

# SUBMISSION TO THE EPBC ACT REVIEW

ANON-K57V-XFT6-N

## Name

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## Organisation

Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS)

## State or Territory

International

## Areas of interest

The objects of the Act; International obligations; Indigenous Australians; Heritage; Matters of National Environmental Significance; Cumulative impacts; Climate change; Decision making; Public participation in decision making; Biodiversity; Conservation; Commonwealth national parks; Water

## Attachment provided?

Yes

## Do you give permission for your submission to be published?

Yes – with my name and/or organisation

## SUBMISSION RESPONSES

### QUESTION 1: Some have argued that past changes to the EPBC Act to add new matters of national environmental significance did not go far enough. Others have argued it has extended the regulatory reach of the Commonwealth too far. What do you think?

As Australia faces a changing climate, the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act) plays a critical role as a central piece of legislation to harmonise the protection and management of the country's natural resources and heritage. The EPBC Act has previously been audited in June 2014 (Audit Report No. 43 2013-14 Managing Conditions of Approval) and in 2017 (Audit Report No. 36 2016-17 Monitoring compliance with Environment Protection and Biodiversity Conservation Act 1999 Conditions of Approval Follow-on audit). Both audits were focused on the monitoring and compliance costs of the EPBC legislation noting significant costs and recommendations for implementation of the legislation.

In line with environmental conservation in general, regulatory efforts are too narrowly focused on compliance, and administrative responses fall short of achieving the intended aims of the EPBC Act. Indigenous communities have also been very effective in identifying threatened species planning for large scale fire and water management and have been proactive in establishing and implementing country management plans. Indigenous groups as traditional custodians also have responsibility for many key ecosystem zones to support the objectives of the EPBC Act. For example, communities remain active on country – to the extent that illegal poaching has been readily identified. This can create key opportunities to effectively manage imports and exports to protect Australia's biodiversity and species threatened by international trade (especially for species listed under the

The Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999* is being undertaken by Professor Graeme Samuel AC, supported by the Department of the Environment and Energy.

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We acknowledge the Traditional Owners of Country throughout Australia and recognise their continuing connection to land, waters and community. We pay our respects to their cultures and their elders past, present and emerging.

Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)). However, many Indigenous communities lack enforcement rights and despite having an active role on country, face obstacles in fulfilling their duties to look after country. Currently, enforcement rights are recognised under the UNDRIP, Article 36 to support the realisation of Indigenous rights and interests – including rights and interests to support the management of traditional country. In our submission, we focus on the key contribution of Indigenous held lands to the achievement of Australia’s Aichi Targets and how this contribution can be positively magnified by addressing the issue of clear rights and responsibilities. This is discussed in further detail below.

Indigenous peoples throughout Australia have always and continue to actively manage these lands. The successful and longstanding Indigenous Protected Areas (IPAs) program (established in 1997) is a prime example: IPAs have grown to incorporate 8.67 per cent of the Australian land mass, but they constitute over 44 per cent of the National Reserve System (and nearly 50 per cent when combined with jointly managed areas) (see Department of Agriculture, Water and Environment 2018). Through contributing to the National Reserve System, IPAs also contribute significantly to Australia’s commitment under the Aichi Targets. There are currently 76 declared IPAs (National Indigenous Australians Agency 2020) and a further 12 IPA projects that are in the consultation phase (or planning and development phase) which will cover both land and seas which will increase the overall NRS by a further 20 per cent.

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Department of Agriculture, Water and Environment. 2018. ‘CAPAD (Collaborative Australian Protected Area Database) 2018’. 2018.

<http://www.environment.gov.au/land/nrs/science/capad/2018>.

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#### **QUESTION 2: Should the objects of the EPBC Act be more specific?**

**How could the principle of Ecologically Sustainable Development (ESD) be better reflected in the EPBC Act? For example, could the consideration of environmental, social and economic factors, which are core components of ESD, be achieved through greater inclusion of cost benefit analysis in decision making?**

Non-Indigenous conceptions of environmental management are often confined to narrow legislative or policy approaches that do not integrate the multilayered nature of ecological interaction – evidenced by the failure of the EPBC Act to counteract Australia’s continuing decline in biodiversity – or the ways that environmental imperatives are related to broader Indigenous aspirations. ESD in an Indigenous context must recognise that environmental management is not isolated from other Indigenous aspirations; sustainable development must involve responsiveness to local aspirations, not only government imperatives (see J. Altman 2012a).

The Northern Land Council’s (NLC) Caring for Country Unit, for instance, was deliberately conceived as more than an environmental ranger program. Its task was primarily to support land owning groups and local organisations ‘to strengthen customary skills and practices’, and so enable ongoing care for country (Northern Land Council (2003) Healthy Country Healthy Families Caring for Country Strategy, 2003-2006, cited in Kerins 2012, 30). Moreover, the remit of activities undertaken was wide-ranging – including introducing community-based planning, introducing new knowledge and information systems, as well as being a broker between land owning groups and government agencies – which is indicative of the broader benefits of ILM to Indigenous groups (see Question 6). Any decision making arrangements need to incorporate broader approaches to conservation in order to ensure that there are effective foundations to meet environmental targets. The Northern Land Council example demonstrates that a sector wide response can create multiple social benefits.

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Kerins, Sean. 2012. 'Caring for Country to Working on Country'. In *People on Country: Vital Landscapes, Indigenous Futures*, edited by Jon Altman and Sean Kerins, 26–44. Sydney: The Federation Press.

### **QUESTION 3: Should the objects of the EPBC Act be more specific?**

As discussed above, the objectives of the EPBC Act lack appropriate integration. Many of the objectives are interrelated and should be combined or refer to each other as well as address multisector issues such as climate change and land and water management. While the legislation does not necessarily need to cover all these areas, there should be scope for harmonisation and expressions of shared principles as formally expressed in the 1997 Heads of Agreement on Commonwealth and State Roles and Responsibilities for the Environment.

Clear legislative objects are critical to the common law interpretation of ambiguous areas of law or application (ALRC 2016). With respect to the objectives of the Act and its identified mechanisms for achieving them, there has been considerable investment in a partnership approach. Yet, these objectives were developed over 20 years ago without the recognition of the urgency and current context of environmental management in Australia – particularly the increased recognition of Indigenous land holdings and the unrealised potential of Aboriginal and Torres Strait Islander peoples in managing critical landscapes and diverse ecosystems. The objectives of the EPBC Act need to be clearer and more directed – not necessarily to increase in number – in order to focus on implementation, policy formation and investment. The current objectives, while addressing issues of concern, are confused without centralising the importance of environmental protections as a means of buffering Australia from many of the current challenges of climate change adaptation and management.

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ALRC. 2016. 'Traditional Rights and Freedoms—Encroachments by Commonwealth Laws (ALRC Report 129)'. 129. ALRC Report. <https://www.alrc.gov.au/publication/traditional-rights-and-freedoms-encroachments-by-commonwealth-laws-alrc-report-129/>.

### **QUESTION 4: Should the matters of national environmental significance within the EPBC Act be changed? How?**

Current processes for determining matters of national environmental significance are based on legislative categories that do not operate in reality or otherwise compartmentalise environmental management practices (T. Tran et al. 2013). The Indigenous estate is managed based on recognised ecosystems of significance that integrates land and water management, fire management, threatened species protection as well as economic and social opportunities (T. Tran, Langford, and Services 2015). The forced listing of matters of national environmental significance, while creating additional protection mechanisms should be automated in Indigenous protected area planning rather than 'applied for' at a later time. For example, the UNESCO world heritage listing of the Budj Bim National Heritage Landscape flows from very similar principles that have been adopted under the EPBC Act. The requirement for 'double listing' creates unnecessary duplication.

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Tran, Tran, Lisa Strelein, Jessica Weir, Claire Stacey, and Anna Dwyer. 2013. 'Changes to Country and Culture, Changes to Climate: Strengthening Institutions for Indigenous Resilience and Adaptation'. NCCARF – National Climate Change Adaptation Research Facility.

<https://www.nccarf.edu.au/synthesis/native-title-and-climate-change-changes-country-and-culture-changes-climate-strengthening>.

**QUESTION 5: Which elements of the EPBC Act should be priorities for reform? For example, should future reforms focus on assessment and approval processes or on biodiversity conservation? Should the Act have proactive mechanisms to enable landholders to protect matters of national environmental significance and biodiversity, removing the need for regulation in the right circumstances?**

The focus of the EPBC act should be on proactive conservation measures as opposed to legal avenues following environmental destruction or degradation that is penalty based. See question 6 below for more discussion on how this can be achieved via the Indigenous estate.

**QUESTION 6: What high level concerns should the review focus on? For example, should there be greater focus on better guidance on the EPBC Act, including clear environmental standards? How effective has the EPBC Act been in achieving its statutory objectives to protect the environment and promote ecologically sustainable development and biodiversity conservation? What have been the economic costs associated with the operation and administration of the EPBC Act?**

Indigenous land management is an area that is fundamental to reforms to the EPBC Act and to the future success of environmental and heritage management in Australia. AIATSIS has previously outlined in detail the alignment between the recognition of Indigenous rights and interests, and opportunities that can be accessed through both native title and statutory titles under, for example, the Aboriginal Land Rights (North Territory) Act 1976 (Strelein et al. 2019).

Here, we emphasise the following facts about Indigenous Land Management and note the extensive evidence base that underpins them.

The Indigenous estate covers a significant area of Australia's landmass, including many areas of ecological significance.

The 'Indigenous estate' refers to the 'aggregate area of Australia's land mass which is held by, or on behalf of, Aboriginal peoples and/or Torres Strait Islanders under a corporate or group title or trust' (J. C. Altman, Buchanan, G.J., and Larsen 2007, 9). Large areas of the Indigenous estate are 'of high conservation value' because they not only cover many rich ecosystems across the continent, but many are relatively intact, which has also allowed for the persistence of species that have declined elsewhere (J. C. Altman, Buchanan, G.J., and Larsen 2007, 24).

The Indigenous estate today is composed of a number of forms of land title that have resulted from a variety of administrative and legal frameworks. Most prominently, under the Native Title Act 1993 (Cth), Indigenous ownership has been recognised to some degree over 39 per cent of the Australian land mass (as at 2 April 2020, see National Native Title Tribunal 2020).

Globally, there is a recognition of the close relationship between Indigenous languages and Natural World Heritage Sites (WHS) – with nearly 80 percent of WHSs intersecting with at least one Indigenous language (Romaine and Gorenflo 2018). This is suggestive not only of the potential for further involvement of Indigenous peoples in environmental protection, but also speaks to how Australia can set international standards by building on its work in Indigenous land management.

- Indigenous land management delivers services to environmental protection that are disproportionately larger than the funding received

Indigenous environmental services take a number of forms, such as border protection, quarantine, fire management, wildfire abatement, carbon sequestration and trading, weed control, feral animal control, biodiversity conservation, fisheries management, restoration of wetlands, water resource

management and sustainable commercial enterprises such as eco-tourism (Weir, Stacey, and Youngetob 2011, 14).

As a significant amount of Indigenous land management occurs on lands which are owned by Indigenous peoples, the state benefits to the extent that environmental protection is provided without the state having to purchase land. Accordingly, while IPAs remain under Indigenous ownership, many other parts of the National Reserve System have required significant funding to purchase (Smyth 2006, 17). And although benefits accrue to many parties, evidence from IPAs suggest that the government remains the greatest beneficiary, accruing over half of the total value generated (SVA Consulting 2016, 19).

To the extent that the state pays for these environmental services through such initiatives as ranger programs, it is clear that Indigenous programs are disproportionately underfunded. For instance, over the four year period, 2014–15 to 2017–18, \$98.6m was spent on IPAs and ‘Working on Country Supplementation’. This equates to only 10.6 per cent of the total funds available to the National Landcare Program, even though IPAs alone make up 44 per cent of the National Reserve System (Department of Environment and Energy and Department of Agriculture and Water Resources 2017, 9). This continues a historical trend: between 1996 and 2005, Indigenous organisations received less than three per cent of natural resource management funding, despite constituting some 20% of the Australian continental land mass (Hill and Williams 2009, 185, 186).

Indigenous land management achieves significant benefits for not only the environment, but the cultural, health, and economic wellbeing of Indigenous Australians, too.

There is a significant and growing evidence base that demonstrates the broader benefits of Indigenous land management beyond environmental conservation. Part of this stems from the fact that for many Indigenous people and peoples, there is a lack of distinction between socio-cultural and ecological goals (T. C. Tran, Ban, and Bhattacharyya 2020, 5), such that achievements of the latter are inherently linked to the former. Indigenous ‘country’ – the lands and waters to which Indigenous peoples have traditional attachments and relationships – is integral to Indigenous cultures. As a result, environmental health, and cultural wellbeing are inextricable, as captured in the oft used phrase, ‘Healthy Country, Healthy People’ (Salmon et al. 2018, 10; Weir, Stacey, and Youngetob 2011).

When these social, cultural and environmental outcomes are accounted for in addition to economic benefits, significant value is generated. A recent Social Return on Investment (SROI) evaluation of four IPAs found that an investment of \$35.2m ultimately yielded an outcome with an adjusted value of \$96.5m (SVA Consulting 2016, 4, 30).

#### Economic and political benefits

Jarvis et al., (2018) found that Indigenous Land and Sea Management Programs in northern Australia make significant contributions to the regional economy, with multipliers commonly exceeding other industries like agriculture and mining. Moreover, these impacts disproportionately went to Indigenous Australians, thereby helping to close the income gap between Indigenous and non-Indigenous Australians.

In another study, Jarvis et al. (2018) also found that expenditure on Indigenous Land and Sea Management Programs generate positive spillovers for Indigenous businesses (even those not engaged in land management).

Tran, Ban and Bhattacharyya’s (2020, 7) review of 86 site-specific initiatives highlight that Indigenous land management helps to generate political capital for Indigenous groups. For instance, Indigenous land management can elevate Indigenous governance and management, and increase political influence through the formation of partnerships with other organisations (including government).

Altman has argued that Indigenous land management is an important source of economic development for remote Indigenous communities, where there are very few other options for ‘locally desired and meaningful paid activity’ (J. Altman 2012a, 226 emphasis added). In this way,

Indigenous land management undermines the notion that economic ‘development’ can only occur through mainstream commercial investment, or migration away from remote communities (J. Altman 2012b).

#### Culture, health and wellbeing

As noted above, it is important to recognise the inherent relationship of country and culture to individuals’ wellbeing. Aboriginal and Torres Strait Islander conceptions of health are conceived of as holistic, rather than narrowly defined on a set of predominantly physical indicators (Salmon et al. 2018).

In an extensive literature review conducted for the Mayi Kuwayu study, Salmon et al. highlighted numerous studies linking being on country with health and wellbeing. These included stronger cultural and spiritual connection to country; eating healthy, traditional foods; gaining skills on country; gaining a sense of self-worth and autonomy through control and ownership of country; and benefits flowing specifically to those engaged in land and sea management (Salmon et al. 2018, 5–11; see also Bourke et al. 2018b; 2018a).

Reported benefits for those specifically involved in land and sea management include: stronger identity and self-esteem, as well as physical health benefits such as reduced rates of certain illnesses (e.g., diabetes, renal disease), and reduced morbidity and extended life expectancy (Salmon et al. 2018, 11). This is in addition to evidence demonstrating the relationship between ranger work, and high life satisfaction and family wellbeing (Jones et al. 2018), as well as participation in cultural activities, language knowledge and belief that the land is looked after (Schultz et al. 2019).

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**QUESTION 9: Should the EPBC Act position the Commonwealth to take a stronger role in delivering environmental and heritage outcomes in our federated system? Who should articulate outcomes? Who should provide oversight of the outcomes? How do we know if outcomes are being achieved?**

The issue of environmental land management within a federated system has been an ongoing theme in discussions about Australian environmental protection (Hawke 2009; House of Representatives, Standing Committee on the Environment 2014). But this obfuscates significant reform needed to empower local communities, particularly Indigenous communities, who reside in or around environmentally significant areas, and who are most impacted by changes there. Existing scholarship on the effectiveness of Indigenous land management programs emphasise how strong local decision making is a significant basis of successful management (Hill et al., 2013). Local communities should have greater rights to have input, control and co-management of those areas (see question 20).

The Commonwealth government's involvement in the implementation of native title and the National Reserve System, and how this interacts with state based land rights and crown land

management systems has a significant impact on the way in which Indigenous communities and organisations can engage with conservation practices.

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**QUESTION 19: How should the EPBC Act support the engagement of Indigenous Australians in environment and heritage management?  
How can we best engage with Indigenous Australians to best understand their needs and potential contributions?  
What mechanisms should be added to the Act to support the role of Indigenous Australians?**

Effective engagement with Indigenous Australians is underpinned by a recognition of their rights as Indigenous peoples, especially in relation to traditional lands and waters. These rights are enshrined



in international law and are buttressed by recognition in numerous international protocols and guidelines.

The most relevant of Australia's international obligations in this regard comes from the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP 2007) especially,

Article 29: 'Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources'; and

Article 32: 'Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands'; and

'States shall consult and cooperate in good faith with indigenous peoples ... [and] provide effective mechanisms for just and fair redress for any such activities [which affect indigenous lands]...'

Indigenous rights in relation to the environment are also included in the Aichi Targets (Target 18) of the Convention on Biological Diversity ('Aichi Biodiversity Targets' n.d.), the UNESCO policy on Engaging with Indigenous Peoples (UNESCO 2018, esp. 77(k) and 77(n)), protocols from the World Conservation Union (Beltrán 2000, esp, principles 2, 3 and 4), and recommendations from the World Parks Congress (2003) (see Bauman and Smyth 2007, 16).

Moreover, all engagement with Indigenous Australians must be underpinned by the right to free, prior and informed consent. Free, prior and informed consent means that agreement must be obtained free of duress or pressure, and it ensures that Indigenous people are fully cognisant of the details and risks of the proposed involvement (see Principle 6 in GERAIS, AIATSIS 2012, 9–10).

In practical terms, this kind of engagement often requires long-term investment and relationship-building with Indigenous organisations, and the flexibility to be able to adapt to the contexts of Indigenous organisations, which have their own priorities, aspirations and capacities (AIATSIS 2020).

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**QUESTION 20: How should community involvement in decision making under the EPBC Act be improved? For example, should community representation in environmental advisory and decision-making bodies be increased?**

Evidence from both domestic and international contexts indicate that strong community involvement in decision making is integral to success in environmental protection. In an Indigenous land and sea management context, such evidence indicates the need for strengthened Indigenous

control and powers in joint management. Some examples of this include greater rights accorded to Indigenous partners in agreement making, particularly in contexts where Indigenous groups do not legally own the land, or the provision of enforcement powers to rangers on the Indigenous estate. Indigenous land and sea management carried out by Dhimurru Aboriginal Corporation is one example of how strong community decision making and leadership underpins successful environmental management. The Yolngu vision for Dhimurru is fundamental and foregrounds Indigenous values and control:

We the old people hope that Dhuwa and Yirritja land will continue to be looked after through the connection of youthu yindi. ...

We envisage working together with the [Northern Territory] Parks and Wildlife Commission ... But the only people who make decisions about the land are those who own the law, the people who own the creation stories, the people whose lives are governed by Yolngu law and belief (quoted in Marika and Roeger 2012, 121).

Indeed, in our submission to the last EPBC Act Review, AIATSIS also highlighted the importance of Yolngu autonomy and control in the context of the Dhimurru IPA, noting that,

The Dhimurru IPA ... demonstrates that, when given the freedom to choose how to take care of their Country, traditional owners willingly enter into collaborative partnerships that can assist them to manage their traditional estates sustainably (Bauman and Smyth 2007, 125).

In other areas of Indigenous land and sea management, practitioners and researchers consistently highlight that success is contingent on strong Indigenous involvement in decision making. A national survey conducted by Hill and colleagues (2013, 59) found that, 'local control and empowerment of Indigenous people is at the heart of many of the success factors'.

Globally, it has been found that environmental protection aims are strongly supported when local communities are involved and have decision making power. In one meta-analysis of 165 protected areas, Oldekop and colleagues (2015) found that conservation targets were met more often in areas where socioeconomic benefits flowed to the local population, which was in turn more likely to occur in protected areas with co-management. In another meta-analysis, research from 55 separate studies demonstrated that local community participation was the only variable of those selected that significantly related to compliance with protected area policies (Andrade and Rhodes 2012). Although the global context – often focused on development and compliance – differs from the Indigenous Australian context, this research is nonetheless indicative of the centrality of community decision making for successful environmental protection.

It is fundamental, therefore, that the EPBC Act empowers traditional owner groups to have stronger control over their land and waters, and develop partnerships that enable them to realise their own aspirations for country.

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**QUESTION 22: What innovative approaches could the review consider that could efficiently and effectively deliver the intended outcomes of the EPBC Act? What safeguards would be needed?**

Within the context of established structures, Indigenous communities, their supportive and representative organisations and partners have also been working creatively to fill existing gaps and barriers in land management. For example, the Indigenous Dessert Alliance (IDA) and newly proposed Indigenous Sea Country Alliance under the Reef 2050 plan reflects the importance of landscape wide cooperation. Through enabling the sharing of best practice, issues such as weeds, feral animals and threatened species can be addressed on a meaningful scale, regardless of state boundaries. These innovations, while not specifically requiring a legislative mandate can be supported through the EPBC Act in creating an enabling environment for their establishment or guarantee funding for their operation.

**ATTACHMENT**

**Additional information was provided as an attachment to this submission. The attachment is provided on the following pages of this document.**



**AIATSIS**

AUSTRALIAN INSTITUTE OF ABORIGINAL  
AND TORRES STRAIT ISLANDER STUDIES

## **AIATSIS Submission: Independent review of the EPBC Act 1999**

Submission via [online form](#)

**22 April 2020**

**By Lisa Strelein, Tran Tran and Tantee Wang**



## Summary and recommendations

- Indigenous held lands are fundamental to the achievement of Australia's Aichi Biodiversity Targets under the International Convention on Biological Diversity. This contribution can be positively magnified by addressing the issue of clear rights and responsibilities under the EPBC Act.
- Indigenous communities are very effective in identifying threatened species planning for large scale fire and water management and have been proactive in establishing and implementing country management plans. This planning process should be foregrounded in the review of the EPBC Act's aims.
- Indigenous engagement on country can create key opportunities to protect Australia's biodiversity and species threatened by international trade (especially for species listed under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)). These contributions should be recognised through a review of the legislation.
- Environmental regulation is too narrowly focused on compliance, and fall short of achieving conservation targets without the capacity to support active land management. The operation of the act should be reviewed to include land management.

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## 1. About you

AIATSIS is Australia's national Institute dedicated to Aboriginal and Torres Strait Islander peoples' knowledge, societies and cultures. We are both the custodian of Australia's national collection of Aboriginal and Torres Strait Islander heritage materials and one of Australia's publicly funded research agencies. AIATSIS has legislative responsibility to provide leadership in Aboriginal and Torres Strait Islander research, providing advice to government on Aboriginal and Torres Strait Islander culture and heritage including native title, land and water management and Indigenous governance. AIATSIS is committed to ensuring Indigenous knowledge, culture and governance are respected, valued and empowered by laws and policies that concern them.

AIATSIS actively undertakes research on issues that impact on the governance and livelihoods of Aboriginal and Torres Strait Islander peoples. The AIATSIS Native Title Research Unit (NTRU) was established 26 years ago following the High Court's Mabo No.2 decision as a partnership with the Commonwealth Indigenous affairs portfolio. During this time AIATSIS has developed significant expertise and partnerships with Indigenous communities and organisations on both the local level and also internationally in its work, for example, with customary land tenure management, the implementation of the Convention on Biological Diversity (CBD) and Indigenous responses to climate change governance and decision making.

AIATSIS research expertise in Indigenous Country and governance combines a multidisciplinary team and extends to land and water management, threatened species protection, Indigenous livelihoods and fisheries and Indigenous responses to climate change with a key focus on Indigenous priorities and aspirations to look after their country.

This submission has been drafted by Lisa Strelein and Tran Tran who have previously been involved in the *Changes to Country, Changes to Culture* NCCARF funded research project into Indigenous governance models for climate change adaptation and land and water management in Bidjandanga and Kowanyama, the role of traditional and sustainable fisheries practices in the South Coast of New South Wales in supporting livelihoods. Tande Wang also provided research assistance and contributed to early drafting. It is on this basis that AIATSIS makes the following submissions to the Inquiry into the 2020 independent review of the EPBC Act.



## 2. About the EPBC Act

1. Some have argued that past changes to the EPBC Act to add new matters of national environmental significance did not go far enough. Others have argued it has extended the regulatory reach of the Commonwealth too far. What do you think?

As Australia faces a changing climate, *the Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) plays a critical role as a central piece of legislation to harmonise the protection and management of the country's natural resources and heritage. The EPBC Act was audited in June 2014 (Audit Report No. 43 2013-14 *Managing Conditions of Approval*) and in 2017 (Audit Report No. 36 2016-17 *Monitoring compliance with Environment Protection and Biodiversity Conservation Act 1999 Conditions of Approval Follow-on audit*). Both audits were focused on the monitoring and compliance costs of the EPBC legislation noting significant costs and recommendations for implementation of the legislation.

In line with environmental conservation in general, regulatory efforts are too narrowly focused on compliance, and administrative responses fall short of achieving the intended aims of the EPBC Act. Indigenous communities have been very effective in identifying threatened species planning for large scale fire and water management and have been proactive in establishing and implementing country management plans. As traditional custodians, Indigenous groups also have responsibility for many key ecosystem zones to support the objectives of the EPBC Act. For example, communities remain active on country – to the extent that illegal poaching has been readily identified. This can create key opportunities to effectively manage imports and exports to protect Australia's biodiversity and species threatened by international trade (especially for species listed under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)). However, many Indigenous communities lack enforcement rights and despite having an active role on country, face obstacles in fulfilling their duties to look after country. Currently, enforcement rights are recognised under the UNDRIP, Article 36 to support the realisation of Indigenous rights and interests – including rights and interests to support the management of traditional country. In our submission, we focus on the key contribution of Indigenous held lands to the achievement of Australia's Aichi Targets and how this contribution can be positively magnified by addressing the issue of clear rights and responsibilities. This is discussed in further detail below.

Indigenous peoples throughout Australia have always and continue to actively manage these lands. The successful and longstanding Indigenous Protected Areas (IPAs) program (established in 1997) is a prime example: IPAs have grown to incorporate 8.67 per cent of the Australian land mass, but they constitute over 44 per cent of the National Reserve System (and nearly 50 per cent when combined with jointly managed areas) (see Department of Agriculture, Water and Environment 2018). Through contributing to the National Reserve System, IPAs also contribute significantly to Australia's commitment under the Aichi Targets. There are currently 76 declared IPAs (National Indigenous Australians Agency 2020) and a further 12 IPA projects that are in the consultation phase (or planning and development phase) which will cover both land and seas which will increase the overall NRS by a further 20 per cent.

2. How could the principle of Ecologically Sustainable Development (ESD) be better reflected in the EPBC Act? For example, could the consideration of environmental, social and economic factors, which are core components of ESD, be achieved through greater inclusion of cost benefit analysis in decision making?

Non-Indigenous conceptions of environmental management are often confined to narrow legislative or policy approaches that do not integrate the multilayered nature of ecological interaction – evidenced by the failure of the EPBC Act to counteract Australia's continuing decline in biodiversity – or the ways that environmental imperatives are related to broader Indigenous aspirations. ESD in an Indigenous context must recognise that environmental management is not isolated from other Indigenous aspirations; sustainable development must involve responsiveness to local aspirations, not only government imperatives (see J. Altman 2012a).

The Northern Land Council's (NLC) Caring for Country Unit, for instance, was deliberately conceived as more than an environmental ranger program. Its task was primarily to support land owning groups and local organisations 'to strengthen customary skills and practices', and so enable ongoing care for country (Northern Land Council (2003) Healthy Country Healthy Families Caring for Country Strategy, 2003-2006, cited in Kerins 2012, 30). Moreover, the remit of activities undertaken was wide-ranging – including introducing community-based planning, introducing new knowledge and information systems, as well as being a broker between land owning groups and government agencies – which is indicative of the broader benefits of ILM to Indigenous groups (see Question 6). Any decision making arrangements need to incorporate broader approaches to conservation in order to ensure that there are effective foundations to meet environmental targets. The Northern Land Council example demonstrates that a sector wide response can create multiple social benefits.

### 3. Should the objects of the EPBC Act be more specific?

As discussed above, the objectives of the EPBC Act lack appropriate integration. Many of the objectives are interrelated and should be combined or refer to each other as well as address multisector issues such as climate change and land and water management. While the legislation does not necessarily need to cover all these areas, there should be scope for harmonisation and expressions of shared principles as formally expressed in the 1997 Heads of Agreement on Commonwealth and State Roles and Responsibilities for the Environment.

Clear legislative objects are critical to the common law interpretation of ambiguous areas of law or application (ALRC 2016). With respect to the objectives of the Act and its identified mechanisms for achieving them, there has been considerable investment in a partnership approach. Yet, these objectives were developed over 20 years ago without the recognition of the urgency and current context of environmental management in Australia – particularly the increased recognition of Indigenous land holdings and the unrealised potential of Aboriginal and Torres Strait Islander peoples in managing critical landscapes and diverse ecosystems. The objectives of the EPBC Act need to be clearer and more directed – not necessarily to increase in number – in order to focus on implementation, policy formation and investment. The current objectives, while addressing issues of concern, are confused without centralising the importance of environmental protections as a means of buffering Australia from many of the current challenges of climate change adaptation and management.

### 4. Should the matters of national environmental significance within the EPBC Act be changed? How?

Current processes for determining matters of national environmental significance are based on legislative categories that do not operate in reality or otherwise compartmentalise environmental management practices (T. Tran et al. 2013). The Indigenous estate is managed based on recognised ecosystems of significance that integrates land and water management, fire management, threatened species protection as well as economic and social opportunities (T. Tran, Langford, and Services 2015). The forced listing of matters of national environmental significance, while creating additional protection mechanisms should be automated in Indigenous protected area planning rather than ‘applied for’ at a later time. For example, the UNESCO world heritage listing of the Budj Bim National Heritage Landscape flows from very similar principles that have been adopted under the EPBC Act. The requirement for ‘double listing’ creates unnecessary duplication.

5. Which elements of the EPBC Act should be priorities for reform? For example, should future reforms focus on assessment and approval processes or on biodiversity conservation? Should the Act have proactive mechanisms to enable landholders to protect matters of national environmental significance and biodiversity, removing the need for regulation in the right circumstances?

Indigenous values and knowledges play a critical role in the management of Australia's land and waters and the unique ecosystems that continue to support the productivity of the landscape. Indigenous knowledges are not only linked to specific and detailed knowledge of specific plant and animal species but also seasonal variations and necessary land management actions that contribute to the productivity of the landscape.

The focus of the EPBC act should be on proactive conservation measures as opposed to legal avenues following environmental destruction or degradation that is penalty based. See question 6 below for more discussion on how this can be achieved via the Indigenous estate.

6. What high level concerns should the review focus on? For example, should there be greater focus on better guidance on the EPBC Act, including clear environmental standards? How effective has the EPBC Act been in achieving its statutory objectives to protect the environment and promote ecologically sustainable development and biodiversity conservation? What have been the economic costs associated with the operation and administration of the EPBC Act?

Indigenous land management is an area that is fundamental to reforms to the EPBC Act and to the future success of environmental and heritage management in Australia. AIATSIS has previously outlined in detail the alignment between the recognition of Indigenous rights and interests, and opportunities that can be accessed through both native title and statutory titles under, for example, the *Aboriginal Land Rights (North Territory) Act 1976* (Strelein et al. 2019).

Here, we emphasise the following facts about Indigenous Land Management and note the extensive evidence base that underpins them.

- **The Indigenous estate covers a significant area of Australia's landmass, including many areas of ecological significance**

The 'Indigenous estate' refers to the 'aggregate area of Australia's land mass which is held by, or on behalf of, Aboriginal peoples and/or Torres Strait Islanders under a corporate or group title or trust' (J. C. Altman, Buchanan, G.J., and Larsen 2007, 9). Large areas of the Indigenous estate are 'of high conservation value' because they not only cover many rich ecosystems across the continent, but many are relatively intact, which has also allowed for the persistence of species that have declined elsewhere (J. C. Altman, Buchanan, G.J., and Larsen 2007, 24).

The Indigenous estate today is composed of a number of forms of land title that have resulted from a variety of administrative and legal frameworks. Most prominently, under the *Native Title Act 1993* (Cth), Indigenous ownership has been recognised to some degree over 39 per cent of the Australian land mass (as at 2 April 2020, see National Native Title Tribunal 2020).

Globally, there is a recognition of the close relationship between Indigenous languages and Natural World Heritage Sites (WHS) – with nearly 80 percent of WHSs intersecting with at least one Indigenous language (Romaine and Gorenflo 2018). This is suggestive not only of the potential for further involvement of Indigenous peoples in environmental protection, but also speaks to how Australia can set international standards by building on its work in Indigenous land management.

- **Indigenous land management delivers services to environmental protection that are disproportionately larger than the funding received**

Indigenous environmental services take a number of forms, such as border protection, quarantine, fire management, wildfire abatement, carbon sequestration and trading, weed control, feral animal control, biodiversity conservation, fisheries management, restoration of wetlands, water resource management and sustainable commercial enterprises such as eco-tourism (Weir, Stacey, and Youngetob 2011, 14).

As a significant amount of Indigenous land management occurs on lands which are owned by Indigenous peoples, the state benefits to the extent that environmental protection is provided without the state having to purchase land. Accordingly, while IPAs remain under Indigenous ownership, many other parts of the National Reserve System have required significant funding to purchase (Smyth 2006, 17). And although benefits accrue to many parties, evidence from IPAs suggest that the government remains the greatest beneficiary, accruing over half of the total value generated (SVA Consulting 2016, 19).

To the extent that the state pays for these environmental services through such initiatives as ranger programs, it is clear that Indigenous programs are disproportionately underfunded. For instance, over the four year period, 2014–15 to

2017–18, \$98.6m was spent on IPAs and ‘Working on Country Supplementation’. This equates to only 10.6 per cent of the total funds available to the National Landcare Program, even though IPAs alone make up 44 per cent of the National Reserve System (Department of Environment and Energy and Department of Agriculture and Water Resources 2017, 9). This continues a historical trend: between 1996 and 2005, Indigenous organisations received less than three per cent of natural resource management funding, despite constituting some 20% of the Australian continental land mass (Hill and Williams 2009, 185, 186).

- **Indigenous land management achieves significant benefits for not only the environment, but the cultural, health, and economic wellbeing of Indigenous Australians, too**

There is a significant and growing evidence base that demonstrates the broader benefits of Indigenous land management beyond environmental conservation. Part of this stems from the fact that for many Indigenous people and peoples, there is a lack of distinction between socio-cultural and ecological goals (T. C. Tran, Ban, and Bhattacharyya 2020, 5), such that achievements of the latter are inherently linked to the former. Indigenous ‘country’ – the lands and waters to which Indigenous peoples have traditional attachments and relationships – is integral to Indigenous cultures. As a result, environmental health, and cultural wellbeing are inextricable, as captured in the oft used phrase, ‘Healthy Country, Healthy People’ (Salmon et al. 2018, 10; Weir, Stacey, and Youngetob 2011).

When these social, cultural and environmental outcomes are accounted for in addition to economic benefits, significant value is generated. A recent Social Return on Investment (SROI) evaluation of four IPAs found that an investment of \$35.2m ultimately yielded an outcome with an adjusted value of \$96.5m (SVA Consulting 2016, 4, 30).

#### *Economic and political benefits*

- Jarvis et al., (2018) found that Indigenous Land and Sea Management Programs in northern Australia make significant contributions to the regional economy, with multipliers commonly exceeding other industries like agriculture and mining. Moreover, these impacts disproportionately went to Indigenous Australians, thereby helping to close the income gap between Indigenous and non-Indigenous Australians.
- In another study, Jarvis et al. (2018) also found that expenditure on Indigenous Land and Sea Management Programs generate positive spillovers for Indigenous businesses (even those not engaged in land management).
- Tran, Ban and Bhattacharyya’s (2020, 7) review of 86 site-specific initiatives highlight that Indigenous land management helps to generate political capital for Indigenous groups. For instance, Indigenous land management can

elevate Indigenous governance and management, and increase political influence through the formation of partnerships with other organisations (including government).

- Altman has argued that Indigenous land management is an important source of economic development for remote Indigenous communities, where there are very few other options for 'locally desired and meaningful paid activity' (J. Altman 2012a, 226 emphasis added). In this way, Indigenous land management undermines the notion that economic 'development' can only occur through mainstream commercial investment, or migration away from remote communities (J. Altman 2012b).

### *Culture, health and wellbeing*

- As noted above, it is important to recognise the inherent relationship of country and culture to individuals' wellbeing. Aboriginal and Torres Strait Islander conceptions of health are conceived of as holistic, rather than narrowly defined on a set of predominantly physical indicators (Salmon et al. 2018).
- In an extensive literature review conducted for the Mayi Kuwayu study, Salmon et al. highlighted numerous studies linking being on country with health and wellbeing. These included stronger cultural and spiritual connection to country; eating healthy, traditional foods; gaining skills on country; gaining a sense of self-worth and autonomy through control and ownership of country; and benefits flowing specifically to those engaged in land and sea management (Salmon et al. 2018, 5–11; see also Bourke et al. 2018b; 2018a).
- Reported benefits for those specifically involved in land and sea management include: stronger identity and self-esteem, as well as physical health benefits such as reduced rates of certain illnesses (e.g., diabetes, renal disease), and reduced morbidity and extended life expectancy (Salmon et al. 2018, 11). This is in addition to evidence demonstrating the relationship between ranger work, and high life satisfaction and family wellbeing (Jones et al. 2018), as well as participation in cultural activities, language knowledge and belief that the land is looked after (Schultz et al. 2019).

## 4.B. Better environment and heritage outcomes

9. Should the EPBC Act position the Commonwealth to take a stronger role in delivering environmental and heritage outcomes in our federated system? Who should articulate outcomes? Who should provide oversight of the outcomes? How do we know if outcomes are being achieved? Should the EPBC Act position the Commonwealth to take a stronger role in delivering environmental and heritage outcomes in our federated system? Who should articulate outcomes? Who should provide oversight of the outcomes? How do we know if outcomes are being achieved?

The issue of environmental land management within a federated system has been an ongoing theme in discussions about Australian environmental protection (Hawke 2009; House of Representatives, Standing Committee on the Environment 2014). But this obfuscates significant reform needed to empower local communities, particularly Indigenous communities, who reside in or around environmentally significant areas, and who are most impacted by changes there. Existing scholarship on the effectiveness of Indigenous land management programs emphasise how strong local decision making is a significant basis of successful management (Hill et al., 2013). Local communities should have greater rights to have input, control and co-management of those areas (see question 20).

The Commonwealth government's involvement in the implementation of native title and the National Reserve System, and how this interacts with state based land rights and crown land management systems has a significant impact on the way in which Indigenous communities and organisations can engage with conservation practices.



## 4.D. Indigenous Australians' knowledge and experience

19. How should the EPBC Act support the engagement of Indigenous Australians in environment and heritage management?

Effective engagement with Indigenous Australians is underpinned by a recognition of their rights as Indigenous peoples, especially in relation to traditional lands and waters. These rights are enshrined in international law and are buttressed by recognition in numerous international protocols and guidelines.

The most relevant of Australia's international obligations in this regard comes from the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP 2007) especially,

Article 29: 'Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources'; and

Article 32: 'Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands'; and 'States shall consult and cooperate in good faith with indigenous peoples ... [and] provide effective mechanisms for just and fair redress for any such activities [which affect indigenous lands]...'.<sup>1</sup>

Indigenous rights in relation to the environment are also included in the Aichi Targets (Target 18) of the Convention on Biological Diversity ('Aichi Biodiversity Targets' n.d.), the UNESCO policy on Engaging with Indigenous Peoples (UNESCO 2018, esp. 77(k) and 77(n)), protocols from the World Conservation Union (Beltrán 2000, esp, principles 2, 3 and 4), and recommendations from the World Parks Congress (2003) (see Bauman and Smyth 2007, 16).

Moreover, all engagement with Indigenous Australians must be underpinned by the right to free, prior and informed consent. Free, prior and informed consent means that agreement must be obtained free of duress or pressure, and it ensures that Indigenous people are fully cognisant of the details and risks of the proposed involvement (see Principle 6 in GERAIS, AIATSIS 2012, 9–10)

In practical terms, this kind of engagement often requires long-term investment and relationship-building with Indigenous organisations, and the flexibility to be able to

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<sup>1</sup> United Nations General Assembly: Declaration on the Rights of Indigenous People. 2007 A/RES/61/295 (UNDRIP). See also, United Nations General Assembly International Convention on the Elimination of All Forms of Racial Discrimination 1966 Treaty Series 660, 195 (CERD); United Nations General Assembly, International Covenant on Economic, Social and Cultural Rights, 1966, United Nations, Treaty Series 993.

adapt to the contexts of Indigenous organisations, which have their own priorities, aspirations and capacities (AIATSIS 2020).

#### **4.E. Community inclusion, trust and transparency**

20. How should community involvement in decision-making under the EPBC Act be improved? For example, should community representation in environmental advisory and decision making bodies be increased?

Evidence from both domestic and international contexts indicate that strong community involvement in decision making is integral to success in environmental protection. In an Indigenous land and sea management context, such evidence indicates the need for strengthened Indigenous control and powers in joint management. Some examples of this include greater rights accorded to Indigenous partners in agreement making, particularly in contexts where Indigenous groups do not legally own the land, or the provision of enforcement powers to rangers on the Indigenous estate.

Indigenous land and sea management carried out by Dhimurru Aboriginal Corporation is one example of how strong community decision making and leadership underpins successful environmental management. The Yolngu vision for Dhimurru is fundamental and foregrounds Indigenous values and control:

We the old people hope that Dhuwa and Yirritja land will continue to be looked after through the connection of youthu yindi. ...

We envisage working together with the [Northern Territory] Parks and Wildlife Commission ... But the only people who make decisions about the land are those who own the law, the people who own the creation stories, the people whose lives are governed by Yolngu law and belief (quoted in Marika and Roeger 2012, 121).

Indeed, in our submission to the last EPBC Act Review, AIATSIS highlighted the importance of Yolngu autonomy and control in the context of the Dhimurru IPA, noting that,

The Dhimurru IPA ... demonstrates that, when given the freedom to choose how to take care of their Country, traditional owners willingly enter into collaborative partnerships that can assist them to manage their traditional estates sustainably (Bauman and Smyth 2007, 125).

In other areas of Indigenous land and sea management, practitioners and researchers consistently highlight that success is contingent on strong Indigenous involvement in decision making. A national survey conducted by Hill and colleagues (2013, 59) found that, 'local control and empowerment of Indigenous people is at the heart of many of the success factors'.

Globally, it has been found that environmental protection aims are strongly supported when local communities are involved and have decision making power. In one meta-analysis of 165 protected areas, Oldekop and colleagues (2015) found that conservation targets were met more often in areas where socioeconomic benefits flowed to the local population, which was in turn more likely to occur in protected areas with co-management. In another meta-analysis, research from 55 separate studies demonstrated that local community participation was the only variable of those selected that significantly related to compliance with protected area policies (Andrade and Rhodes 2012). Although the global context – often focused on development and compliance – differs from the Indigenous Australian context, this research is nonetheless indicative of the centrality of community decision making for successful environmental protection.

It is fundamental, therefore, that the EPBC Act empowers traditional owner groups to have stronger control over their land and waters, and develop partnerships that enable them to realise their own aspirations for country.

#### **4.F. Innovative approaches**

22. What innovative approaches could the review consider that could efficiently and effectively deliver the intended outcomes of the EPBC Act? What safeguards would be needed?

Within the context of established structures, Indigenous communities, their supportive and representative organisations and partners have also been working creatively to fill existing gaps and barriers in land management. For example, the Indigenous Desert Alliance (IDA) and newly proposed Indigenous Sea Country Alliance under the Reef 2050 plan reflects the importance of landscape wide cooperation. Through enabling the sharing of best practice, issues such as weeds, feral animals and threatened species can be addressed on a meaningful scale, regardless of state boundaries. These innovations, while not specifically requiring a legislative mandate can be supported through the EPBC Act in creating an enabling environment for their establishment or guarantee funding for their operation.

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