SUBMISSION TO THE EPBC ACT REVIEW

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Name

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Organisation

North Australia Indigenous Land and Sea Management Alliance

Areas of interest

Threatened species; Indigenous Australians; Decision making; Biodiversity; Water

Attachment provided?

Yes

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Yes - with my name and/or organisation

SUBMISSION RESPONSES

This submission was provided as an attachment only. The attachment is provided on the following pages of this document.

Independent Review of the EPBC Act

A submission from the North Australian Indigenous Land and Sea Management Alliance P/L

14 February 2020

Summary

The EPBCA and connected commonwealth programs driving achievement of national environmental goals have played critical roles in engaging with Aboriginal landowners and managers to generate meaningful employment in remote areas of northern Australia, where other opportunities are few. People have been assisted to return to their traditional country, undertake planning to restore natural and cultural values by controlling pervasive pressures that would otherwise run unchecked on "orphan" lands.

In stark contrast to the systematic approaches to Aboriginal engagement with national conservation agendas, there has been no equivalent effort to inform and work with Aboriginal people on development opportunities and risks. Instead they are often expected to respond quickly to external proposals for developments on their land about which they have no prior knowledge. This *ad hoc* approach to development means that it is difficult to achieve genuinely informed consent to individual proposals, for Aboriginal people to influence selection of alternatives, ensure that issues of particular importance to them are addressed in development design, or optimise socioeconomic and other benefits.

In this submission, we shape our responses to the discussion paper's consultation questions to illustrate how changes to the Act could (1) enhance important successes in conservation and natural resource management in tandem with socioeconomic development through deeper and wider engagement with Aboriginal people and (2) how major barriers to full Aboriginal participation in the environmental assessment process can be overcome.

In brief, we argue that present conservation foci enabled by the Act are biased by dependence on the subset of international agreements to which Australia is signatory. Settings have not been designed explicitly to address key issues and facilitate approaches that are best matched to Australia's unique needs and opportunities, but rather to interpret options in terms of their fit to somewhat idiosyncratic lists of MNES. Top down, highly prescribed approaches also have the effect of directing effort to idiosyncratic treatment of symptoms instead of causes in underlying and often very broad scale weaknesses in land and habitat management practice. Moreover, such a rigid framework cannot respond easily to recognise local, regional and national values and priorities that differ from external foci. The absence of overt recognition of Indigenous values in conservation priorities is of particular concern and significance for north Australia's Indigenous people, who own a large proportion of the land area and coasts.

Where present foci do align with Indigenous values and interests, such as facilitating restoration of active management of traditional lands through Indigenous Protected Areas, performance has been good and produced strong returns on investment. Nonetheless, there is great scope to enhance performance, especially through better recognition of Indigenous values and associated approaches

to land and natural resource management, designed to deal consistently with pervasive pressures over larger areas.

A critical contribution to this opportunity will be to revise the objects of the Act to require work to determine and act on local and regional views and information about priorities and opportunities, especially Indigenous views. And recognition of Indigenous views and priorities must go beyond roles as conservation practitioners, useful as that recognition has been. Changes in objects should also be backed by specific provisions in the body of revised law about commonwealth obligations to engage the community in determining priorities.

Dealing seriously with Indigenous values will also help address severe barriers to genuine participation of Indigenous landowners and managers in environmental assessments. But again it will be necessary to do more than make rhetorical commitments in objects. The Act should provide explictly for development proponents to show how they determined and responded to Indigenous values to minimise impacts and to involve relevant people in design and subsequent work to mitigate or offset effects on those values. This is rarely achieved given present emphases on formal statements of MNES.

We propose that suitable objects will:

- provide for protection of the Australian environment, especially those attributes and functions that require or will particularly benefit from nationally consistent, coordinated and collaborative management;
- require that statements of national goals and priorities are based on improved understanding of the values and expectations of the Australian community, especially Indigenous people who accept strong cultural obligations to care for country;
- go beyond hackneyed restatements of principles for ESD to require actions that explicitly link development to environmental improvement;
- recognise that Indigenous peoples' ties and obligations to traditional lands are not substitutable and treat all environmental risks potentially affecting them accordingly;
- support indigenous people to participate fully in management of lands, seas and natural resources to protect the environment in developed and undeveloped lands;
- promote application of Indigenous peoples' knowledge of Australian environments and environmental management practice, by the owners of the knowledge; and
- emphasise application of incentives to support state and territory governments, landowners and the wider community to adopt practices that advance national conservation goals.

Enabling provisions in the Act proper should:

- outline proponent obligations to address Aboriginal values and the rights and interests of Aboriginal communities in relation to areas that may be impacted by development;
- support Indigenous people to understand the land use and development options likely to be available to them and their potential impacts on important values;
- require proponents to ascertain and respond to Indigenous values and concerns, document how they determined important values and appropriate responses, and provide related information and analysis to Indigenous interests in forms accessible to them;
- ensure that approaches to delivering national goals and targets also address international obligations under relevant conventions (including UNDRIP) endorsed by Australia but, most importantly, are not limited by them;

- seek and apply community knowledge and understanding (including scientific and traditional knowledge and understanding) of the natural and cultural values of areas that may be affected by proposed actions;
- strengthen the role of offsets in delivering net environmental improvement;
- require that all agreements involving accreditation of state or territory governments or other forms of delegation require regular review and demonstration of close adherence to the objects and detail of the commonwealth act; and
- outline types of incentives and processes for accessing them that the commonwealth will foster to meet national goals, including intergovernmental agreements, markets in environmental services, support for bioregional planning and strategic environmental assessment and access to public support for all related activities.

Additional propositions appears under responses to the suite of questions put in the discussion paper.

Introduction

The EPBCA is complex law that intersects particularly strongly with the futures of Indigenous landowners and their communities. It is not possible to do justice to all relevant issues in a short submission. This paper, based around responses to the Review's questions, therefore focuses mostly on issues of principle and fundamentals of desirable practice. Where essential we also identify connections to other areas of government policy that require complementary attention and resetting. We would be dismayed if the Review treats Indigenous concerns in the EPBCA as solely about managing interactions with or obligations to biodiversity conservation. The content of the Act and the way it interfaces with other policy has critical implications for economic development on Indigenous lands and their peoples' socio-economic and cultural futures.

References and attachments cover much of the argument supporting the propositions put here, but additional material can be made available, on request, on matters of particular interest to the Review. References to lands include associated fresh and marine waters.

Responses to Discussion Paper questions

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?***

Options available to the Commonwealth to deal with environmental issues are constrained by the Constitution's narrow specification of the federal role relative to the states. But many environmental issues benefit from coordinated action across state and territory boundaries or are of clearly national significance, irrespective of scale or location or whether or not they appear in the set of international treaties to which Australia is signatory. The Commonwealth must have capacity to offer leadership and also react effectively to particularly complex or otherwise intractable problems that challenge technical, financial or political capacity of individual states or territories.

The idiosyncratic foci generated by reliance on powers accessed through international conventions raise questions about the appropriateness of the present mix. They are not wide (comprehensive) enough to address all important issues but, within the operational scope enabled by the EPBCA, they are deep enough to cover involvement in matters arguably of chiefly regional or local interest that depend mostly on locally-shaped responses for resolution. Patchy coverage of issues and attributes, conceptually disparate framing, and weak or absent matching to intersecting areas of policy produce a far from optimal mix.

We therefore view specific inclusions or gaps in MNES as a second-order issue: the primary problem is an absence of a well-communicated understanding of conditions under which federal intervention is necessary and effective; and the mechanisms necessary to make it work rather than add to contention, confusion and costs.

We argue that present settings encourage over-prescription, mostly by way of often extraordinarily detailed lists under each MNES offered as a weak substitute for provisions setting out the why and how of a federal role. They too often direct Commonwealth attention to routine local matters, rather than confining involvement to cases where assets, environmental processes and resource uses of

genuinely national significance are damaged or under real threat or the public interest, including rights and interests of Indigenous people, is unreasonably compromised. Federal involvement in the routine arguably weakens capacity to articulate, present convincingly, and carry through more important interventions really demanded by the national interest.

Improved function might be achieved by better articulation of criteria for federal intervention and description of federal roles (see Q3 below) in preference to long, sometimes arbitrary, endlessly-debatable and forever mutable lists.

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 benefits analysis in decision making?***

ESD's present articulation is little more than a weak formalisation of the self-evident: that every significant development decision has social, economic and environmental implications. Formal cost-benefit analysis (CBA) is a quantitative tool for attempting to compare elements of the full spectrum of benefits and costs across these and other dimensions and identify winners and losers. But it remains just as dependent as any other decision-support system on competing views about scales of assessment and reasonable trade-offs among national, regional, local and individual interests; as well as broader issues around the public versus private interest.

Experience in the application of CBA to environmental decision-making in the US illustrates some of the limitations. Industry lobbied hard for all regulation to require CBA. But as evidence of the real economic costs of poor environmental decisions accumulated and was applied to decision-making, industry enthusiasm for comprehensive CBA waned, because results often supported the case for greater intervention in private activity in the wider public interest. Industry responses have included arguments to exclude co-benefits like public health improvements or, following longstanding practice in climate change denial, to simply reject evidence-based approaches. So a putative problem-solving tool has itself become a source of contention. And in the process driven discussion into the hands of specialists, at the expense of participation by those whose interests are less amenable to quantification. No technical silver bullet can substitute for clarity of intent about outcomes combined with unambiguous articulation of core principles shaped to realise intent.

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

Our responses under a number of consultation questions illustrate why we consider much better framing of the EPBCA's objects to be so important. Clear statements of Parliament's intent provides essential guidance to all who interpret, apply, observe or enforce the law, particularly when unanticipated gaps or ambiguities are encountered, as is inevitable in a complex area of law affecting so many activities and values. The alternative is a huge array of complex prescription that - regardless of bulk - always remains incomplete.

Clarity does not require that objects must be more specific in the sense of detailed catalogues of the

particular environmental attributes with which federal authorities will engage. Arguably the existing law has already gone too far down this line. Instead, we urge serious efforts to reframe EPBCA objects to (in addition to other essential matters):

1. more clearly determine the fundamental federal role, emphasising leadership and the maintenance of standards; and
2. in exercising that role, to commit to protection and good management of the full array of values of concern to all elements of Australian society, including Indigenous people; and
3. develop and promote national guidelines for environmental monitoring and reporting, emphasising transparency; and
4. set out other principles that bound the need for federal engagement and help identify effective mechanisms for enabling an appropriate federal role.

We expand on ways of framing these clearer objects in other parts of this submission, including a partial set of objects that encompasses our understanding of Indigenous interests.

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

Reference to ESD in the EPBCA surely recognises that matters of importance in conservation and environmental assessment are hard to pull apart and treat separately. Attempts to be highly prescriptive about what phenomena are important or the jurisdictional scales at which importance waxes or wanes are profoundly un-ecological. Crude characterisations deny the linkages among assets and processes that determine the collective health of all natural and modified landscapes. Treating some matters as important and implying that others are unimportant because they do or don't appear in one or another international treaty is also wrong-headed in a policy sense, implying that Australians and their local, regional and national authorities are incapable of identifying and agreeing the attributes and processes that require management and then providing support. Such an approach all but guarantees contention.

Obviously, we would argue that matters of significance to Indigenous people would feature strongly and explicitly in any meaningful set of MNES, not only because they are required in international law, but because proper recognition of and response to Indigenous interests is essential in many other areas of national social policy. But we are not convinced that more complex arrays treating Indigenous interests as quirky variants of already idiosyncratic lists is the best way of recognising and fostering better recognition and response. We believe that those with whom we work would regard attempts to rank the significance of attributes - and then to consider their needs and manage them more or less independently - as inefficient and ultimately ineffective. As well as irrelevant and insulting if attributes that local people are obliged by customary law to protect are dismissed as too trivial to warrant recognition.

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?

No state or territory jurisdiction has seriously focused environmental assessments of developments affecting Indigenous lands on the set of values important to them, or to work through alternatives. This failure is particularly striking in northern Australia where much of the land area is held under title by Indigenous people or other formal legal interests have been recognised. Instead of seriously addressing this issue, some governments and industries have sought to weaken Indigenous rights to influence decisions.

It is clearly absurd to expect local people to reach, in a few weeks or months, informed collective decisions about major developments that may affect every aspect of their relationships with their lands and determine their collective economic and cultural futures, when they have had little or no prior exposure to the issues involved. Genuinely informed decisions will involve consideration of multiple complex technical issues in physical and environmental science, economics and finance, business development, social development, cultural aspirations and obligations; and more. There is no way in which such issues can be effectively translated, communicated and debated and their interactions even broadly understood in the timeframes sought by developers and required in present law.

The EPBCA should address asymmetry in availability of high quality, unbiased and relevant information at two broad levels: (1) Indigenous access to the technical information and analysis needed for good decision-making and (2) information that regulators and developers need about Indigenous values, cultural obligations, knowledge and land management practice.

Indigenous access to information

North Australian Indigenous leaders have developed "Business on Country" frameworks for fostering Indigenous-led land development, built around commitments from governments to work systematically through land use options and the governance arrangements necessary to support them, preferably in advance of, but where unavoidable, in tandem with specific development proposals.

Meeting Indigenous interests demands more than retreat to procedural "fairness" - the same process applied to all - instead demanding commitment to substantive fairness, in which process is designed explicitly to drive equitable outcomes and ensure their compatibility with other pressing policy objectives.

Regulator and industry consideration of Indigenous values and obligations

The EPBCA offers narrow rhetorical commitment " to recognise the role of indigenous people in the conservation and ecologically sustainable use of Australia’s biodiversity; and to promote the use of indigenous peoples’ knowledge of biodiversity with the involvement of, and in co-operation with, the owners of the knowledge" (s3(1)f and g). We accept that the intent was to require recognition of a relevant sliver of Indigenous views and values, but the attempt has been only partially successful.

We are aware of no case in which Indigenous knowledge has been strongly influenced the outcomes of an environmental assessment. During the Act's two decades of operation, in federally-administered national parks located entirely within Indigenous-owned lands, genuine Indigenous involvement in such fundamental operations as fire management has been spurned in

favour of weak re-interpretations of Indigenous practice, applied ineptly by non-Indigenous staff. A more productive approach will require proper consideration of Indigenous values that goes beyond dressing up orthodox conservation dogma, designed by and for over-developed nations, with a few half-hearted tweaks to acknowledge other views. Present approaches are inequitable and demonstrably failing.

Perhaps most importantly, the EPBCA is about sustainable development, so it makes little sense to in the Act's objects to circumscribe the Indigenous role in a nation where they are major landholders under title acknowledging enduring connections to, economic dependence on, and cultural obligations to specific areas of land. The present objects in regard to Indigenous people are inadequate, anachronistic and observed mostly in the breach. New objects must be backed up in other provisions to prevent future slippage into lip-service.

Change must recognise Indigenous people as more than conservation practitioners, important as that recognition is. They are potential developers, investors and partners in economic use of lands in ways that are sustainable from the perspectives of traditional custodians. The Act should contribute - within scope - to a national commitment to empower landowners to make good commercial decisions about land uses manageable in accordance with cultural obligations.

New environmental law can make an immediate contribution by requiring development proponents to show, in their environmental impact analyses, how they took account of Indigenous values and how their proposals drive management in accordance with those values. To do either of those things well will require genuine dialogue with Indigenous landowners and managers, including an appreciation of the role of Indigenous knowledge. Governments can play critical leadership roles by making available the expertise of their resource management specialists to work with Indigenous landowners, under a Business on Country program or its equivalent, so that both Indigenous landholders and development proponents can engage in productive dialogue about the available options.

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?***

Issues of greatest concern to Indigenous people in areas covered directly or indirectly by the EPBCA are:

1. absence of obligations to ascertain and give priority to maintenance of environmental values of particular importance to Indigenous people;
2. weak (if entangled in MNES) or absent obligations in environmental assessment to demonstrate understanding of and specific steps to manage impacts on natural, social and cultural values of particular importance to Indigenous people;
3. asymmetries in information availability that disadvantage Indigenous landholders requiring informed decisions on land use and related developments;

4. relegation of Indigenous roles to conservation practice rather than key decision-makers, investors and partners in sustainable development;
5. failures to give proper effect to objects relating to Indigenous interests due to inadequate supporting provisions in the Act proper;
6. weak requirements for social impact assessment that take too little account of cultural impacts and obligations to generate local benefits to compensate for often severe dislocation of relationships with country.

These issues must be addressed in all aspects of the review.

Given the dominant role of the states and territories in land and resource management, federal leadership is required to achieve national goals that cannot reasonably be subordinated to local or regional imperatives, including the particular rights of Indigenous people. Potent operational expressions of leadership may include setting national targets and standards, attached to incentives for the states and territories to adopt and achieve them. Where warranted, specialised federal agencies like the Office of the Supervising Scientist can play critical independent roles in framing and promoting those standards and in monitoring and reporting performance.

The Act has been important in countering a race to the environmental bottom driven by states and territories competing to attract investors. But it has not prevented major developments that have been destructive of social cohesion, Indigenous culture and critical connections with land. Framing and promoting robust standards backed by incentives to apply them will be necessary to cover this area as well as more direct biophysical impacts.

Given its primary foci, the Act has little to say directly about how to promote genuinely sustainable development, as distinct from avoiding the worst impacts. Genuinely sustainable development and ameliorating an idiosyncratic sub-set of impacts are poles apart, especially where landowners seek to maintain intimate connections with particular areas of land on which they depend for both cultural integrity and economic futures. A particularly egregious expression of this gap is the pigeon-holing of Indigenous interests as conservation practice, rather than important landowners with distinct views about desirable development directions and acceptable practice. Narrowness of perspective is a recurring problem, which in addition to being dealt with directly within a revised Act, will benefit from overt linkages to other law and policy.

We have no direct knowledge of the costs of administering the Act for government or private interests required to respond to it. We are aware that Land Council and native title body resources are stressed by obligations to conduct a parallel environmental assessment process to consider properly Indigenous values and concerns. However, we consider it likely that total expenditures are more than offset by avoidance of direct costs that would otherwise need to be met by government in the future (like the huge outstanding costs of rehabilitating many poorly-designed and managed mines) or by ongoing community losses of opportunity and amenity.

7. ***What additional future trends or supporting evidence should be drawn on to inform the review?***

The review should take full account of (1) the existing and emerging role of Indigenous people and their lands in meeting Australia's national conservation goals and the potential for expansion of that

role (2) the socio-economic and environmental benefits of sustainable development of Indigenous lands, especially in northern Australia (3) greater use of high quality, verified environmental offsets and (4) recent proposals from the Northern Territory government to apply Indigenous knowledge to environmental assessment. These matters are also dealt with in responses to other questions.

8. ***Should the EPBC Act regulate environmental and heritage outcomes instead of managing prescriptive processes?***

We have argued that the present structure of the Act leads to excessive prescription that can never be complete at the national scale, because the number of phenomena and impacts on them is too large, despite gaps in matters covered in MNES. Greater emphasis should be placed on clearer articulation of broad national goals and standards for performance, coupled with a system of incentives accessible to all sectors of society, including state and territory governments. This offers greater prospect of success in arresting the continuing slide in environmental conditions and adverse social effects than do denser and deeper thickets of idiosyncratic lists and other prescriptions under constant reconstruction.

A particularly rewarding focus for incentives to meet national environmental standards is available through expanded partnerships with Indigenous people. Partnership in Indigenous Protected Areas (IPAs) has already made a critical contribution to Australia's success in meeting international commitments to expand the national protected areas system. The key to success, despite very modest financial support, has been recognition that landholders do not have to eschew all forms of commercial activity on their lands, but rather avoid uses that significantly impact the values that the area was designated to protect. This sort of approach can work on many Indigenous estates large enough to partition uses and apply development conditions specifically designed to avoid impact on nominated values in other areas. Indeed, in some locations any residual effects of development on part of an estate can be more than compensated by positive actions on other parts, supported by either or both commercial incomes and linked or independent payments for delivery of ecosystem services.

Sites do not need to be designated as IPAs to work effectively to achieve a positive mix of socioeconomic and conservation initiatives to produce net environmental benefits. Technical approaches to co-design development and offsets for residual impacts have been refined under, for example, the TNC's Development by Design initiative. In northern and remote Australia in particular, such models, backed by government under a Business on Country program, could help drive evolution of sophisticated, integrated approaches to land development, in preference to the adversarial approach embodied in present environmental assessment practice, which privileges the polar views of environmental and industry lobby groups over the efforts of local landowners too poorly-resourced to access unbiased advice.

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?***

Rather than mandating generally stronger roles, it is more important to specify the circumstances under which commonwealth intervention will be required. And this clarity should be presented against the background of incentives and other measures to encourage states and territories to adopt and achieve national goals, and the circumstances under which it may be necessary to go beyond incentives. In part that clarity can be achieved by references to standards.

10. ***Should there be a greater role for national environmental standards in achieving the outcomes of the EPBC Act seeks to achieve? In our federated system should they be prescribed through:***
    - ***non-binding policy and strategies?***
    - ***expansion of targeted standards, similar to the approach to site contamination under the National Environment Protection Council, or water quality in the Great Barrie Reef catchments?***
    - ***the development of broad environmental standards with the commonwealth taking a monitoring and assurance role? Does the information exist to do this?***

Environmental standards are self-evidently desirable but difficult to frame in practice, except where - like greenhouse gas emissions and global warming - causal links are unusually clear and relationships between pressure and response are quantitatively well defined. But some absurd political and industry treatments of climate change shows that even the most obvious relationships, understood for over a century within well-established, mainstream knowledge systems will be challenged without apparent embarrassment when stakes are high.

More often in conservation science, causal links are weakly defined. So even well-funded protected areas struggle to report their progress in meeting conservation objectives. Recurring failure, over decades to more than a century of operation, speaks to the challenges of setting agreed standards and building monitoring systems for the ultimate targets of management strategies - like the abundance of a rare cryptic animal - and the need to use surrogates until methods are refined through experience or trends become clearer through time. Choice of surrogates should be influenced by knowledge of their position in the causal chain of influences on the target, based where necessary on expert opinion. Social and cultural attributes raise additional and different difficulties.

Recognising Indigenous landowners as critical stakeholders will require that the choice of targets for standards and the way they are indexed also includes Indigenous views and knowledge. Taking account of Indigenous views of acceptable outcomes adds to complexity, particularly where they invoke place-specific Indigenous knowledge.

We do not suggest that these difficulties warrant a retreat from commitment to codified standards, but that a coherent process to build, agree and refine them is more important than specifying now their range or content. We endorse increased use of environmental standards to inform decision-making processes, under the following conditions:

1. a properly funded program, supported by specific provisions in the Act, to develop, apply and refine them;
2. formal recognition that standards must evolve and so cannot offer the illusion of certainty demanded by some in industry, but provide an orderly process for refinement and change (e.g. by setting review periods);
3. obligation to include targets identified by Indigenous interests and informed in

design and application by Indigenous knowledge; and
4. emphasising standards for rehabilitation of damaged lands (habitats).

11. ***How can environmental protection and environmental restoration be best achieved together?***
    - ***Should the Act include incentives for proactive environmental protection?***
    - ***How will we know if we're successful?***
    - ***How should Indigenous land management practices be incorporated?***

Despite the apparent structural integrity of much of the north Australian landscape, there is a great need to restore ecological function over huge areas damaged by wildfire, feral animals and poorly managed grazing and extractive operations. The problem of legacy mines and the ongoing creation of awful new legacies by still operational mines is too well-documented to need cataloguing here. Perversely, this history of poor design and management can, as we have already mentioned, be deployed to help drive much more sophisticated models for development that integrate environmental protection with commercial incomes. Those models offer particularly important opportunities for Indigenous groups who are looking for livelihoods as well as the means to return to and restore their country.

Proactive environmental protection is embedded in a number of existing government programs, such as the longstanding Working on Country program, which has been re-badged as a workforce development program. However badged, this program is an important example of the Commonwealth leading by example to achieve conservation and social goals in tandem. The states and territories have followed to implement complementary programs. There is opportunity to enhance this leading role through changes in structure and shifts in application of the EPBCA. Some other elements of the procedural framework needed to identify and optimise proactive measures are already present in strategic environmental assessment (SEA) and bioregional planning (BRP) provisions. Unfortunately, SEA has been most actively deployed to "escape" the EPBCA (e.g. offshore petroleum and gas and NOPSEMA) rather than promote good land use planning at any scale.

We have already identified the essential role that incentives play in a more sensible development-assessment and condition-setting process. Their significance extends well beyond individual developments to land use and property development planning more generally. We also highlight the role of paid ecosystem services delivered to public and private buyers to support development that is genuinely sustainable because arrangements optimise the mix of socio-economic, cultural and environmental costs and benefits.

Despite the important acknowledgement of different views implied by the question regarding Indigenous conservation practice, it appears to reiterate a narrowness of perspective on Indigenous interests. This gap is particularly germane to restoration, given that Indigenous land without its people is by definition - and through scientific evidence of impacts of unmanaged fire and feral animals - unhealthy. In contemporary settings, the means to support activity on country is therefore inseparable from restoration of proper condition and function. A more significant question is therefore about the mix of commercial and non-commercial activity that fosters application of

Indigenous practice; by the Indigenous owners of land; and to achieve the outcomes that they consider important.

In the comments to follow, we attempt to bring these and other threads together to summarise the sorts of proactive measures and incentives we consider likely to be most productive, structures and processes to support them, their particular relevance to Indigenous people, and indicators of success.

A relevant set of provisions in the EPBCA will contain the following elements:

1. incentives for industry, state and territory government agencies and landowners to participate in SEA and BRP;
2. mandatory attention to restoration and rehabilitation options and provisions for their support in all SEA and BRP;
3. mandatory attention to restoration and rehabilitation options in all EIA through improved offset provisions, including preference for offsets provided locally and demonstrably rehabilitating similar environments;
4. noting that Indigenous landholders have often recovered lands left over from alienation of their lands most suitable for orthodox pastoral or agricultural use, but which are nonetheless bio-diverse, preferences for Indigenous offset providers, particularly where land use investigations reveal limited orthodox alternatives;
5. specific support for Indigenous landholders to participate in SEA, BRP and estate development planning, including technical and language support to match their property plans to the principles and practices endorsed in relevant SEAs and BRPs;
6. requirements to incorporate Indigenous views of environmental (conservation and rehabilitation) goals in all SEA and BRP; and
7. monitoring and reporting arrangements, designed specifically to reveal performance in meeting goals, to be mandatory for all SEA, BRP and offsets arrangements.

12. ***Are heritage management plans and associated incentives sensible mechanisms to improve? How can the EPBC Act adequately represent Indigenous culturally important places? Should protection and management be place-based instead of values based?***

Indigenous heritage is best protected by Indigenous people who have traditional responsibility for lands and/or their dependent attributes. The EPBCA can contribute to capacity in three ways. First, by requiring that Indigenous heritage values are identified and management obligations developed in context, rather than allowing sites to be treated as independent of each other and of the physical and cultural linkages among them. Second, by supporting preparations of Indigenous landholders for development on their lands within frameworks like SEA or BRP through practical planning to maintain heritage values in landscapes that may be subject to change in patterns of use. Third, incentives for proactive conservation of both natural and cultural values, favourable offset and environmental restoration provisions, and facilitated access to the financial and other resources needed to sustain active management.

Indigenous cosmology vests individual sites with continuing significance based on activities of ancestral beings moving through and remaining present in landscapes. Values and place are inseparable. A more relevant framing of this question from an Indigenous perspective may be "How

do we ensure that places recognised as particularly significant are protected in ways that respect Indigenous rights in maintaining the health of landscapes, including connections to other places and the obligations of custodians to access and maintain them". We have already outlined the mechanisms that could be used to improve present arrangements.

13. ***Should the EPBC Act require the use of strategic assessment to replace case-by-case assessments? Who should lead or participate in strategic assessments?***

Rather than replacing individual assessments, SEA can greatly reduce scale, complexity, duplication of effort, and hence costs of project-specific EIA. To entirely replace individual assessments, SEAs would need to anticipate all possible interactions among competing uses, changes in technology, changes in status of affected attributes, the ultimate scale of development and its intensity, shifts in the relative commercial and social value of resources used or compromised, and much more.

A realistic role for SEA and related BRP is to:

1. set out anticipated development trajectories and the evidence supporting their relevance to a designated region;
2. support local people to match their own aspirations and land use plans to likely development trajectories and to participate in SEA;
3. identify matters of principal concern in regions likely to subject to substantial change through development, taking full account of their biophysical and social character;
4. consider likely cumulative impacts and make explicit the bounds to development intensity that were assumed in framing the SEA;
5. set out priorities, standards, acceptable (preferred) management approaches to be applied to assessment of individual proposals based on:
    - recognition of values of local, regional and national significance
    - recurring issues or concerns for management of important values identified by local people and organisations
    - avoidance of duplication of assessment effort.

Amendments to the EPBCA will need to: clarify the role of SEA and BRP; set mechanisms for formal adoption by federal, state and territory governments; establish minimum standards including participation and consultation mechanisms; identify sources of funding; and outline a process for rapid assessment of individual proposals by local authorities for compliance with SEA, which might remove the need for referral to the Commonwealth. Like many other aspects of these environmental laws, there will need to be clarity about how downstream decision-makers under other law will be informed/bound by SEA outcomes.

In regard to Indigenous people, particular attention will be required to mechanisms for selecting and supporting participation and the nature and extent of support; which should emphasise engagement of individual local land owners or native title holders and not just their supporting organisations. The Indigenous values identified, how they were identified, Indigenous concerns and proposed management responses should be explicit in SEA outputs.

14. ***Should the matters of national significance be refined to remove duplication of responsibilities between different levels of government? Should states be delegated to deliver EPBC Act outcomes subject to national standards?***

As we have indicated, we regard MNES as clumsy vehicles for setting, communicating and achieving national conservation goals. Whilst there is clearly a strong practical or constitutional case for a predominant federal role in some areas (e.g. oceans), significance does not derive from that position alone, but rather a pressing and ongoing need for action of a type or scale that demands a coordinated and consistent national response.

As indicated elsewhere, we support change to rationalise this area of the Act, including preference for a leading Commonwealth role in setting standards and delivering incentives for improved performance, taken up and applied by the states and territories. However, arrangements must ensure that states and territories cannot evade obligations to Indigenous people in this area of law that is so important for maintaining relationships with land and generating sustainable socioeconomic benefits from land ownership. Delegatees' obligations must be clearly set out in a revised EPBCA and invariably incorporated in all relevant instruments (regulations, formal bilateral or wider agreements, and SEA).

15. ***Should low-risk projects receive automatic approval or be exempt in some way?***
    - ***How could data help support this approach?***
    - ***Should a national environmental database be developed?***
    - ***Should all data from environmental impact assessment be made publicly available?***

We do not support any approach that increases the risk that Indigenous views of priorities and practice will continue to be ignored or subordinated. That risk will be greatly increased if exemptions or automatic approvals are legislated because the present weak understanding and respect for Indigenous interests does not allow framing of robust criteria for identifying low-risk projects.

There are already a number of publicly assessable national databases containing information from and useful for environmental assessment. We agree that all data gathered for assessments or in monitoring compliance with conditions, including performance of offsets, should be publicly available.

16. ***Should the commonwealth's regulatory role under the EPBC Act focus on habitat management at a landscape-scale rather than species-specific protections?***

The apparent objectivity of lists of species as automatic triggers for federal law is illusory. The weakness of information for rare or difficult to survey threatened species over much of the continent means that it is often difficult to know whether such species are present or not at a particular site. They often have specialised requirements that are met in few places even in a structurally intact landscape.

But reliance on finely discriminated habitat classes is often impractical because mapping of their extent and configuration is almost never available, and very expensive and time consuming to

generate *de novo*, even if knowledge of the species' needs is sufficient to warrant the attempt. Management requirements to maintain the relevant resource attributes of favoured habitat may also be poorly known. The particular mix of conditions required by flora or fauna may shift in location over time as they respond at different rates to past and present natural disturbance regimes. So even saying whether a particular place reliably supports unusually favourable habitats may be problematic.

A common response to these difficulties is to seek to influence the management of large areas of broadly suitable terrain in ways that maintain diversity and optimise the probability that especially favourable habitat will be present within a designated area, over the long term. Given this reality it might be argued that the EPBCA should shift to management of pressures at landscape scales to maintain diversity within and connections to other landscapes, and less on the often ambiguous status of individual rare species.

However, we consider that attention to both landscape-scale management and individual species remains necessary and nothing in the construction of the EPBCA should imply otherwise. It will most often be necessary to work over a range of spatial and temporal scales. Approaches to maintaining functional landscapes that maintain necessary ecological functions and connections should be built into reworked SEA and BRP provisions, while individual assessments might consider the status of species of concern within those landscapes. Ensuring the continued function of a landscape will not maintain biodiversity if an individual development within that landscape wipes out the last remaining refuge for that species. Or maintain cultural values if an individual project destroyed a key sacred site or compromised abundance of a species important in the customary economy. As noted above, the principal role of SEA will often be to tailor individual EIA to context so that they put effort into additional appraisals where they are most necessary and likely to contribute to the public good.

While attention to individual species remains an essential feature of EIA, there is no doubt that lists should be rationalised because their clumsy application can lead to absurdities. For example, in most situations to treat *Crocodylus porosus* as a species of special conservation concern solely because it has been classed as a migratory species is indefensible bureaucratic humbug. However, there may be grounds for special provisions for the species in regions where it is of totemic significance to the local population. Application of more sensible lists should always be matched to context.

17. ***Should the EPBC act be amended to enable broader accreditation of state and territory, local and other processes?***

Dependent on the Commonwealth retaining a leadership role through attention to Indigenous peoples' roles, rights and interests, high quality SEA and BRP, and capacity to intervene when the national interest genuinely requires, we consider that where states or territories have demonstrated capacity and commitment, then accreditation could be considered subject to rigorous tests of compliance and mandatory withdrawal of accreditation when slippage occurs. The commonwealth must maintain an active role on any matters intersecting strongly with Indigenous interests.

18. ***Are there adequate incentives to give the community confidence in self-regulation?***

Performance of some industry sectors has been so consistently bad for so long (e.g. in mineral extraction) that it would be naive to express confidence in self-regulation. In explaining commitments to comprehensively revise its environmental law, the NT Government acknowledged loss of public confidence in industry and regulator respect for and capacity to protect the public interest.

In extractive industries, design to maintain environmental standards is often a sufficiently large component of total costs to create particularly strong incentives to dismiss, evade or ignore risks. In the absence of more powerful disincentives like real prospects of withdrawal of rights to operate, which governments will always be reluctant to invoke, self regulation remains incompatible with the public interest. Strong and determined regulation is necessary to generate the certainty that the public requires that their health and other interests will not be knowingly or carelessly compromised.

19. ***How should the EPBC Act support 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?***

Making distinct provisions for Indigenous Australians recognises that as owners or holders of other fundamental interests in much of the continent's land area and coasts, they are more than just another stakeholder group. In addition to roles as skilled natural resource managers, Indigenous people are important co-investors in regional development and conservation management. They have a particularly important place and stake in the economic and social development of northern Australia and the region's environmental management performance.

It follows that Indigenous people should be fully engaged in all facets of the revised Act, including operational matters like SEA, BRP and EIA and, importantly, more conceptual and socio-cultural questions like setting targets and standards.

Stronger engagement can be driven initially by supporting Indigenous people to work through land development options and their implications, preferably in advance of obligations to consider external proposals for commercial developments on their lands. The requirement to consider, in EIA, alternatives to proposed developments is rarely done in better than dichotomous terms (development much as proposed or no development at all), so that landholders are rarely able to compare today's opportunities with different options that might arise tomorrow.

Working through options might be approached through a systematic program like Business on Country and, within the scope of a reformed EPBCA, by support available to landholders to participate in SEA and/or BRP where there are reasons to anticipate accelerated regional development.

When it comes to EIA for individual projects, substantial changes to the obligations of proponents

are required. In particular they should be required to engage with Indigenous interests to:

- ascertain natural and heritage values of particular significance to Indigenous people;
- identify effects on those values;
- frame management responses to adverse effects on Indigenous-identified values that are consistent with Indigenous tradition or adapted contemporary practice, to be implemented by Indigenous people with connections to the site;
- identify Indigenous roles in delivery of management responses to effects on other values of concern; and
- describe clearly how these obligations were met, including how the authority of informants to deal with these matters was ascertained.

In northern Australia such work may require the involvement of intermediaries including translators, but methods should be robust enough and reported in sufficient detail to assure regulators that the views of Indigenous landowners and their management authorities have been accurately and comprehensively described.

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?***

Experience suggests that advisory committees have limited impact on implementation of policy or quality of practice. So far as we are aware, this review and its terms were not initiated by existing committees and we think it unlikely that the questions to which we are responding here were determined by advisory committees.

There are clearly practical limits to direct community involvement in all potentially relevant decision-making. However, there is a role for strong community representation on bodies making decisions on standards, and in SEA and BRP. However, language, literacy, and inappropriate time-frames pose great barriers to understanding and hence to the quality and influence of communities' active involvement.

Enhanced involvement of the Indigenous community requires special measures of the sort we have outlined under other questions. In brief, EIA law and practice, regional planning, social and industry development policy and related Indigenous affairs policy must align to increase Indigenous participation in analysis of options for commercial land use and interactions with cultural obligations. This should be done systematically under an organised program like Business on Country, but obviously be accelerated and better resourced for SEA, BRP and EIA covering areas in which Indigenous people have immediate and particular interests.

21. ***What is the priority for reform to governance arrangements? The decision-making structures or the transparency of decisions? Should the decision maker under the EPBC Act be supported by different governance arrangements?***

Obviously governance arrangements must be matched to revised objects and in particular the mix of

regulatory and incentive mechanisms deployed in new law. We are not in a position to propose detail except to note that maximising transparency should be the default position.

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?

As identified in the Review discussion paper and related questions, the most important areas of innovation will be around improved incentives to limit impacts and, importantly, to deliver environmental improvements and restoration. A shift in emphasis - from the adversarial cycle of proposal, criticism of the proposal, rebuttal of criticisms, supplementary proposals etc, towards integrated approaches putting greater emphasis on opportunity to link developments to specific conservation improvements – is likely to improve performance.

Such opportunities to link development to environmental improvement are particularly relevant to northern Australia, where there is a contemporary conjunction of government and industry intent to accelerate development, many sites requiring rehabilitation of acute and more diffuse chronic degradation, Indigenous initiatives to consider business options built on land ownership, and demonstration of the great potential of the environmental services industry. A reformed EPBCA must ensure that Australia can take full advantage of that conjunction and at the same time align provisions with obligations to address Indigenous disadvantage.

23. *Should the commonwealth establish new environmental markets? Should the commonwealth implement a trust fund for environmental outcomes?*

The extraordinary success of savanna burning projects, including their rapid uptake by many corporate buyers offering above market prices for carbon credits, demonstrates the level of demand for environmental products, especially where they also deliver social co-benefits. There is great scope to create other markets in water quality and availability, biodiversity, and landscape rehabilitation of many types also linked to socio-economic advancement for remote Indigenous groups.

The most important roles for the commonwealth are to (1) establish a base demand by designing its offsets regimes for greater flexibility in matters considered for offsetting, backed by legislated standards for the various products (2) supporting related monitoring and reporting arrangements and (3) designing SEA and BRP to require options for environmental improvement, as distinct from just avoiding or minimising new impacts (4) in EIA, requiring development proponents to explore options for net environmental improvement through offsets.

A fund might be considered as a mechanism for creating early demand and assessing the scale of potential supply and demand, rather than necessarily being seen as a permanent feature of the market landscape for environmental services. The need for such a fund will depend on the novelty of products considered by the commonwealth and a consequent obligation to kick off awareness and establish credibility in conjunction with related work to establish and promote acceptance of standards.

24. ***What do you see are the key opportunities to improve the current system of environmental offsetting under the EPBC Act?***

There has been a tendency to over-prescribe offsetting arrangements, particularly for biodiversity. There is a preference for like-for-like or complex numerical expressions of equivalence. This emphasis is appropriate in some circumstances, especially in grossly over-developed environments where valued species or assemblages have been reduced to tiny remnants.

But it is completely inappropriate in the less developed landscapes of northern Australia, where there are opportunities to achieve great environmental benefits by addressing ongoing but more diffuse degradation over huge areas. It is perverse to lose such opportunities because they fail to address formally listed phenomena. The primary criteria for assessing offsets should be demonstration of net environmental benefits, with, for example, ambiguities about equivalence being addressed through multiples on areas managed or other product delivered.

Offsets should be constructed and celebrated as important examples of sustainable development in action, rather than framed almost apologetically by being hedged about with over-specified caveats.

However, a critical corollary of greater flexibility and less onerous criteria for demonstrating equivalence or better is complete transparency. Offset agreements, the actions taken and evidence of their effectiveness must be openly available to any member of the public with an interest. Designing informative offset registers and specifying the content they must offer will be an essential feature of policy redesign.

And most importantly, offsets must address environmental issues and targets for improvement that meet the needs and expectations of Indigenous people. All of the steps we have proposed for improved interactions with the environmental assessment process must also be applied to design and delivery of offsets.

25. ***How could private sector and philanthropic investment in the environment be best supported by the EPBC Act?***
    - ***Could public sector financing be used to increase these investments?***
    - ***What are the benefits, costs or risk with the commonwealth developing a public investment vehicle to coordinate EPBC Act offset funds?***

Our experience suggests that there is great scope to increase both direct and indirect (through purchase of various environmental credits) private sector and philanthropic investment in the environment. Public financing under existing programs like Working on Country has built and continues to grow capability that attracts additional private investment. Increased public funding can be strongly leveraged (in substantial multiples) by enhancing confidence among other investors.

The history of northern Australia's Indigenous carbon farming industry, now worth about $30 million pa, indicates that government engagement early in development was critical in securing initial industry investment, and encouraging subsequent philanthropic investments. The federal government has a critical role in building the credibility of novel environmental service industries that require a solid base in assurance about stability of core financing and in building and legislating

standards. Support for registers of environmental services/offset projects that include information on biophysical and social co-benefits can help diversify demand and expand markets.

A public investment vehicle has the potential to create initial confidence and help establish a market by guaranteeing a minimum early level of sales/purchase, a mechanism for small and emerging providers to pool products for sale, and drive improved awareness, especially for more novel products. However, we do not consider such an arrangement as indispensable. Other steps like reinforcing the Working on Country program, supporting development of (preferably legislated) standards, fostering enhanced offsets and restoration arrangements should not be conditional on creation of such a fund.

26. ***Do you have suggested improvement to the … principles? How should they be applied during the Review and in future reform?***

Effective Protection of Australia's environment
Protecting Australia's ~~unique~~ environment and heritage through effective, clear and focused protections for the benefit of current and future generations *across all sectors of Australian society*.

Suggested change in italics is desirable to highlight obligations to improve access and performance for presently marginalised groups, especially Indigenous people.

Making decisions simpler
Achieving efficiency and certainty in decision making, including by reducing unnecessary regulatory burdens for Australians, businesses and governments.

Wording (burdens) implies that regulation is inherently undesirable. Well-considered and properly designed, proportionate regulation is an essential feature of good public order. Certainty in any commercial sphere is an illusion, but a necessary feature in procedural aspects of regulatory settings. Suggest reword as:

Achieving efficiency and procedural certainty in environmental decision making for Australians, businesses and governments, by reducing complexity and eliminating overlap and duplication.

Indigenous *roles*
Ensuring the role of Indigenous Australians' knowledge and experience in managing Australia's environment and heritage.

This principle is important but risks perpetuating a narrow view of the role of Indigenous Australians as conservation practitioners. This important recognition should not be lost, but needs to be broadened to avoid implied exclusion from other roles as decision-makers and investors. Suggested rewording (in addition to the change in heading)

Ensuring that Indigenous Australians participate fully in and apply their knowledge and experience to decisions and actions to improve management of Australia's environment and heritage.

Improving inclusion, trust and transparency

Improving *outcomes through* inclusion, trust and transparency *based on* better access to information, *analysis* and decision making, and improved governance and accountability arrangements.

Suggested changes in italics to accommodate potential for active support for participation and emphasise improved outcomes through openness and inclusion

Supporting partnerships and economic opportunity
Supporting partnerships to deliver for the environment, *enhance* investment and create new jobs.

This is a most important principle for Indigenous people on both sides of the development-environmental protection equation.

Integrating planning
Streamlining and integrating planning to support ecologically sustainable development.

No change proposed.