmost point of Melville Island. These are the lands of the Tiwi Claimants. A map is below:<sup>2</sup>



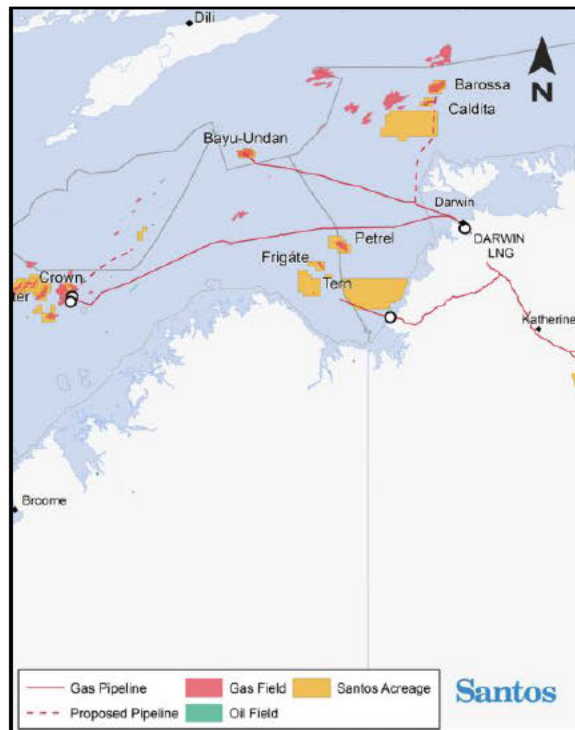
14. Santos Limited is a gas and oil company listed on the Australian Securities Exchange (ASX). The company proposes to develop and operate the Barossa gas field in northern Australian waters. Three projects are proposed by Santos and its joint venture partners to extract and process gas from the Barossa gas field:
- (a) the **Barossa** project, which includes Barossa gas field subsea production wells and subsea infrastructure, a Floating Production, Storage and Offloading (**FPSO**) vessel at the field, the Barossa export pipeline, otherwise referred to as the **Barossa Gas Export Pipeline**, and the Darwin Pipeline Duplication project or **DPD**;<sup>3</sup>
  - (b) the Darwin LNG life extension project or **DLNG** project which will upgrade the existing LNG processing facility on Larrakia country at Wickham Point near Darwin to process gas from Barossa starting in 2027. The facility currently processes LNG from the Bayu-Undan field which is expected to cease production in 2024;

<sup>2</sup> Source: Tiwi Land Council: [www.tiwilandcouncil.com/index.cfm?fuseaction=page&p=265&l=2&id=67&smid=194](http://www.tiwilandcouncil.com/index.cfm?fuseaction=page&p=265&l=2&id=67&smid=194)

<sup>3</sup> Detailed company information on the scale and impacts of the Barossa project is found in a version of the "Barossa Development Drilling and Completions Environment Plan" (**Drilling EP**) accessed here: <https://docs.nopsema.gov.au/A831694>

- (c) the **Bayu-Undan CCS** project which proposes to convert the Bayu-Undan offshore gas field located in Timor-Leste waters from a gas producing field to one that receives and stores CO<sub>2</sub> from LNG processed at Darwin from the Barossa field. The existing pipeline between Bayu-Undan and Darwin will stop transporting gas and carry CO<sub>2</sub> in the opposite direction.<sup>4</sup>

15. A diagram of the location of the Barossa field is below:<sup>5</sup>



16. Santos has suspended drilling operations since the time of the first instance decision of *Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority (No 2)* [2022] FCA 1121 (*Tipakalippa (No 2)*) in September 2022.<sup>6</sup> In November 2022 Santos stated, somewhat ambiguously, that the suspended drilling activities were “not on the critical path” for the Barossa project.<sup>7</sup> In early December 2022 Santos said the project “remains on track to be delivered in the first half of 2023”.<sup>8</sup>
17. On 13 January 2023, NOPSEMA, the offshore petroleum regulator, suggested it had raided Santos’ corporate offices on 21 and 22 December 2022. NOPSEMA stated that it had gathered evidence of Santos’ plans to commence construction of the Barossa Gas Export Pipeline by late January 2023. NOPSEMA ordered Santos not to commence construction and to obtain further information about the “risks of the activity to any underwater cultural heritage places along the Barossa Gas Export Pipeline Route to which people, in accordance with Indigenous tradition, may have spiritual and

<sup>4</sup> S&P Global Commodity Insights, “Bayu-Undan, DLNG and Barossa – How the energy transition is shaping the future”

[www.spglobal.com/commodityinsights/en/ci/research-analysis/bayuundan-dlng-and-barossa-the-energy-transition.html](http://www.spglobal.com/commodityinsights/en/ci/research-analysis/bayuundan-dlng-and-barossa-the-energy-transition.html)

<sup>5</sup> Source: Santos ASX release, [www.asx.com.au/asxpdf/20220216/pdf/4560m1hhdc48fy.pdf](http://www.asx.com.au/asxpdf/20220216/pdf/4560m1hhdc48fy.pdf) (p35)

<sup>6</sup> Santos Fourth Quarter Report for the period ending on 31 December 2022, at p 1, 9. Accessed at [www.asx.com.au/asxpdf/20230119/pdf/45ks1v3cqt9vj9.pdf](http://www.asx.com.au/asxpdf/20230119/pdf/45ks1v3cqt9vj9.pdf).

<sup>7</sup> [www.asx.com.au/asxpdf/20221108/pdf/45hc9ldnr9t840.pdf](http://www.asx.com.au/asxpdf/20221108/pdf/45hc9ldnr9t840.pdf) p28

<sup>8</sup> Santos Media Release, “Full Federal Court Decision for the Barossa Gas Project” (2 December 2022): [www.santos.com/news/full-federal-court-decision-for-the-barossa-gas-project/](http://www.santos.com/news/full-federal-court-decision-for-the-barossa-gas-project/)



cultural connections.”<sup>9</sup> Relevantly, by August 2022, Santos had withdrawn a revised application for that pipeline because it might not survive legal challenge<sup>10</sup> leaving the company to rely on years-old documentation to assess pipeline impacts and risks.<sup>11</sup> NOPSEMA noted Santos’ Environment Plans must cover the full extent of known environmental risks.<sup>12</sup>

18. Santos’ recent disclosures state that the Barossa project is 55% complete.<sup>13</sup> The company is now attempting to undertake a consultation process in the manner required by Australian regulations but is facing significant criticism for its attempts.<sup>14</sup>

#### B. The role of equity in developing the Barossa project

19. Santos’ 2022 Annual Report dated 22 February 2023 (p30) states:<sup>15</sup>

Santos’ business and, in particular, the development of large-scale projects, relies on access to debt and equity financing.

20. Equity financing includes capital raised from previous issuances of shares. Equity value also increases the company’s ability to raise debt.

### III. **TIWI ISLANDERS’ LONG-STANDING CONNECTION TO SEA COUNTRY**

21. The Impacted Tiwi Communities are the traditional custodians of the land and the sea. They have the responsibility to look after both.
22. Songlines run through both land and sea country and there are dreaming sites and sacred sites under water.<sup>16</sup>
23. The Tiwi people are deeply connected to country and the sea, otherwise known as sea country, through their totems and skin names. Any negative impact on the totems has a physical impact on individuals in the community – both on their physical health and emotional well-being.<sup>17</sup>
24. Spiritually, the Tiwi people’s ancestors live in the sea.
25. Marine animals such as dolphins, sharks, dugong, varieties of fish and turtles are very important to the Tiwi people.<sup>18</sup>
26. Turtle nesting sites are critically important to Tiwi customs and tradition.

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<sup>9</sup> Santos ASX Media Release (8 November 2022). Accessed at <[www.nopsema.gov.au/sites/default/files/documents/General%20Direction%201898.pdf](http://www.nopsema.gov.au/sites/default/files/documents/General%20Direction%201898.pdf)>

<sup>10</sup> The Guardian, “Santos withdraws applications for NT gas pipeline approval over legal challenge risk” (3 September 2022). Accessed at <[www.theguardian.com/business/2022/sep/03/santos-withdraws-applications-for-nt-gas-pipeline-approval-over-legal-challenge-risk](http://www.theguardian.com/business/2022/sep/03/santos-withdraws-applications-for-nt-gas-pipeline-approval-over-legal-challenge-risk)>.

<sup>11</sup> [https://info.nopsema.gov.au/activities/353/show\\_public](https://info.nopsema.gov.au/activities/353/show_public)

<sup>12</sup> NOPSEMA, “General Direction - s 574” - Direction No. 1898, (13 January 2021). Accessed at <[www.nopsema.gov.au/sites/default/files/documents/General%20Direction%201898.pdf](http://www.nopsema.gov.au/sites/default/files/documents/General%20Direction%201898.pdf)>.

<sup>13</sup> Santos ASX Media Release (22 February 2021), at p 6. Accessed at <[www.asx.com.au/asxpdf/20230222/pdf/45lvzdsq6dp1z.pdf](http://www.asx.com.au/asxpdf/20230222/pdf/45lvzdsq6dp1z.pdf)>.

<sup>14</sup> ABC News, “Tiwi Islanders accuse Santos of leaving out Barossa gas project environmental risks from community consultations” (28 February 2023). Accessed at <[www.abc.net.au/news/2023-02-28/nt-tiwi-islands-consultations-barossa-gas-project-santos/102030454](http://www.abc.net.au/news/2023-02-28/nt-tiwi-islands-consultations-barossa-gas-project-santos/102030454)>.

<sup>15</sup> [www.asx.com.au/asxpdf/20230222/pdf/45lvscgg5ft47c.pdf](http://www.asx.com.au/asxpdf/20230222/pdf/45lvscgg5ft47c.pdf)

<sup>16</sup> Affidavit of Paulina Jemma Purantatameri, 23 June 2022, VID 306 of 2022

<sup>17</sup> Affidavit of Carol Maria Puruntatameri, 23 June 2022, VID 306 of 2022

<sup>18</sup> Affidavit of Paulina Jemma Purantatameri, 23 June 2022, VID 306 of 2022

27. Any disturbance to the sea country will deeply harm the physical, emotional and cultural well-being of the Impacted Tiwi Communities.
28. Further information may be provided in appropriate dialogue with the fund.

#### IV. DESKTOP ANALYSIS OF IMPACTS OF THE BAROSSA PROJECT

29. In this section we refer to Santos' environmental planning documents and maps which assess risks and impacts of the Barossa project. We do so to provide an indication of the impacts, however it is important to note that the Claimants do not accept or concede as to the accuracy or completeness of Santos' surveys, mapping or assessments. Santos' documents might be considered to provide a minimum baseline of the magnitude of physical impacts. Many further impacts are expected to be recognised by reviews and surveys, such as impacts on underwater cultural heritage.<sup>19</sup>
30. Songlines and movement of sea animals and birds are not restricted to lines on a map.<sup>20</sup> For the Tiwi people, the spiritual and cultural impacts of the Barossa project are immense. The documents featured in this section, and NOPSEMA's apparent remit,<sup>21</sup> are deficient in this regard.
  - A. Impacts from Drilling and Pipeline installation
31. As detailed in *Tipakalippa (No 2)* and in the Barossa Development Drilling and Completions Environment Plan dated 11 February 2022,<sup>22</sup> or **Drilling EP**, Santos proposes to drill and complete up to eight production wells between 2022 to 2025 (which would be one phase of the larger Barossa project). The operational area for the drilling is approximately 138 km north of the Tiwi Islands.<sup>23</sup>
32. The Drilling EP provides the following map outlining the "environment that may be affected" (**EMBA**) by the drilling activities and activities relating to the Barossa Gas Export Pipeline. The map below shows the area of the EMBA. The Barossa Gas Export Pipeline comes within 7 kilometres of the Tiwi Islands.<sup>24</sup> The map below is extracted from Santos' documents.<sup>25</sup>

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<sup>19</sup> See [www.nopsema.gov.au/sites/default/files/documents/General%20Direction%201898.pdf](http://www.nopsema.gov.au/sites/default/files/documents/General%20Direction%201898.pdf)

<sup>20</sup> Affidavit of Carol Maria Puruntatameri, 23 June 2022 at [38], VID 306 of 2022

<sup>21</sup> NOPSEMA's remit is limited to authorising environmental management processes and matters protected under the *Environment Protection Biodiversity and Conservation Act 1999* (EPBC Act) according to NOPSEMA "Introducing NOPSEMA" (April 2019) at <[www.nopsema.gov.au/sites/default/files/documents/2021-03/A631330.pdf](http://www.nopsema.gov.au/sites/default/files/documents/2021-03/A631330.pdf)>.

<sup>22</sup> Drilling EP, p 22.

<sup>23</sup> Drilling EP, p 34.

<sup>24</sup> [www.nopsema.gov.au/sites/default/files/documents/General%20Direction%201898.pdf](http://www.nopsema.gov.au/sites/default/files/documents/General%20Direction%201898.pdf) p4

<sup>25</sup> Drilling EP, Appendix C (titled "Barossa Values and Sensitivities of the Marine and Coastal Environment") at p 11, Figure 1-1.

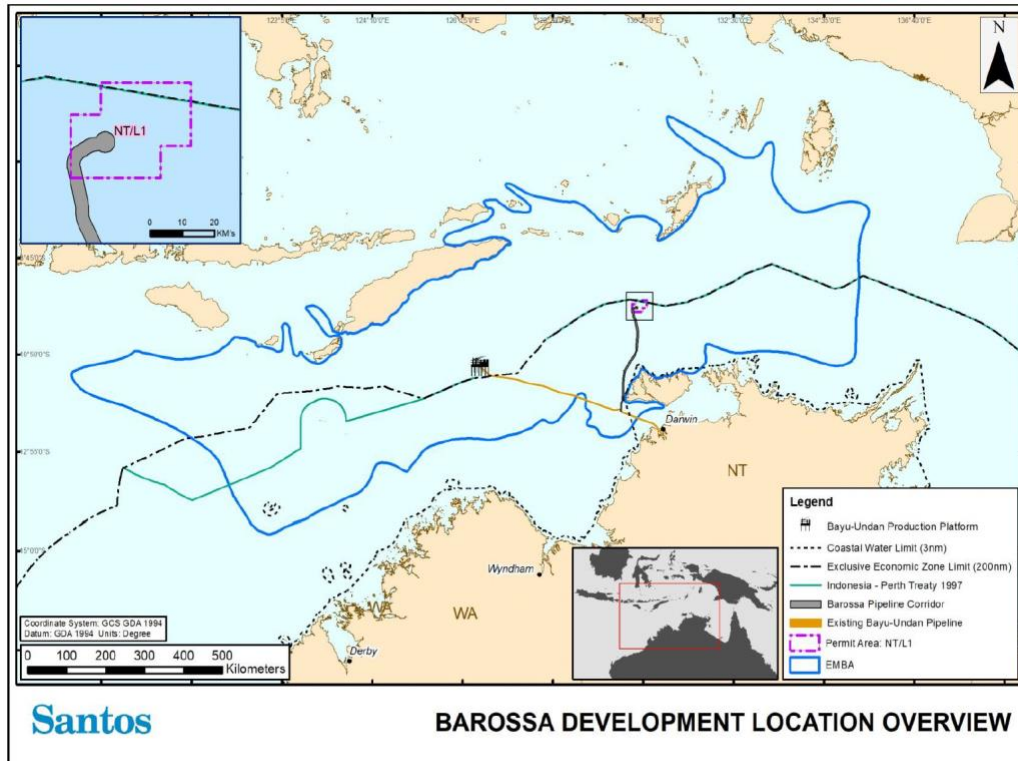


Figure 1-1: Location of permit area (NT/L1) and the pipeline route corridor

33. The EMBA, according to Santos, represents “the largest possible spatial extent that a worst-case spill event affects.”<sup>26</sup> Two spill event scenarios were modelled for the EMBA:
  - (a) loss of well control event from development drilling at the Barossa field;
  - (b) vessel collision resulting in a loss of marine diesel along the pipeline route corridor.<sup>27</sup>
34. The modelling scenarios on this map are therefore restricted to development drilling as well as installation of the Barossa Gas Export Pipeline, as vessel collision is related to vessels laying the pipeline.
35. The Drilling EP also noted (as cited at paragraph [205] of *Tipakalippa (No 2)*) that the EMBA includes “**significant sea country for Traditional Owners**”.<sup>28</sup> As detailed in the appendix to the Drilling EP, the EMBA extends across sea country and marine sources that are of cultural and spiritual significance to the Impacted Tiwi Communities:

Aboriginal and Torres Strait Islander peoples have a strong ongoing association with the area that extends from the beginning of human settlement in Australia some 50,000 years ago. The close, long-standing relationship between Aboriginal and Torres Strait Islander peoples and the coastal and marine environments of the area is evident in indigenous culture today. The Aboriginal and Torres Strait Islander peoples of the northwest continue to rely on coastal and marine environments and resources for their cultural identity, health and wellbeing, as well as

<sup>26</sup> Drilling EP, Appendix C (titled “Barossa Values and Sensitivities of the Marine and Coastal Environment”) at p 9.

<sup>27</sup> Ibid.

<sup>28</sup> Drilling EP, Appendix C (titled “Barossa Values and Sensitivities of the Marine and Coastal Environment”) at 14.5.1, p 119.

their domestic and commercial economies (DEWHA, 2008a). **Within the EMBA, the Tiwi Islands have a long history of occupancy by Aboriginal and Torres Strait Islander peoples and the marine areas, particularly the Arafura Marine Park, are significant sea country for Aboriginal and Torres Strait Islander peoples.**

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 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 (DEWHA, 2008a).

A mapping exercise has been undertaken with the Tiwi Island Land Council to identify environmental and socioeconomic values along the Tiwi Islands coastline (ConocoPhillips, 2019). The mapping exercise focused on the northern, western and southern coastlines of the Tiwi Islands (within the EMBA). It included an initial desktop exercise to identify publicly available environmental, social, cultural and economic datasets. Preliminary maps were developed based on these datasets, and these maps were used during stakeholder engagement workshops held with Tiwi Islanders.

...

A search of registered Indigenous heritage sites did not identify any specific sites within the Western Australian portion of the EMBA. **However, in the Northern Territory portion of the EMBA there are a number of sacred and significant sites located on the Tiwi Islands. There are currently four registered sacred sites on the Tiwi Islands** (Aboriginal Areas Protection Authority, 2016). Another 56 sites of significance to Tiwi Islanders have been recorded, including two sites on the NT mainland (Tiwi Land Council, 2003). The Tiwi Islands sites hold importance as they have high spiritual and cultural history value (Tiwi Land Council, 2003).<sup>29</sup>

[our emphasis]

36. Some of the so-called planned impacts of the drilling include noise emissions, light emissions, seabed disturbances, operational discharges and spill response operations.<sup>30</sup> These discharges include 150 cubic metres of cement slurry.<sup>31</sup> The so-called unplanned impacts of drilling that are described as “possible” include “non-hydrocarbons and chemical release (surface liquids)”, “hydrocarbon spill - marine diesel” and “minor hydrocarbon release (surface and sub-sea)”.<sup>32</sup>
37. For the construction of the Barossa Gas Export Pipeline, the risk rating for “Vessel collision leading to loss of a single pipelay vessel fuel tank” was deemed “medium”.<sup>33</sup>
38. The Drilling EP’s EMBA extends to significant portions of nesting and foraging areas for flatback turtles, as set out in the following Santos map.

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<sup>29</sup> Drilling EP, Appendix C (titled “Barossa Values and Sensitivities of the Marine and Coastal Environment”) at 14.5.1, p 119.

<sup>30</sup> Drilling EP, p 49.

<sup>31</sup> Drilling EP, at 6.7.1.2, at p 198.

<sup>32</sup> Drilling EP, at Table 7-1, at p 229.

<sup>33</sup> Barossa Offshore Project proposal, p372

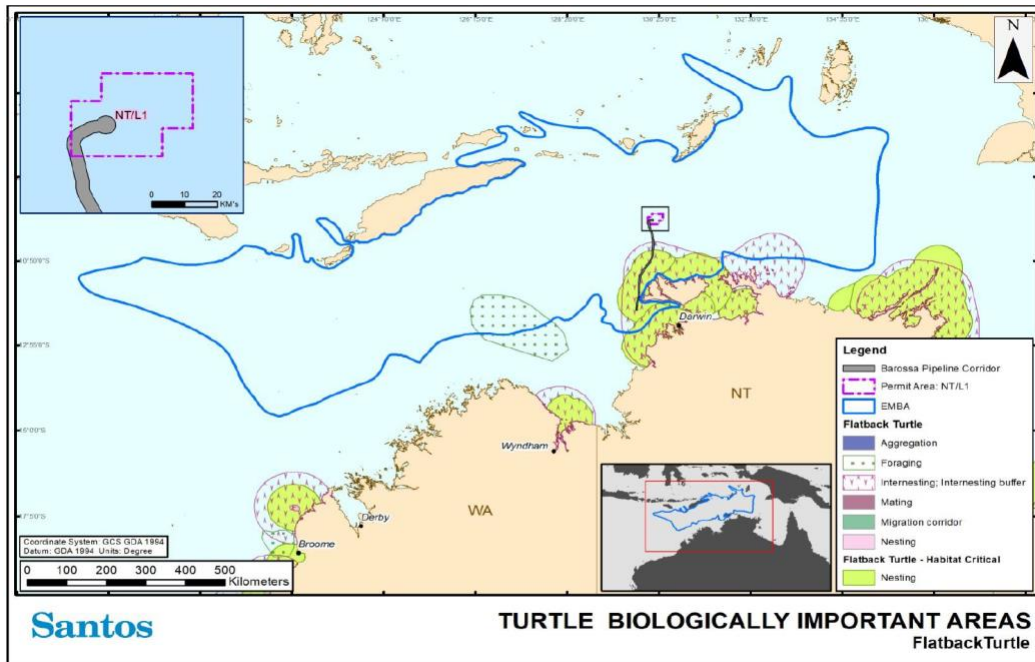


Figure 6-4: Biologically important areas and critical habitat – flatback turtle

39. The map shows critical habitats for flatback turtles to be located predominantly around the Tiwi Islands. While the drilling brings risks to turtle habitats, there are real risks of oil spills and pipeline ruptures throughout the lifetime of the Barossa project, as detailed in the following section, that would directly harm turtles and other marine animals.

**B. Impacts beyond the Drilling EP & EMBA**

40. The EMBA relates only to the limited risks of development drilling in the Barossa field and the Barossa Gas Export Pipeline installation, being the risk vessel fuel tank ruptures as a result of vessel collision.

41. The Drilling EP does not deal with the risks and impacts associated with the:

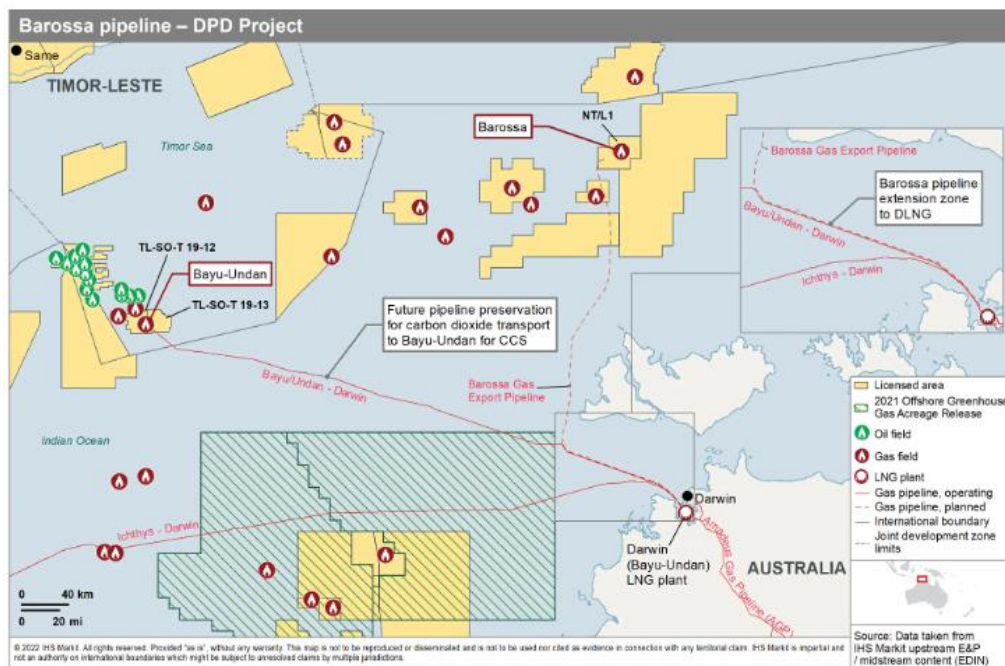
- (a) ongoing drilling operations and well maintenance for the Barossa field wells;
- (b) operation of the FPSO;
- (c) physical installation and existence of the Barossa Gas Export Pipeline;
- (d) decades-long operation and ongoing maintenance of the Barossa Gas Export Pipeline;
- (e) physical installation, existence, operation and maintenance of the Pipeline Duplication Project.

42. All are included in the Barossa project.

43. Other project documents describe three oil spill scenarios, all rated as “medium risk”, for drilling operations and the FPSO:<sup>34</sup>

<sup>34</sup> “Barossa Area Development Offshore Project Proposal” (2017) [www.nopsema.gov.au/sites/default/files/documents/2021-03/A598152.pdf](http://www.nopsema.gov.au/sites/default/files/documents/2021-03/A598152.pdf) at 4.3.2, p105

- (a) vessel collision leading to a loss of a single FPSO facility condensate storage tank which would cause a spill on the surface that lasts 6 hours;
  - (b) long-term well blowout which would cause a subsea oil spill for at least 80 days; and
  - (c) vessel collision leading to loss of an offtake tanker fuel tank which would lead to a heavy fuel oil spill on the surface that would last 6 hours.
44. Project documents also describe the atmospheric emissions associated with the project at its operational stage through combustion emissions, the periodic flaring of gas or other fugitive emissions to include oxides of nitrogen, CO<sub>2</sub>, sulphur dioxide, carbon monoxide and methane.<sup>35</sup>
45. Relevant to the unassessed impacts of the Barossa Gas Export Pipeline, and as referred to above, the regulator, NOPSEMA, on 13 January 2023, said Santos must undertake underwater cultural heritage surveys along the pipeline route for the Barossa Gas Export Pipeline before it could commence pipeline construction.<sup>36</sup>
46. In the operations phase of the Barossa Gas Export Pipeline there are real risks of pipeline rupture and resulting impacts from spills.<sup>37</sup> There are also risks of incidents and impacts relating to the ongoing maintenance of the pipeline and presence of ships.
47. The Darwin Duplication Pipeline (DPD) project is an additional pipeline to the Barossa Gas Export Pipeline. The DPD joins the southern tip of the Barossa gas export pipeline to Darwin. It was first proposed on 18 January 2022.<sup>38</sup> The map below shows its location.<sup>39</sup>



<sup>35</sup> “Barossa Area Development Offshore Project Proposal” (2017)

<[www.nopsema.gov.au/sites/default/files/documents/2021-03/A598152.pdf](http://www.nopsema.gov.au/sites/default/files/documents/2021-03/A598152.pdf)> at 4.3.5.5, p127

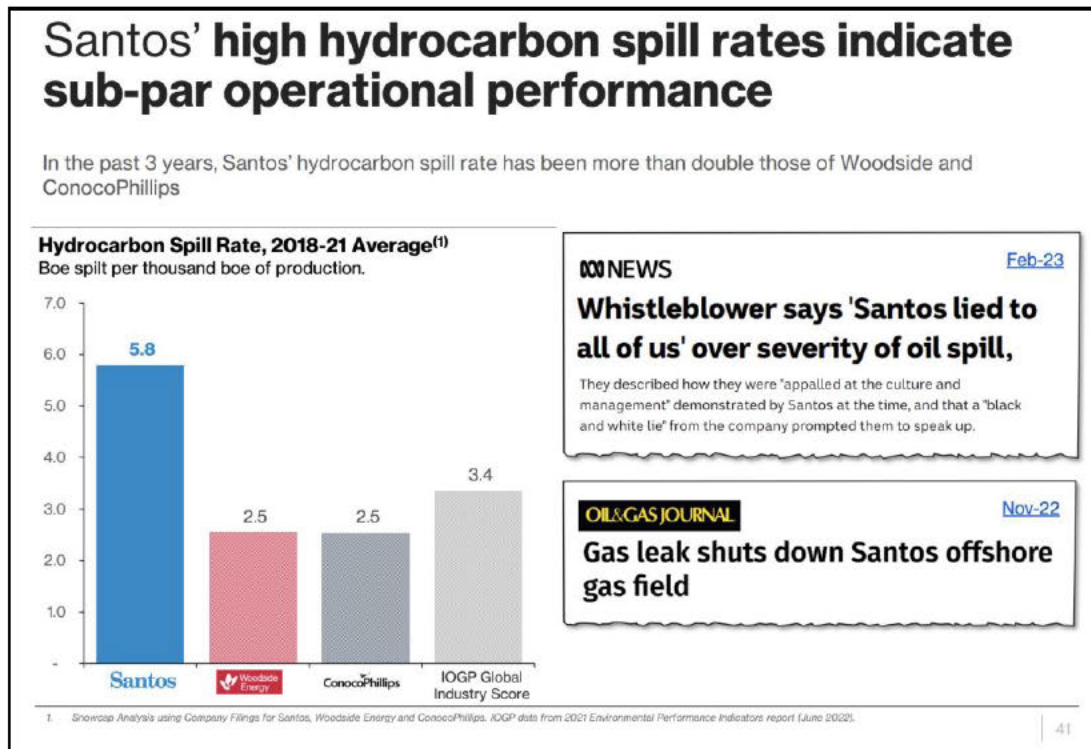
<sup>36</sup> [www.nopsema.gov.au/sites/default/files/documents/General%20Direction%201898.pdf](http://www.nopsema.gov.au/sites/default/files/documents/General%20Direction%201898.pdf) p4

<sup>37</sup> Det Norske Veritas Report for the Australian Maritime Safety Authority (AMSA), Model of Offshore Oil Spill Risks, 14 December 2011, page V.4 and V.5: [www.amsa.gov.au/sites/default/files/2011-12-mp-dnv-risk-assessment-oil-spill-appendix-5.pdf](http://www.amsa.gov.au/sites/default/files/2011-12-mp-dnv-risk-assessment-oil-spill-appendix-5.pdf)

<sup>38</sup> <https://ntepa.nt.gov.au/consultation/darwin-pipeline-duplication-project>

<sup>39</sup> [www.spglobal.com/commodityinsights/en/ci/research-analysis/santos-darwin-pipeline-duplication-dpd-project-confirmed-au.html](http://www.spglobal.com/commodityinsights/en/ci/research-analysis/santos-darwin-pipeline-duplication-dpd-project-confirmed-au.html)

48. Like the Barossa Gas Export Pipeline, the DPD's impacts and risks include those related to the installation, operation and maintenance of the pipeline. Risks include vessel collision and resulting fuel tank rupture, as well as rupture of the pipeline itself in areas around the pipeline. There will be impacts relating to the construction and location of the pipeline.
49. The Barossa Gas Export Pipeline (262 km) and DPD (123km) have a combined length of 385 km.<sup>40</sup> In 2011, when Australia had 1135 km of subsea pipelines, modelling commissioned by AMSA following the Montara oil spill concluded that every year there was a 6% chance of a pipeline rupture that would release a minimum of 1 tonne of spill.<sup>41</sup>
50. Of further concern is that Santos' spill rates are over twice that of its industry peers.<sup>42</sup>



### C. Accepted magnitude of social and environmental impacts

51. In December 2021, the Korean Trade Insurance Corporation (K-SURE) designated the Barossa project as "Category A".<sup>43</sup>
52. "Category A" is the accepted categorisation by financial institutions of projects that have the most severe social and environmental impacts and risks.<sup>44</sup> According to its definition, including under the Equator Principles and OECD Common Approaches, a "Category A" project has potential significant adverse environmental and social risks and/or impacts that are diverse, irreversible or unprecedented.

<sup>40</sup> [www.santos.com/wp-content/uploads/2022/05/Santos-Barossa-Notification-of-Northern-Territory-Pipeline-Licence-Application-April-2022\\_Rev-0.pdf](https://www.santos.com/wp-content/uploads/2022/05/Santos-Barossa-Notification-of-Northern-Territory-Pipeline-Licence-Application-April-2022_Rev-0.pdf)

<sup>41</sup> [www.amsa.gov.au/sites/default/files/2011-12-mp-dnv-risk-assessment-oil-spill-appendix-5.pdf](https://www.amsa.gov.au/sites/default/files/2011-12-mp-dnv-risk-assessment-oil-spill-appendix-5.pdf) at V.5

<sup>42</sup> Snowcap Analysis, 2023:  
<https://static1.squarespace.com/static/63f7678e37a01501e18c5356/t/6418485bf25dbb728bf0e718/1679313005464/230308+-+Reform+Santos+Presentation+vF.pdf> p41

<sup>43</sup> [www.ksure.or.kr/rh-en/bbs/i-681/down.do?bbs\\_id=1011&ntt\\_sn=612628&data\\_ty\\_cd=A&atfile\\_sn=425401](https://www.ksure.or.kr/rh-en/bbs/i-681/down.do?bbs_id=1011&ntt_sn=612628&data_ty_cd=A&atfile_sn=425401)

<sup>44</sup> [https://equator-principles.com/app/uploads/The-Equator-Principles\\_EP4\\_July2020.pdf](https://equator-principles.com/app/uploads/The-Equator-Principles_EP4_July2020.pdf) p8

## V. HUMAN RIGHTS IMPACTS OF THE BAROSSA PROJECT

### A. Economic, social and cultural rights

53. Santos' Barossa project will impact the sea country and marine ecosystems that Tiwi people have spiritually relied upon for tens of thousands of years of physical and cultural existence. The project breaches the economic, social and cultural rights of the Impacted Tiwi Communities.
54. The Barossa project will breach the **right to manifest, practise, develop and teach spiritual and religious traditions** (UNDRIP, Articles 12 and 15), the **right to enjoy their own culture** (ICCPR, Article 27) the **right to maintain and strengthen their distinctive spiritual relationship with traditionally owned territories, waters and coastal seas** and other resources (UNDRIP, Article 25):
- (a) The Impacted Tiwi Communities, as well as other clan groups of the Tiwi Islands, have sea country in the Timor Sea to the north of the Tiwi Islands, extending to and beyond the EMBA outlined in the map above.<sup>45</sup> The Impacted Tiwi Communities have a responsibility to look after and protect the marine environment, including sacred sites, as part of their culture and traditions. The Drilling EP states that at least four registered sacred sites fall within the EMBA for the drilling operations. There are numerous other unregistered sacred sites that are within the EMBA. The pipeline and the ongoing operation of the project would also disturb numerous other registered and unregistered sacred sites, including underwater sites of cultural heritage.
  - (b) Other than sacred sites, disturbances to the seabed in any part of the deep waters would break the Impacted Tiwi Communities' songlines and spiritual connections. The ecological well-being of the ocean is intrinsically tied to the spiritual wellbeing and traditions of the Impacted Tiwi Communities.
  - (c) The Impacted Tiwi Communities maintain maritime culture and heritage through ritual, storytelling and traditional knowledge in the nearshore region and adjacent areas. By disturbing sacred waters and marine resources, the Barossa project would disrupt the ability of the Impacted Tiwi Communities to keep their country, dreamings and traditions for future generations. It will ultimately breach the right of the Impacted Tiwi Communities to manifest, practise and develop their unique traditions.
  - (d) Beyond the drilling, any spills of heavy fuel, condensate and distillate would destroy the Tiwi Impacted Communities' spiritual and cultural resources in both sea country and on shore. An oil spill would decimate the marine ecology that the Impacted Tiwi Communities rely on for their cultural and spiritual traditions, such as the collection of sea turtle eggs at nesting sites, fishing and hunting activities.<sup>46</sup>
55. The Barossa project will breach **the right to cultural institutions, ancestral lands, natural resources and traditional knowledge** (UNDRIP, Article 31; ICESCR, Article 27) and the broader **right that Indigenous peoples have to territories and resources which they have traditionally owned or occupied** (UNDRIP, Article 26; ICCPR, Article 1(2)). Article 1(2) of the ICESCR embraces Indigenous peoples' right to own their lands and to freely dispose of their natural resources.<sup>47</sup> This

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<sup>45</sup> See also *Tipakalippa (No 2)*, at [10].

<sup>46</sup> Notably, activities like fishing and hunting fall within the realm of Article 27 of the ICCPR. See para [7] of the UN HRC's General Comment No. 23.

<sup>47</sup> CESCR, Concluding Observation: Finland, UN Doc E/C.12/FIN/CO/6 (2014) [9(a)]; CESCR, Concluding Observation: Paraguay, UN Doc E/C.12/PRY/CO/4 (2015) [6]; CESCR, Concluding Observation: Chile, UN Doc E/C.12/CHL/CO/4 (2015) [8].



right to ancestral lands and natural resources extends to marine natural resources and waters.<sup>48</sup> The right of Indigenous peoples to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions relies on non-interference by third parties with the exercise of cultural practices and access to cultural goods.<sup>49</sup> In the present case:

- (a) Not only will the drilling interfere in the Impacted Tiwi Communities' ability to fulfil their cultural and spiritual links with deep offshore waters, the "planned" and "unplanned" impacts of drilling (including seabed disturbances and operational discharges, as outlined above) will harm culturally critical activities such as fishing and hunting. The Impacted Tiwi Communities also have strong cultural and subsistence links to sea turtles and the threat posed by the Barossa project to critical habitats of flatback turtles could devastate the heart of the Impacted Tiwi Communities' culture.
- (b) Any vessel collisions, oil spills (which, as detailed above, have been categorised a "medium" risk), and pipeline ruptures over the course of the Barossa project's construction and operation would have large impacts on the marine ecosystem, the natural resources and the ancestral waters that the Impacted Tiwi Communities are highly dependent on for their livelihoods and culture. Shipping oil and heavy fuels, when spilled, smother marine animals and birds.<sup>50</sup>
- (c) Any planned and unplanned discharges throughout the construction and operation of the Barossa project, including the real risk of oil spills, will break the Impacted Tiwi Communities' unique symbiotic relationship with the marine environment. The consequences of this will entail an irretrievable loss of Tiwi traditional knowledge and practices. The Barossa project presents a real and foreseeable threat of the complete loss of the Impacted Tiwi Communities' culture. Ultimately, the Barossa project interferes with the right of the Impacted Tiwi Communities to use and protect their marine resources and territories which they have held for tens of thousands of years.

56. The Barossa project will breach **the right to food (Article 11, ICESCR)**. The UN's Food and Agriculture Organization (UN FAO) has said that Indigenous peoples' right to food has a cultural dimension in terms of food choices, preparation and acquisition. The cultural appropriateness of food is part of the normative content of the right to food.<sup>51</sup> In the present case:

- (a) The Impacted Tiwi Communities hunt for fish, crabs, oysters, mangrove worm, turtles, stingrays and dugongs. As identified in the extract from the Drilling EP above, the coastlines and the waters which the Impacted Tiwi Communities and other Tiwi Islanders use for food collection, hunting and fishing may be contaminated by the planned discharges and emissions associated with the Barossa project. Critical turtle habitats also face a real and foreseeable threat and a change in the migration patterns of turtles would generate the loss of a critical food source for the Impacted Tiwi Communities.
- (b) The implications of an oil spill or other similar event would be immense for the Impacted Tiwi Communities' collective right to food. Not only would this destroy the availability of fish, mangrove worms and other sources of subsistence, it would harm the Impacted Tiwi Communities' right to culturally appropriate food. As outlined above in this Grievance, there are real and foreseeable risks of oil spills and pipeline ruptures which would endanger the availability of food collection, fishing and hunting activities.

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<sup>48</sup> International Labour Office, ILO Convention on Indigenous and Tribal Peoples, 1989 (No 169): A Manual (Geneva, 2003) 29. See also UNDRIP Article 25 which encompasses "waters and coastal seas and other resources."

<sup>49</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment no. 21, Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights)*, 21 December 2009, E/C.12/GC/21, at p 2.

<sup>50</sup> UN General Assembly, UN Special Rapporteur on Toxics and Human Rights: Implications for Human Rights of the environmentally sound management and disposal of hazardous wastes, 28 July 2022, A/77/183, at [35].

<sup>51</sup> Joint report by the FAO and UNPFI "The Right to Food and Indigenous Peoples" (2008). Accessed at [www.un.org/esa/socdev/unpfi/documents/Right\\_to\\_food.pdf](http://www.un.org/esa/socdev/unpfi/documents/Right_to_food.pdf)

57. The Barossa project threatens the **right to health (Article 12.1, ICESCR)**. The UN Committee on Economic, Social and Cultural Rights states “in indigenous communities, the health of the individual is often linked to the health of the society as a whole and has a collective dimension. In this respect, the Committee considers that development-related activities that lead to the displacement of indigenous peoples against their will from their traditional territories and environment, denying them their sources of nutrition and breaking their symbiotic relationship with their lands, has a deleterious effect on their health.” In the present case:
- (a) The disruption to the Impacted Tiwi Communities’ spiritual connections caused by drilling activities will harm their health and wellbeing.<sup>52</sup> Drilling will disrupt spiritual connections and threaten the mental and physical health of the Impacted Tiwi Communities.
  - (b) Seabed disturbances, discharges, oil spills or other contamination of the waters during the construction and operation of the Barossa project will generate immense anxiety and distress to the Tiwi Claimants.
  - (c) UN Special Rapporteurs have observed that oil spills are frequent and devastating.<sup>53</sup> The aromatic carcinogens released from spills can remain in the water and sediments of streams for long periods of time, increasing exposure to toxic substances.<sup>54</sup> The proximity of the Barossa Gas Export Pipeline to the coast of the Tiwi Islands, the frequency of ships carrying heavy fuel oil along this path, and the real and foreseeable risk of pipe ruptures and spills threatens the Impacted Tiwi Communities’ right to health.
  - (d) The use and carriage of fuel oil by ships poses an immediate threat to the health of the Impacted Tiwi Communities from spills. Marine fuel, and especially heavy fuel oil, can be dangerous to human health.
  - (e) Emissions and pollutants during the operational phase of the Barossa project such as oxides of nitrogen, CO<sub>2</sub>, sulphur dioxide, carbon monoxide and methane also pose a serious threat to the health of the Impacted Tiwi Communities. The UN Special Rapporteur on Toxics and Human Rights concludes that emissions from gas flaring in offshore oil and gas projects can cause reproductive abnormalities, asthma and cancer.<sup>55</sup>

#### B. The right to FPIC and self-determination

58. Under ordinary principles of international human rights law (detailed below), the Impacted Tiwi Communities have a right to FPIC with respect to the sea country and marine resources that the EMBA extends to.
59. The rights of indigenous peoples are encapsulated in the Indigenous and Tribal Peoples Convention 1989 (No. 169) (**ILO Convention 169**) and UNDRIP. The UNDRIP is the most comprehensive instrument detailing the rights of indigenous peoples in international law and policy, and it has been regularly used as a guide by States, UN bodies and international courts. A cornerstone of the ICESCR and the UNDRIP is the right to self-determination, by virtue of which indigenous people may “freely determine their political status and freely pursue their economic, social and cultural

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<sup>52</sup> *Tipakalippa Interlocutory Decision*, at [49].

<sup>53</sup> UN General Assembly, UN Special Rapporteur on Toxics and Human Rights: Implications for Human Rights of the environmentally sound management and disposal of hazardous wastes, 28 July 2022, A/77/183.

<sup>54</sup> *Ibid.*, at [33].

<sup>55</sup> UN General Assembly, UN Special Rapporteur on Toxics and Human Rights: Implications for Human Rights of the environmentally sound management and disposal of hazardous wastes, 28 July 2022, A/77/183.

development.”<sup>56</sup> The UNDRIP has explicitly recognised the principle of FPIC in several of its provisions.<sup>57</sup> FPIC is a part of, and a complement to, the right to self-determination.<sup>58</sup>

60. In most circumstances affecting the rights and resources of indigenous peoples, FPIC is a right to affirmative *consent*. This has been confirmed in several authoritative commentaries by bodies such as the UN Human Rights Committee (in its interpretation of the ICCPR),<sup>59</sup> the Inter-American Court of Human Rights,<sup>60</sup> UN Special Rapporteurs,<sup>61</sup> the Committee on Economic, Social and Cultural Rights (in its interpretation of the ICESCR)<sup>62</sup> and others.
61. Based on principles of international human rights law, the Impacted Tiwi Communities’ right to FPIC is enlivened in the context of the Barossa project for the following reasons:
- (a) Consent is required where there is a “large-scale exploitation of natural resources including subsoil resources”<sup>63</sup>. The Barossa project falls within the definition of such a project, in that it proposes to exploit, at a large scale, subsea gas;
  - (b) Consent is required where the project has “a direct bearing on areas of cultural significance”.<sup>64</sup> As detailed in the sections above, the Barossa project would disrupt sacred sites in sea country and areas containing culturally significant marine resources;<sup>65</sup>
  - (c) Consent is required where the project “[depletes] resources necessary for physical and cultural survival...”<sup>66</sup> As detailed above, the marine ecology and resources that are central to both the physical and cultural survival of the Impacted Tiwi Communities, whether it is for traditional food collection, customary practices, songlines or totems. These resources are threatened by the Barossa project and the real risks of oil spills and contamination;
  - (d) Consent is required to protect “the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources”.<sup>67</sup> In the context of ILO 169, “lands” and “resources” include marine resources such as the sea (the surface as well as the

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<sup>56</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, UN General Assembly, Article 1 (**ICCPR**); *United Nations Declaration on the Rights of Indigenous Peoples* : resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295 (**UNDRIP**), Articles 3 and 4.

<sup>57</sup> UNDRIP, Articles 10, 11(2), 19, 28(1) and 32(2).

<sup>58</sup> See UN General Assembly, “Annual report of the Expert Mechanism on the Rights of Indigenous Peoples” (10 August 2018) A/HRC/39/68, at para [7].

<sup>59</sup> See Human Rights Committee, *Views: Communication No 1457/2006*, 95th sess, UN Doc CCPR/C/95/D/1457/2006 (24 April 2009) 11 at [7.6].

<sup>60</sup> See, for e.g. the Inter-American Court of Human Rights case of *Saramaka People v. Suriname, Interpretation of the Judgment on Preliminary Objections, Merits, Reparations, and Costs*, Ser. G, No. 185 (Aug. 12, 2008) at paras [129] - [137]. Accessed at <[www.corteidh.or.cr/docs/casos/articulos/seriec\\_172\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf)>.

<sup>61</sup> UN Commission on Human Rights, Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People , 21 January 2003, E/CN.4/2003/90 at [www.refworld.org/docid/45377ac70.html](http://www.refworld.org/docid/45377ac70.html) (at para [73]).

<sup>62</sup> United Nations Committee on Economic, Social and Cultural Rights, *General Comment No 21: Right of Everyone to Take Part in Cultural Life*, 43rd sess, UN Doc E/C.12/GC/21 (21 December 2009) [37], [55](e).

<sup>63</sup> UN Commission on Human Rights, Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People , 21 January 2003, E/CN.4/2003/90 at [www.refworld.org/docid/45377ac70.html](http://www.refworld.org/docid/45377ac70.html) (at para [6] and [73]). See also the FPIC Note at paragraph 26.1.

<sup>64</sup> See United Nations Special Rapporteur James Anaya, Report of the Special Rapporteur on the rights of indigenous peoples, A/HRC/21/47 (Jul. 6, 2012), at para [65].

<sup>65</sup> See *Tipakalippa (No 2)* at [204](xiii).

<sup>66</sup> See *Saramaka People v Suriname (Preliminary Objections, Merits, Reparations and Costs)* (2007) 172 Inter-Am Ct HR (ser C) 41 at [135] citing the UN Special Rapporteur Radolfo Stavenhagen’s report.

<sup>67</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 21 (November 2009) at para [36].

subsurface).<sup>68</sup> The UNDRIP reinforces this broad definition of “land” by explicitly recognizing indigenous peoples’ “right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, **waters and coastal seas and other resources**”.<sup>69</sup> Therefore, the right to *consent* in FPIC is not limited to only those instances where there is interference with land rights. The UNDRIP and ILO 169 provide clear grounds for the right of indigenous peoples (and especially indigenous peoples in the Pacific) to govern the ocean.<sup>70</sup> In the present context, this includes sea country and marine resources that the Impacted Tiwi Communities have long-standing spiritual connections with; and

- (e) Consent is required where “cultural resources, especially those associated with their way of life and cultural expression, are at risk” and more broadly with respect to the rights of Indigenous peoples, consent is required “in all matters covered by their specific rights”.<sup>71</sup> The UN Committee on Economic, Social and Cultural Rights has made it clear that any interference with the cultural values associated with indigenous peoples’ ancestral lands, natural resources and relationship with nature should not take place unless FPIC has been obtained.<sup>72</sup> Cultural rights “may include such traditional activities as *fishing or hunting*...”<sup>73</sup> By way of example, the Human Rights Committee found in *Apirana Mahiuka et al v New Zealand* that fishing was a fundamental aspect of Maori culture and religion.<sup>74</sup> As detailed above, the Barossa project has the potential to seriously harm activities that are fundamental to the Impacted Tiwi Communities’ culture (such as fishing and hunting) and their deep spiritual connection with sea country (such as totems connected to marine animals).

62. As part of the corporate responsibility to respect human rights under the UNGPs, businesses must also respect the right to FPIC:

- (a) Although the UNGPs do not explicitly refer to FPIC, the principles are intended to cover the spectrum of internationally recognised rights.<sup>75</sup> The UNGPs add that “business enterprises may need to consider additional standards...[I]n this connection, United Nations instruments have elaborated further on the rights of indigenous peoples.”<sup>76</sup> On a natural reading, this would include the right to self-determination and FPIC as declared in both ILO 169 and the UNDRIP.
- (b) Various international authorities including the UN Expert Mechanism on the Rights of Indigenous Peoples (**EMRIP**)<sup>77</sup> and the UN Committee on Economic Social and Cultural

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<sup>68</sup> ILO 169 defines ‘land’ broadly in Article 13(2): “*The use of the term lands in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the [Indigenous] peoples concerned occupy or otherwise use.*” See the comments of the ILO Secretariat in International Labour Office, *ILO Convention on Indigenous and Tribal Peoples, 1989 (No 169): A Manual* (Geneva, 2003) at 29 confirming that the “concept of land usually embraces *the whole territory* [Indigenous peoples] use including forests, rivers, mountains and sea, the surface as well as the subsurface.”

<sup>69</sup> UNDRIP, Art 25.

<sup>70</sup> UN Economic and Social Council, *Note by the Secretariat: Study on the relationship between indigenous peoples and the Pacific Ocean* (19 February 2016) E/C.19/2016/3 at [8]. Accessed at <<https://digitallibrary.un.org/record/822537?ln=en>>

<sup>71</sup> United Nations Committee on Economic, Social and Cultural Rights, *General Comment No 21: Right of Everyone to Take Part in Cultural Life*, 43rd sess, UN Doc E/C.12/GC/21 (21 December 2009) [37], [55](e).

<sup>72</sup> *Ibid.*, at p 9.

<sup>73</sup> UN Human Rights Committee (HRC), CCPR General Comment No. 23: Article 27 (Rights of Minorities), 8 April 1994, CCPR/C/21/Rev.1/Add.5, at [7].

<sup>74</sup> UN Human Rights Committee, *Apirana Mahiuka et al. v. New Zealand*, Communication No. 547/1993, U.N. Doc. CCPR/C/70/D/547/1993 (2000).

<sup>75</sup> UNGPs, pages 13-14.

<sup>76</sup> UNGPs, Principle 12, Commentary.

<sup>77</sup> UN Economic and Social Council, Report of the International expert Group Meeting on Indigenous Peoples and Forests (8 February 2011), [www.un.org/esa/socdev/unpfii/documents/E\\_C19\\_2011\\_5.pdf](http://www.un.org/esa/socdev/unpfii/documents/E_C19_2011_5.pdf), at p 14.

Rights<sup>78</sup> have confirmed that businesses should respect the principle of FPIC in relation to all matters that could affect the rights, lands, territories and resources of indigenous people.

- (c) The UN Global Compact, which is the largest corporate sustainability initiative, has noted that although FPIC is ordinarily understood to fall within the responsibility of governments, companies should obtain FPIC in order to avoid complicity in violations of human rights.<sup>79</sup> The Global Compact emphasized that consultation and consent together are a special requirement safeguarding a number of substantive human rights that are firmly established in international law.<sup>80</sup>
63. Prior to the *Tipakalippa* proceedings, Santos had never undertaken consultation with the Impacted Tiwi Communities for the Barossa project let alone sought the Impacted Tiwi Communities' consent.
64. The Impacted Tiwi Communities have never given their free, prior and informed consent for the construction of the Barossa project's pipeline and any other related developments in the Barossa gas field. The continued development of the Barossa project and gas field is in breach of the rights of the Impacted Tiwi Communities to FPIC and their right to self-determination.

## **VI. HUMAN RIGHTS IMPACTS OF THE DARWIN LNG LIFE EXTENSION PROJECT**

65. The planned DLNG project and the DLNG Loan will enable the DLNG facility to process gas from the Barossa gas field from 2027. The DLNG project, like the Barossa project and in particular the Darwin Pipeline Duplication project, is expected to adversely impact the economic, social and cultural rights of the Larrakia people. As such, any plans for the life extension of DLNG must not occur without the consent of the Larrakia Claimant and Larrakia Traditional Owners.

## **VII. HUMAN RIGHTS IMPACTS OF THE NARRABRI PROJECT**

66. Santos' Narrabri gas project would see the company drill 850 coal seam gas wells in the Pilliga/Billiga forest. Gomeroi/Gamilaraay Traditional Owners have been told their entire lives that the Billiga is sacred, with stories passed down from generation to generation.
67. Culturally significant sites include sandstone caves, rock paintings, distinctive native wildlife, grinding grooves, scarred trees, the sacred Yowie Yeni, and the most sacred of all - the Great Artesian Basin. Santos' planned gas drilling at Narrabri poses unacceptable risk to the Great Artesian Basin - the country's largest underground water source. This sacred site extends over almost one-fifth of Australia and connects to the Murray-Darling Basin and the Lake Eyre Basin. It is the only source of fresh water to many inland communities. Santos' Narrabri gas project would drill through clean water bores with serious risk of contamination to land and water.

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<sup>78</sup> See United Nations Committee on Economic, Social and Cultural Rights, *General Comment No 21: Right of Everyone to Take Part in Cultural Life*, 43rd sess, UN Doc E/C.12/GC/21 (21 December 2009); See also United Nations Committee on Economic, Social and Cultural Rights, *General Comment No 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, UN Doc E/C.12/GC/24 (10 August 2017) at [12] where the Committee states that "businesses should respect the principle of free, prior and informed consent of indigenous peoples in relation to all matters that could affect their rights, including their lands, territories and resources that they have traditionally owned, occupied or otherwise used or acquired."

<sup>79</sup> UN Global Compact, "Indigenous Peoples' Rights and the Role of Free, Prior and Informed Consent: A Good Practice Note endorsed by the United Nations Global Compact Human Rights and Labour Working Group on 20 February 2014" at p 5. Accessed at [https://d306pr3pise04h.cloudfront.net/docs/issues\\_doc%2Fhuman\\_rights%2FHuman\\_Rights\\_Working\\_Group%2FFPIC\\_Indigenous\\_Peoples\\_GPN.pdf](https://d306pr3pise04h.cloudfront.net/docs/issues_doc%2Fhuman_rights%2FHuman_Rights_Working_Group%2FFPIC_Indigenous_Peoples_GPN.pdf).

<sup>80</sup> *Ibid.*, pp 6 - 7.

68. In a report prepared by Namoi Water to the Review of the Environmental Impact Statement of the Narrabri Gas Project, it was noted that despite Santos' own assessments of project impacts on access to clean water:<sup>81</sup>

There have been substantial spills, leaks, operation and poor monitoring of water infrastructure to date...[T]he environmental and human health risks were documented by the Chief Scientist, that despite best endeavors the interaction of technology failure and human mismanagement would result in risks. These have not been adequately addressed by Santos in the EIS assessment.

69. A report by the Moree Ecological Holistic Information centre (**MEHI Centre**) further detailed the threats of water contamination and chemical spills:<sup>82</sup>

The risks associated with potential groundwater and/or surface water contamination with 'produced CSG water' are of particular significance in the Narrabri Project (in comparison with other gas projects), due to the unusually poor water quality associated with the Gunnedah Basin coal seams underneath the Project area, and the unusually high quality of the shallow groundwater and surface water in the Project area.

Spills or leaks of produced water onsite, on route to or during storage at the water treatment facilities, have already occurred in the Pilliga Forest on about 20 occasions, detrimentally affecting the surrounding land and shallow ground water in the uppermost unconfined water table aquifers and the surrounding vegetation.

Attempts at rehabilitating well-sites throughout the forest with natural and planted vegetation have failed. A community study (PEG 2018) showed that routine activities at well-sites have resulted in the localised spillage of 'produced water', causing changes to soil chemistry harmful to local plant species. Soils in the Pilliga forests are very acidic, whereas soils at well sites were found to be neutral or alkaline, with little native ground storey, large numbers of weeds and a failure to increase tree numbers.

Santos has also failed to demonstrate how it will dispose of waste brine arising from the water treatment process, creating significant uncertainty about the environmental impacts of this disposal process. Independent expert evidence provided to the EDONSW shows that there is a significant risk of localised and down-stream environmental harm arising from this waste material.

Based on international evidence and the previous leaks and spills that have occurred in the forest (including several substantial spills of 'produced water', and groundwater contamination), the size of the project and the number of wells and required infrastructure to collect, transport and store the 'produced water', there is a strong likelihood that further leaks and/or spills of 'produced water' will occur throughout the life of the project, risking contamination of shallow aquifers and surface water bodies in the area.

Evidence shows that Santos has underestimated the risk of waste-water spills and leaks, which leaves the Project vulnerable and poorly equipped to respond to the incidents that will inevitably arise. The combination of significant volumes of poor-quality water being produced and managed across hundreds of sites in the project area over a period of 25 years, and the impact on the high quality of the groundwater in the Pilliga Sandstone and alluvium, raises significant concerns about harmful environmental and water impacts.

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<sup>81</sup> Namoi Water, "Submission to the Review of Environmental Impact Statement - Santos Narrabri Gas Project 2017", at p 8.

<sup>82</sup> MEHI Centre, "Pilliga Forest Cultural Values and Threats from Coal and Gas" (June 2021) at p40.

70. The MEHI Centre's report also noted that "important relevant information and data continues to be lacking or has not been considered" with respect to groundwater risks. There is not sufficient baseline data to assess the magnitude of this impact:<sup>83</sup>

The drilling, 'stimulation' and extraction of water in these coal seams by gas mining depressurizes the gas bearing coal formations but may also cause additional pathways for gas and water seepage between vertical layers to occur in the bedrock by increasing levels of localised fracturing of the bedrock. This is the mechanism by which predicted water table decline will occur, the magnitude of which however is not certain in industry groundwater assessments, mainly due to a lack of information. The Santos EIS is no exception.

71. The damage that Santos proposes to these lands and to the Great Artesian Basin would be irreversible, and the Gomerioi/Gamilaraay lands, waters, and peoples will suffer severe direct consequences. The human rights breaches caused by this damage include violations of the **right to enjoy their own culture** (ICCPR, Article 27) **the right to cultural institutions, ancestral lands, natural resources and traditional knowledge** (UNDRIP, Article 31; ICESCR, Article 27), the broader **right that Indigenous peoples have to territories and resources which they have traditionally owned or occupied** (UNDRIP, Article 26; ICCPR, Article 1(2)); the **right to manifest, practise, develop and teach spiritual and religious traditions** (UNDRIP, Articles 12 and 15), and the **right to maintain and strengthen their distinctive spiritual relationship with traditionally owned territories, waters and coastal seas** and other resources (UNDRIP, Article 25). It also breaches their right to water and their right to health. Superannuation funds that are investing for members' futures should not be investing in Santos.
72. Under ordinary principles of international law, the Gomerioi/Gamilaraay Traditional Owners' right to FPIC is enlivened by the Narrabri project. Consent is required to protect "the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources".<sup>84</sup> The project not only impacts areas of cultural significance, it also "[depletes] resources necessary for physical and cultural survival..."<sup>85</sup>. FPIC is a critical safeguard in these circumstances where the cultural survival of traditional owners are threatened. Gomerioi/Gamilaraay Traditional Owners have never given and do not expect to consent to the Narrabri gas project.<sup>86</sup>

## VIII. FUND OBLIGATIONS UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS

73. The United Nations Guiding Principles on Business and Human Rights 2011 (**UNGPs**), the Organisation for Economic Cooperation and Development (**OECD**) and the United Nations Working Group on the issue of human rights and transnational corporations and other business enterprises (**UN Working Group**) require businesses including institutional investors to identify both *actual* and *potential* human rights impacts to which they may be contributing to or directly linked.<sup>87</sup>
74. The *actual* and *potential* human rights impacts of the Barossa and Narrabri projects include:
- (a) the breach of economic, social and cultural rights; and

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<sup>83</sup> Ibid., at p 39.

<sup>84</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 21 (November 2009) at para [36].

<sup>85</sup> See *Saramaka People v Suriname (Preliminary Objections, Merits, Reparations and Costs)* (2007) 172 Inter-Am Ct HR (ser C) 41 at [135] citing the UN Special Rapporteur Radolfo Stavenhagen's report.

<sup>86</sup> <https://www.theguardian.com/australia-news/2022/apr/08/gomerioi-traditional-owners-vote-against-agreement-with-santos-for-narrabri-gas-project>

<sup>87</sup> UNGPs, Principle 11; Responsible Business Conduct for Institutional Investors, OECD (2017) at p16 accessed at <https://mneguidelines.oecd.org/RBC-for-Institutional-Investors.pdf>; UN Working Group on the issue of human rights and transnational corporations and other business enterprise, *Taking stock of investor implementation of the Guiding Principles on Business and Human Rights* (2021), p5, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/151/67/PDF/G2115167.pdf?OpenElement>

- (b) the breach of the right to free, prior and informed consent (**FPIC**) and the right to self-determination.

75. The UNGPs require business enterprises directly linked to adverse human rights impacts to prevent or mitigate those impacts. Principle 13 is extracted below.<sup>88</sup>

**13. The responsibility to respect human rights requires that business enterprises:**

**(a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;**

**(b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.**

76. In 2013 the UN Office of the High Commissioner for Human Rights (**OHCHR**) confirmed that institutional investors holding shares in companies, no matter how small the holdings, are directly linked to the adverse impacts of the companies they invest in:<sup>89</sup>

“Business relationships” are understood in the Commentary to GP 13 [UNGP Guiding Principle 13] to include “relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services.” OHCHR’s Interpretive Guide on the Corporate Responsibility to Respect Human Rights further elaborates that business relationships “include indirect business relationships in its value chain, beyond the first tier, and minority as well as majority shareholding positions in joint ventures. The use of the word “include” suggests that the examples of business relationships are non-exhaustive and illustrative. There is no indication that minority ownership outside the context of joint ventures would be excluded from the scope of application of GP 13 (b).

...

The relative size or percentage of the share an institutional investor holds in a company is not a factor in determining whether there is a business relationship for the purposes of GP 13 (b).

...

Institutional investors typically invest funds – their own or on behalf of clients – in various assets, which may include minority shareholdings. Impacts arising from the activities of the entities in which an investor has a minority shareholding can therefore reasonably be considered as being directly linked to the investors’ operations, products or services.

(references omitted).

77. The UNGPs require business enterprises to take appropriate action, depending on the extent of its leverage, to avoid involvement in adverse human rights impacts (Guiding Principles 13, 19). The UN Working Group also confirmed that where investors contribute to human rights impacts through a business relationship or investment activity they:<sup>90</sup>

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<sup>88</sup> UNGPs, Principle 11.

<sup>89</sup> UN Office of the High Commissioner for Human Rights, *The issue of the applicability of the Guiding Principles on Business and Human Rights to minority shareholdings* (26 April 2013), p3 accessed at <https://www.ohchr.org/sites/default/files/Documents/Issues/Business/LetterSOMO.pdf> .

<sup>90</sup> UN Working Group on the issue of human rights and transnational corporations and other business enterprise, *Taking stock of investor implementation of the Guiding Principles on Business and Human Rights* (2021), p6, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/151/67/PDF/G2115167.pdf?OpenElement>



...are expected to cease or prevent the action contributing to the harm, play a direct role in remediating the harm to the extent that they have contributed to it and build and use their leverage to influence other actors contributing to the harm to prevent, mitigate and address the harm.

78. Relevantly, investors:<sup>91</sup>

...should seek to build and use their leverage to *enable* remedy for affected rights-holders.

79. The 2013 OHCHR clarification on the applicability of the UNGPs to minority shareholdings helpfully sets out the relevant principles.<sup>92</sup>

In line with the commentary to GP 19, where an investor with a minority shareholding has leverage to prevent or mitigate an adverse impact, it should exercise it.

...

In situations where the minority shareholder finds it lacks leverage, it should consider ways in which it may increase its leverage to prevent or mitigate the human rights risk. This could, for example, involve filing shareholder proposals or entering into dialogue with other shareholders to build alliances for voting on the issue at shareholder meetings. Dialogue with authorities and relevant industry associations could also be considered.

As part of a strategy to increase leverage, it may be effective to engage with relevant expertise to document the consequences of the adverse impacts on human rights and possibly to the investment itself, in the form of increased costs/opportunity costs due to reputational, legal and operational risks. The shareholder should also consider whether a public statement to clarify its expectations may increase its leverage, or whether a more cautious behind-the-scene approach may be more effective.

Where a minority shareholder lacks leverage and cannot increase it, it should consider ending the relationship by disinvesting/selling its shares. The decision on ending the relationship should take into account credible assessments of any potential adverse human rights impact of doing so. Wherever possible, the shareholder should take steps to consult with potentially affected stakeholders on their proposed approach.

The Commentary to GP 19 emphasizes that the severity of the adverse human rights impact is an important factor in considering whether to continue the relationship. The more severe the abuse, the more quickly a business enterprise will need to see change before it takes a decision on whether it should end the relationship, including in situations where the relationship can be considered a “crucial” one. In any case, for as long as the abuse continues and a business enterprise remains in the relationship, it should be able to demonstrate its own ongoing efforts to mitigate the impact and be prepared to accept any consequences – reputational, financial or legal – of the continuing connection.

*In conclusion, institutional investors would be expected to seek to prevent or mitigate human rights risks identified in relation to shareholdings – including minority shareholdings. The Guiding Principles set out that the appropriate action in response to the identified risk depends*

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<sup>91</sup> Guiding Principle 19, Commentary. See also UN Working Group on the issue of human rights and transnational corporations and other business enterprise, *Taking stock of investor implementation of the Guiding Principles on Business and Human Rights* (2021), p7, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/151/67/PDF/G2115167.pdf?OpenElement>

<sup>92</sup> UN Office of the High Commissioner for Human Rights, “The issue of the applicability of the Guiding Principles on Business and Human Rights to minority shareholdings” (26 April 2013), pp4-6 accessed at <https://www.ohchr.org/sites/default/files/Documents/Issues/Business/LetterSOMO.pdf>

*on the degree of its leverage, where a number of options should be considered with a view to use or enhance leverage, to effect change in terms of ending harmful practice and mitigating risks of human rights abuse. If efforts in this regard are not successful, the Guiding Principles stipulate that the institutional investor should consider ending the relationship.*

80. Leverage in the context of investors includes “engaging companies in dialogue, filing shareholder resolutions, proxy voting, participating in peer-to-peer and multi-stakeholder initiatives...”<sup>93</sup>. In the aftermath of the Juukan Gorge disaster, for example, institutional investors worked together to drive greater transparency and disclosures from Rio Tinto with respect to its management of social and environmental risks.<sup>94</sup> Further, the size of the investor itself is a consideration regarding its leverage and the appropriate actions it should take.<sup>95</sup>
81. The Working Group has detailed the obligation of institutional investors to meaningfully *enable* remedies and to have grievance mechanisms:<sup>96</sup>

At the institutional level, investors should have in place their own human rights grievance mechanisms to support the provision of remedy when they cause or contribute to a situation where someone’s human rights are adversely impacted.

...

Adopting a ‘remedy ecosystem’ approach may help strengthen the ability of investors to enable remedy by: (1) proactively supporting preparedness for remedy before harm occurs by building and using leverage to communicate expectations on remedy to investees and engage investees on the effectiveness of their grievance mechanisms and (2) reactively building and using leverage when a harm has occurred to influence those causing or contributing to the harm to focus on remedy, engage with affected rights-holders and other relevant stakeholders and ensure that there is an effective process and meaningful outcome in the provision of remedy.

82. International human rights principles require institutional investors to have in place a policy commitment to respect all internationally recognised human rights, as well as details on how the institution operationalises its human rights commitment through its oversight and governance structures and investment activities.<sup>97</sup> The UNGPs and other guidance from the UN Working Group and the OECD note that as part of their responsibility to respect human rights, investors are expected to carry out human rights due diligence before and during the life of their investment to ensure that they are not involved in adverse human rights impacts.<sup>98</sup>

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<sup>93</sup> UN Working Group on the issue of human rights and transnational corporations and other business enterprise, *Taking stock of investor implementation of the Guiding Principles on Business and Human Rights* (2021), p7, available at <https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F47%2F39%2FAdd.1&Language=E&DeviceType=Desktop&LangRequested=False>.

<sup>94</sup> <https://acsi.org.au/media-releases/juukan-gorge-destruction-investor-collaboration-drives-new-transparency-commitments-by-rio-tinto/>

<sup>95</sup> Ibid

<sup>96</sup> UN Working Group on the issue of human rights and transnational corporations and other business enterprise, *Taking stock of investor implementation of the Guiding Principles on Business and Human Rights* (2021), p8, available at <https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F47%2F39%2FAdd.1&Language=E&DeviceType=Desktop&LangRequested=False>.

<sup>97</sup> UN Working Group on the issue of human rights and transnational corporations and other business enterprise, *Taking stock of investor implementation of the Guiding Principles on Business and Human Rights* (2021), p. 5, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/151/67/PDF/G2115167.pdf?OpenElement>

<sup>98</sup> Ibid.

83. The UN Working Group states that investors should formally disclose how they take action to prevent, mitigate and address severe human rights risk and impacts.<sup>99</sup> Investor transparency is critical to allow rights-holders and other stakeholders to identify and engage investors in companies responsible for human rights abuses.
84. If efforts by investors to exercise leverage do not prevent the human rights impacts, the UN Working Group notes the importance of divestment as a key tool for investors to ensure that they are themselves respecting human rights:<sup>100</sup>

The Guiding Principles clarify that a business relationship may have to be terminated if efforts to exercise leverage aimed at addressing an adverse human rights impact prove unsuccessful. As noted for example by the OECD, divestment from a company may be an appropriate response after continuous failed attempts at mitigating the harm, where mitigation is unfeasible or because of severity of the adverse impact warrants it.

## IX. FUND OBLIGATIONS - AUSTRALIAN LAW & JUUKAN GORGE

85. Under Australian law, superannuation funds and their trustees must:
- (a) act in members' best financial interests;<sup>101</sup>
  - (b) act with the requisite degree of care, skill and diligence;<sup>102</sup>
  - (c) ensure the fund is maintained solely for the purpose of providing benefits to members in retirement;<sup>103</sup>
  - (d) establish appropriate risk management frameworks, including for the recognition of material systemic risks;<sup>104</sup>
  - (e) operate under the current regulatory framework which was designed "to take account of the importance of superannuation funds to the long-term development and stability of the economy".<sup>105</sup>
86. Superannuation funds and trustees should also be preparing to preserve savings to deliver income for a dignified retirement, alongside government support, in an equitable and sustainable way.<sup>106</sup>
87. International human rights principles that require funds to undertake effective engagement, exercise leverage and prevent adverse human rights impacts are, in our view, in the case of Santos, both

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<sup>99</sup> UN Working Group on the issue of human rights and transnational corporations and other business enterprise, *Taking stock of investor implementation of the Guiding Principles on Business and Human Rights* (2021), p24, available at: <https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F47%2F39%2FAdd.1&Language=E&DeviceType=Desktop&LangRequested=False>

<sup>100</sup> UN Working Group on the issue of human rights and transnational corporations and other business enterprise, *Taking stock of investor implementation of the Guiding Principles on Business and Human Rights* (2021), p7, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/151/67/PDF/G2115167.pdf?OpenElement>

<sup>101</sup> *Superannuation Industry (Supervision) Act 1999* (Cth) (**SIS Act**), ss 52(2), 52A(2)

<sup>102</sup> *Ibid*

<sup>103</sup> SIS Act, s 62

<sup>104</sup> SIS Act s 34, and for example APRA Prudential Standard *CPS 220 Risk Management*)

<sup>105</sup> ALRC Report No 59 *Collective Investments: Superannuation* (1992), p (Iviv), under the heading *Making superannuation safe*: <http://www.austlii.edu.au/au/other/lawreform/ALRC/1992/59.html>

<sup>106</sup> <https://www.corr.com.au/insights/legislating-the-objective-of-superannuation-gathers-momentum>

consistent with and permitted by the Australian legal framework. In fact, the actions demanded by the international principles for investors to comply with the human rights framework may be required to satisfy the Australian legal requirements.

88. As set out above, a fund that is directly linked to negative human rights impacts through its investment activities is expected to build and use its leverage to influence other actors causing or contributing to the harm to prevent, mitigate and address the harm.<sup>107</sup> Forms of leverage include “engaging companies in dialogue, filing shareholder resolutions, proxy voting, participating in peer-to-peer and multi-stakeholder initiatives, engaging with State institutions and other standard-setting bodies, engaging with other stakeholders such as civil society organisations and integrating human rights criteria into agreements with business relationships”.<sup>108</sup> These forms of leverage would be familiar to funds that already employ engagement and other stewardship practices in accordance with their climate and other ESG commitments.
89. The duty to act in the best financial interests of beneficiaries allows the trustee of a fund making key decisions that have important broader social and environmental benefits provided the decision has been made for the purpose of advancing the financial interests of the members.<sup>109</sup> Like fund actions on Juukan Gorge, which we explore below, there is a clear financial case to prevent Santos causing adverse human rights impacts - both with respect to reputational damage and vanilla financial performance metrics.
90. As a starting point, funds should take a systemic view of risks to their investment portfolios and assume that, given their universal-owner status, they have an interest in the overall health and stability of the social and environmental systems that underpin the financial system within which they invest for the benefit of their members.<sup>110</sup> In taking that view, forms of leverage consistent with international human rights standards to address negative human rights impacts is permitted by the Australian legal framework.<sup>111</sup> This view is also described as “crucial” by the UN Working Group on the issue of human rights and transnational corporations and other business enterprise:

In the case of large passive asset managers, also known as 'universal owners,' using leverage to promote public policy that tackles systemic risks to human rights is an especially crucial form of leverage. By effectively owning a slice of the whole economy, universal owners are uniquely exposed to and have a responsibility to address the systemic and collective adverse impacts of the economy as a whole.

91. In addition to the human rights impacts, all projects are new fossil fuel projects that will increase emissions and make the Paris Agreement goals of limiting global warming increasingly out of reach.

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<sup>107</sup> UN Working Group on the issue of human rights and transnational corporations and other business enterprise, *Taking stock of investor implementation of the Guiding Principles on Business and Human Rights* (2021), p6-7, available at: <https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F47%2F39%2FAdd.1&Language=E&DeviceType=Desktop&LangRequested=False>

<sup>108</sup> UN Working Group on the issue of human rights and transnational corporations and other business enterprise, *Taking stock of investor implementation of the Guiding Principles on Business and Human Rights* (2021), p7, available at: <https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F47%2F39%2FAdd.1&Language=E&DeviceType=Desktop&LangRequested=False>

<sup>109</sup> Freshfields Bruckhaus Deringer, *A legal framework for impact: Sustainability impact in investor decision-making* (2021), p154-5, available at: <https://www.freshfields.com/4a1df8/globalassets/noindex/documents/ffi/unep-final-compiled.pdf>; <https://www.mondaq.com/australia/financial-services/1278208/evidencing-superannuations-best-financial-interests-duty--the-beauty-or-the-beast>.

<sup>110</sup> See generally, UN Principles for Responsible Investment, *Active Ownership 2.0: the evolution stewardship urgently needs* (2021), available at: <https://www.unpri.org/download?ac=9721>.

<sup>111</sup> Freshfields Bruckhaus Deringer, *A legal framework for impact: Sustainability impact in investor decision-making* (2021), pp 10, 14-19, 154-188, available at: <https://www.freshfields.com/4a1df8/globalassets/noindex/documents/ffi/unep-final-compiled.pdf>.

Relevantly, in the expert report of actuary Dr Ramona Meyricke or Taylor Fry filed in Federal Court of Australia proceeding *Anjali Sharma v Minister for the Environment*, VID607 of 2020, Dr Meyricke concluded:<sup>112</sup>

it is my opinion that due to a material proportion of climate risk being non-diversifiable, on average individuals aged under 18 will earn lower long-term investment returns as a result of climate change.

92. In any event, on an idiosyncratic view of vanilla financial performance metrics, the recent findings of investment and advisory firm Snowcap in relation to Santos become acutely relevant. Santos' financial performance is suffering due to the following key issues:<sup>113</sup>
- (a) a misguided growth strategy;
  - (b) inadequate capital returns, which ignore transition risk;
  - (c) unacceptable environmental and safety record;
  - (d) misaligned executive incentives.
93. Santos disclosed at its 6 April 2023 annual general meeting that it will not change its growth strategy.<sup>114</sup>
94. Santos' misguided growth strategy and unacceptable environmental and safety record are causing the adverse human rights impacts. Santos' growth strategy has been shown to correspond with its underperformance. This can underpin a fund's actions to use leverage (or increase leverage) to prevent the adverse impacts of Santos' growth strategy in accordance with the best interests financial duty. Where the adverse human rights impacts and negative financial impacts are yet to be fully realised, as in the case of the Barossa project and Narrabri project, the appropriate aim is to prevent human rights impacts and financial losses.
95. Using the forms of leverage suggested above to prevent adverse human rights impacts is consistent with the duty for a fund trustee to act with the requisite care, skill and diligence. In order to discharge this duty, amongst other things, the trustee is required to have regard to foreseeable risks of harm to the beneficiaries' interests (which are predominantly financial, but could encompass broader reputational and other interests) and consider what steps a reasonable person in their position would take in the circumstances to alleviate those risks.<sup>115</sup> Being directly linked to adverse human rights impacts could be a foreseeable risk of harm to the interests of beneficiaries, compelling a trustee to take certain steps to prevent the harm. The UN Working Group observed the material costs for investors where companies fail to act with due diligence to respect the rights of Indigenous Peoples. The Working Group cited a First Peoples Worldwide report which found that firms with ownership stakes in the Dakota Access Pipeline project incurred no less than US\$7.5 billion in costs.<sup>116</sup>

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<sup>112</sup> Expert Report of Dr Ramona Meyricke, available via FOI, see page 407 of 668 (In the report at paragraph 3.4.18. See also Table 3 that models loss scenarios, including up to a 49% loss on the base case with no climate change): <https://www.agriculture.gov.au/sites/default/files/documents/24983.pdf>

<sup>113</sup> Snowcap letter to Santos Board, 9 March 2023: <https://static1.squarespace.com/static/63f7678e37a01501e18c5356/t/64088612cb2e110c13936624/1678280211416/230308+Snowcap+Letter+to+Santos+Board+vF.pdf>. See also <https://static1.squarespace.com/static/63f7678e37a01501e18c5356/t/6418485bf25dbb728bf0e718/1679313005464/230308+-+Reform+Santos+Presentation+vF.pdf>

<sup>114</sup> <https://www.afr.com/companies/energy/ccs-critical-to-australia-s-net-zero-plans-santos-20230405-p5cyhm>

<sup>115</sup> Freshfields Bruckhaus Deringer, *A legal framework for impact: Sustainability impact in investor decision-making* (2021), p157, available at: <https://www.freshfields.com/4a1df8/globalassets/noindex/documents/lfi/unep-final-compiled.pdf>.

<sup>116</sup> UN Working Group on the issue of human rights and transnational corporations and other business enterprise, *Taking stock of investor implementation of the Guiding Principles on Business and Human Rights* (2021), p11,

96. Superannuation funds have a history of being too late to act to avoid serious risks to their investee companies.<sup>117</sup> The Committee appointed by the Parliament of Australia appointed to investigate Rio Tinto's Juukan Gorge disaster stated:<sup>118</sup>

The Committee is dismayed to hear reports that some companies continue to endanger critical heritage sites. It calls upon those in the industry who are improving their processes, to hold their peers to account for these inappropriate actions. The mining industry peak bodies also have a role in driving change. **The Committee feels too that it is incumbent on shareholders, particularly institutional investors, to hold publicly listed companies to account for their actions or inaction in regard to improving relationships with traditional owners.** After the destruction of the Juukan caves it is clear that Aboriginal and Torres Strait Islander heritage is intertwined with Australia's heritage and that its destruction is the destruction of ancient Australian heritage.

97. In a section on free, prior and informed consent, the Committee noted that failure to respect indigenous rights of free prior and informed consent to the international legal standard would result in poor investor returns:<sup>119</sup>

#### **Free, Prior and Informed Consent**

Free, Prior and Informed Consent (FPIC) is a core principle of UNDRIP. Stakeholders throughout this inquiry have pointed to it as a crucial principle that must be enshrined within Australian Aboriginal cultural heritage legislation and related practices.

FPIC is a specific right that pertains to Indigenous people which allows them to give or withhold consent to any project that may affect them or their lands. Once given, consent may be withdrawn at any stage. Furthermore, the principle of FPIC allows Indigenous people the right to negotiate conditions under which the project will be designed, implemented, monitored and evaluated. This is also embedded within the right of self-determination.

The elements of FPIC can be defined as follows:

- **Free:** The consent is free, given voluntarily and without coercion, intimidation or manipulation. A process that is self-directed by the community from whom consent is being sought, unencumbered by coercion, expectations or timelines that are externally imposed.
- **Prior:** The consent is sought sufficiently in advance of any authorisation or commencement of activities.
- **Informed:** The engagement and type of information that should be provided prior to seeking consent and also as part of the ongoing consent process.
- **Consent:** A collective decision made by the right holders and reached through a customary decision-making process of the communities.

There is agreement between Aboriginal and Torres Strait Islander groups and industry concerning the importance of FPIC. In Dhawura Ngilan: A vision for Aboriginal and Torres Strait Islander heritage in Australia it is stated that:

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available at:

<https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F47%2F39%2FAdd.1&Language=E&DeviceType=Desktop&LangRequested=False>

<sup>117</sup> <https://www.theguardian.com/business/2020/aug/27/rio-tinto-response-to-juukan-gorge-caves-blast-not-good-enough-australiansuper-says>

<sup>118</sup> Joint Standing Committee on Northern Australia (Parliament of the Commonwealth of Australia), *A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge*, 15 October 2021, at 3.92:

[https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024757/toc\\_pdf/AWayForward.pdf;fileType=application%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024757/toc_pdf/AWayForward.pdf;fileType=application%2Fpdf)

<sup>119</sup> *Ibid*, at 6.83, 6.84, 6.86, 6.91

As a foundational principle, Australia's Indigenous Peoples are entitled to expect that Indigenous Cultural Heritage legislation will uphold the international legal norms contained in the UNDRIP.

...

The Centre for Social Responsibility in Mining observed that the industry is starting to engage with concepts like FPIC to guide agreement making and that the legislative and policy frameworks are falling behind:

As researchers, we are observing and tracking how the industry is engaging with those terms and concepts, which are gaining prominence. We track what the industry commits to. It's all very voluntary. It's self-regulatory. Our submission is that industry capability to keep up with the commitments that it's making in the policy realm, including around free prior and informed consent, is often lacking. Companies are making commitments in this area but we're not always seeing the capability on the ground, in performance teams, to support the commitments they're making and to put them into practice.

.... We also hear that FPIC is—you used the word 'bastardised'—kind of being picked apart a little bit. So it is free, prior and informed, but there is not the consent piece. We do hear that. We hear that FPIC is consultation. So we do agree with you that it is a term that's open to interpretation. But processes of consultation and consent are very important, and we need to have a more open discussion about what it means and what it looks like...

**The Committee also received evidence about the increasing importance of shareholder power in influencing the actions of companies in the mining industry.** National and international shareholders are responding to concerns about heritage and have put a considerable amount of pressure on Rio Tinto to make the changes they did. These actions remind corporations that their social license and corporate ethical positions will affect how they are able to do business in the future – **it will affect their investment prospects and return on investment.**

98. Funds freely joined together to collaborate to increase their leverage to address the adverse human rights impacts of Juukan Gorge after the fact.<sup>120</sup> However, there is no evidence of funds collaborating to prevent the human rights impacts of Santos' Barossa and Narrabri projects. There is no evidence of funds engaging with State institutions to ensure that Santos' Barossa and Narrabri projects do not go ahead. How funds are engaging with Santos is unknown.

## X. FUND KNOWLEDGE

99. Funds are required to conduct ongoing due diligence and they should have known about the adverse human rights impacts of Santos' activities with respect to the Barossa project because of:
- (a) the publication of Santos' Barossa Development Drilling and Completions Environment Plan or Drilling EP, dated 11 February 2022 that referred to three emails being sent to the Tiwi Land Council and stated that Santos believed consultation was adequate under the relevant regulations;<sup>121</sup>

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<sup>120</sup> <https://acsi.org.au/media-releases/juukan-gorge-destruction-investor-collaboration-drives-new-transparency-commitments-by-rio-tinto/>

<sup>121</sup> See pages 94, 95 and 123: <https://docs.nopsema.gov.au/A831694>. The EP was published prior to 1 March 2022: [web.archive.org/web/20220301232706/https://info.nopsema.gov.au/environment\\_plans/556/show\\_public](http://web.archive.org/web/20220301232706/https://info.nopsema.gov.au/environment_plans/556/show_public).

- (b) the court case in South Korea and associated reported in March 2022 regarding KEXIM's loan approval that brought into question the adequacy of Santos' consultation of indigenous people impacted by the Barossa project;<sup>122</sup>
  - (c) the 3 June 2022 filing of the proceeding *Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority* VID 306/2022, and subsequent reporting including on the impacts on the Tiwi Islander indigenous peoples and the inadequate of consultation under the EP;
  - (d) the court's decision in *Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority* [2022] FCA 838 on the interim injunction handed down 14 July 2022 which confirmed the Barossa project impacted indigenous people's social and cultural human rights;<sup>123</sup>
  - (e) the first instance hearing in the trial of the Tipakalippa proceedings from 22 to 26 August 2022 and subsequent reporting, which dealt with the evidence of consultation as set out in the EP;<sup>124</sup>
  - (f) the decision and related reporting of *Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority (No 2)* [2022] FCA 1121 (21 September 2022);
  - (g) the decision and related reporting of the subsequent appeal *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193 (2 December 2022);
  - (h) Human Rights Grievances filed on 4 April 2023 against 15 financial institutions involved in loans or other financial facilities to Santos.<sup>125</sup>
100. The above directly suggests that the requirements for consultation under Australian law, which includes consultation of persons whose functions, interests and activities were to be affected by the activities, had not been complied with.<sup>126</sup> As discussed in the Drilling EP<sup>127</sup> and documents before the regulator, which were provided to the parties in the *Tipakalippa* proceeding around 25 June 2022, Santos' activities would broadly impact the Tiwi Islanders.<sup>128</sup> The *Tipakalippa* proceedings, at minimum, should have alerted financial institutions to the human rights impacts of the Barossa project.
101. Funds should have known about the adverse human rights impacts of Santos' activities with respect to the Narrabri gas project because of:
- (a) the reporting of the Gomerioi/Gamilaraay people's opposition to the Federal government's environmental approval of the project as early as November 2020;<sup>129</sup>
  - (b) reporting of the 2022 overwhelming vote against the Narrabri project and an agreement with Santos by Gomerioi/Gamilaraay Traditional Owners - 162 against, 2 in favour, and 4 abstaining;<sup>130</sup>

<sup>122</sup>See Reuters article [here](#).

<sup>123</sup> *Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority* [2022] FCA 838 at [51].

<sup>124</sup> *Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority (No 1)* [2022] FCA 1121 at [104]-[105]

<sup>125</sup> For details of the Grievances and surrounding media see: <https://equitygenerationlawyers.com/human-rights/>

<sup>126</sup> *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009*, regs 4, 11A, 16.

<sup>127</sup> *Tipakalippa (No 2)* at [205(xiii)].

<sup>128</sup> *Tipakalippa (No 2)* at [110],[119] and orders dated 17 June 2022, available [here](#).

<sup>129</sup> <https://www.sbs.com.au/nitv/article/gomerioi-to-continue-fight-against-narrabri-gas-project-following-environmental-approval/iw12v9xob>

<sup>130</sup> <https://www.theguardian.com/australia-news/2022/apr/08/gomerioi-traditional-owners-vote-against-agreement-with-santos-for-narrabri-gas-project>



- (c) the decision and the related reporting of the National Native Title Tribunal ruling about the Narrabri Gas Project dated 19 December 2022,<sup>131</sup>
- (d) the court case and the related reporting of the Native Title Appeal filed by the Gomeri/Gamilaraay people against Santos for the Narrabri Gas Project on 18 January 2023.<sup>132</sup>

## **XI. REQUESTED ACTIONS, REMEDY AND TIMEFRAMES**

### **A. Expected actions**

- 102. This letter sets out the seriousness of the human rights abuse. Santos in its 6 April 2023 annual general meeting confirmed it was pressing ahead with the Barossa, DLNG and Narrabri projects, despite the fact that no consent would be provided by the Impacted Tiwi Claimants, Larrakia Claimant and Gomeri/Gamilaraay Claimants.<sup>133</sup>
- 103. In the circumstances, funds are to use their leverage to ensure that Santos does not progress with the projects. It is the only way to prevent the human rights impacts.
- 104. There is no evidence of the funds exercising their leverage to ensure Santos does not proceed with the Narrabri, Barossa or Darwin LNG projects.
- 105. The principles above suggest that in making decisions on exercising leverage and considering divestment where the actions of Santos will not change, funds should consult affected stakeholders on their approach.
- 106. There has been no such consultation with our clients by any major Australian superannuation fund.
- 107. The principles above suggest that superannuation funds can band together to increase leverage, petition industry associations or regulators and release public statements on their position.
- 108. There is no evidence the fund has engaged in any of these actions.

### **B. Understanding the fund's conduct**

- 109. This letter raises serious concerns about the fund's conduct and the integrity of its systems with respect to international human rights obligations. To assist the member understand the fund's conduct to date, the following information must be provided under s 1017C of the *Corporations Act*.
  - (a) a copy of the fund's human rights policy (if one exists) or information about its contents;
  - (b) information on how the human rights risks referred to in this letter are incorporated into the fund's risk management framework (if at all);
  - (c) information on the fund's and relevant investment managers' justification of its investment strategy with respect to Santos and with respect to any human rights considerations;
  - (d) information on the fund's engagement with Santos, including how it has exercised leverage to prevent human rights abuses (if this has occurred at all);
  - (e) information on the fund's escalation strategy to increase its leverage, ensure Santos does not cause human rights impacts, or divest from the company.

<sup>131</sup> <https://www.sbs.com.au/nitv/article/santos-given-consent-for-mine-on-gomeri-country/bqxle2g5m>

<sup>132</sup> <https://www.abc.net.au/news/2023-01-18/native-title-appeal-complicates-santos-narrabri-gas-project/101863842>.

<sup>133</sup> <https://www.afr.com/companies/energy/ccs-critical-to-australia-s-net-zero-plans-santos-20230405-p5cyhm>

110. We note that certain documents and very limited information may be withheld by funds under s 1017C(4) of the *Corporations Act*. We note the limited, technical meaning of 'internal working documents', 'trade secrets' and 'information with a commercial value'. We also expect that the provision of information, which is ultimately in the fund's control and may be summarised, would not disclose such information and the exceptions in s 1017(4)(b) and (c) cannot reasonably be used.
111. If the fund does seek to rely on the exceptions in s 1017C(4) to avoid disclosure of certain documents or information, we request that, in accordance with its evidentiary burden under the subsection, it provides a description of the document or information and pinpoints the exception on which it relies.
112. The member does not expect there to be any restrictions on confidentiality with respect to this material. Accordingly, it should be provided to the member and the Claimants given the fund's involvement with the adverse human rights impacts that the Claimants are being subject to.

C. Further requests and timeframes

113. We request the fund to, in accordance with the international human rights principles and the Australian legal framework, as set out in this letter:
- (a) immediately begin to effectively exercise its leverage, or increase its leverage, on Santos to stop development of the Barossa, DLNG and Narrabri projects, or if this is not achieved within a reasonable time, divest;
  - (b) within 14 days, make a public statement containing:
    - i. its position with respect to the adverse human rights impacts caused by Santos regarding the Barossa, Darwin LNG, Narrabri projects;
    - ii. a description of how the fund proposes to use or increase its leverage to prevent adverse human rights impacts;
    - iii. the date by which the fund proposes to divest absent any change in Santos' strategy;
    - iv. the fund's approach to international human rights principles.
  - (c) engage in consultation with our clients and their communities, in a culturally sensitive way and with appropriate consent, on the actions the fund proposes to take regarding Santos, which includes an invitation to members of the board of trustees or fund executives to undertake that consultation on country.
114. We ask you to provide the requested information and respond to the requests above by **26 May 2023**. We expect the response to be in writing.

Yours sincerely



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