SUBMISSION TO THE EPBC ACT REVIEW

ANON-QJCP-UGJD-R

Organisation

Northern Land Council

Attachment provided?

Yes

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Yes – with my name and/organisation

SUBMISSION RESPONSES

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

Northern Land Council submission to the:

Independent Review of the EPBC Act

April 2020

Contents

1. Introduction

1.1 About the Northern Land Council

The Northern Land Council (NLC) was established in 1973. Following the enactment of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (Land Rights Act), the NLC became an independent statutory authority responsible for assisting Aboriginal people in the northern region of the Northern Territory to acquire and manage their traditional lands and seas.

A key function of the NLC is to express the wishes and protect the interests of traditional Aboriginal owners throughout its region.

The Land Rights Act combines concepts of traditional Aboriginal law and Australian property law and sets out the functions and responsibilities of the land councils. The NLC is also a Native Title Representative Body under the *Native Title Act 1993* (Cth) (Native Title Act).

The NLC represents more than 36,000 Aboriginal people, and has a responsibility to protect the traditional rights and interests of Traditional Owners across our region, which is constituted by more than 210,000 square kilometres of the land mass of the Northern Territory and 85 per cent of its coastline. Within its jurisdiction, the NLC assists Traditional Owners[1] by providing services in its key output areas of land, sea and water management; land acquisition; minerals and petroleum; community development; Aboriginal land trust administration; native title services; advocacy; information and policy advice.

Relevant to this submission, this includes managing 12 of the 36 Indigenous ranger groups and three of the 15 Indigenous Protected Areas in its region. Rangers undertake work that addresses many matters of environmental significance to the Northern Territory and Australia, including the protection of cultural heritage, threatened plants and animals, control of listed Weeds of National Significance, feral animals listed as Key Threatening Processes (such as feral pigs), sustainability of traditional food sources on the land and within the marine environments, and biosecurity surveillance. Managing access to land and tidal waters and the occurrence of unauthorised and illegal activities is a high priority, [2] and helps to ensure user groups respect Traditional Owners' rights to manage, protect and control access to their country. Indigenous rangers also undertake landscape fire management through traditional burning activities to prevent late dry season high intensity fires. These projects are one of the largest contributors to carbon abatement in the Northern Territory and constitute a significant emerging industry for Aboriginal people.

The NLC's vision is for a Territory in which the rights and responsibilities of every Traditional Aboriginal Owner are recognised and in which Aboriginal people benefit economically,

[1] For the purposes of this submission, the term Traditional Owner includes traditional Aboriginal owners (as defined in the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), native title holders (as defined in the *Native Title Act 1993* (Cth)) and those with a traditional interest in the lands and waters that make up the NLC's region.

[2] Rangers can hold compliance powers under the *Fisheries Act 1988* (NT) and, more recently, the *Parks and Wildlife Conservation Act 1976* (NT) and the NLC is seeking to establish a compliance program to utilise these powers.

socially and culturally from the secure possession of their lands, freshwater, seas and intellectual property. Our mission is to assist Aboriginal people in the northern region of the NT to acquire and manage their traditional lands and seas, through strong leadership, advocacy, industry engagement and management.

Within this submission the Northern Land Council refers to Aboriginal people who are traditional Aboriginal owners in the Northern Territory as defined under the *Aboriginal Land Rights Act.* However, the Northern Land Council will use the language consistent with the EPBC Act, particularly when referring to the use of the word Indigenous in the legislation or international covenants. The Northern Land Council would like to suggest through this review that the use of Indigenous does not specifically recognise the First Nation peoples of this country who are distinctly Aboriginal and Torres Strait Islander Peoples – perhaps this can be addressed in the objectives of the Act.

1.2 Overview

The NLC welcomes the opportunity to make a submission to the second independent review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act).

The NLC is encouraged by the focus of the review on Indigenous Australians' knowledge and experience, better environment and heritage outcomes and community inclusion, trust and transparency. The NLC supports the clear intent of the review to modernise the EPBC Act, in particular in relation to Indigenous peoples' knowledge and role in the management of environment and heritage.

The NLC's view is that overall the Act has not achieved its intent of protecting the environment and promoting ecologically sustainable development. The 2016 State of the Environment Report confirms that biodiversity has continued to decline since 2011; an increasing number of fauna and flora species have been listed as vulnerable, threatened or critically threatened; and the outlook for Australian biodiversity is generally poor. This decline in the health of the environment is noted in the independent review's Discussion Paper. The effectiveness of the Act in addressing land degradation, retention of native vegetation, air quality and greenhouse gas emissions is highly questionable, and although there has been an expansion of protected areas, the condition of these areas has declined, with an increase in emerging threats (including weeds and animals introduced by other industry interests) and less funding to address them.

While the objects of the Act are admirable and inclusive of Indigenous interests, it is widely accepted that they have not been met. Of particular concern to the NLC is the inadequate achievement of the objects relating to recognising the role of Indigenous people and promoting the use of Indigenous knowledge. This failure is unsurprising, as there is little in the Act to give effect to these objectives, with Indigenous Australians only referenced on an ad-hoc basis across 1,400 pages of legislation (EPBC Act and Regulations). Given that Indigenous knowledge and management have shaped the Australian environment over millennia and are intrinsically linked with the conservation of biodiversity, the lack of recognition of this role also contributes to the failure of other objectives of the Act.

It is timely to consider what changes could be made to achieve the objectives and give them greater effect throughout the Act. As stated in the Discussion Paper, 'The connection of Indigenous Australians to Country is central to their culture, spirituality, language and wellbeing'. The NLC believes a new approach that more fully recognises this connection and the rights and interests of Indigenous people, as well as utilising their traditional ecological knowledge, practices and strengths, would greatly improve the effectiveness of the Act, support sustainable development, and provide efficiencies in the assessment process. This submission presents such an approach.

The implementation of land management practices based on Indigenous knowledge also has implications beyond the recognition of Indigenous rights and interests and biodiversity conservation. For example, the recent Australian bushfire crisis highlights the dangers of uncontrolled fires in the Australian environment. Lessons learned from Indigenous burning practices could play a key role in protecting nationally and internationally recognised cultural and conservation values, protecting assets and saving lives.[3] Scientists have found that in northern Australia, both the total area burnt and the area experiencing hot late dry season wildfires have approximately halved over the past 15 years since the inception of the Indigenous savanna carbon farming industry, when compared with the previous 10 years. This is equivalent to an area the size of Tasmania.[4] They also found that extensive fuel management and fire suppression activities conducted over several years, predominantly by Indigenous ranger groups, meant northern Australia did not see the scale of destruction experienced in the south of the country, despite experiencing severe fire weather conditions.

The 2008 Hawke first independent review of the EPBC Act received approximately 350 written submissions that overwhelmingly supported greater recognition of, and support for, the role of Indigenous people in the conservation and sustainable use and management of Australia's biodiversity. Recommendations made in the Final Report included that:

- the Act be amended to require informed consent where Indigenous knowledge is accessed or used for non-commercial purposes on Commonwealth land;
- [the Department] strengthen involvement of Indigenous people in the workings of the Act by: (1) developing guidelines based on reciprocal responsibilities; (2) working through established representative bodies such as Land Councils; and (3) strengthening processes for early engagement with Indigenous groups in strategic assessment and regional planning; and
- new public consultation provisions should include principles and guidelines specific to Indigenous consultations, particularly in planning approaches.[5]

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[3] Gemma Wilson, Indigenous Fire Practitioner: 'Let us drive for a change' (SBS Insight, 4 February 2020) <https://www.sbs.com.au/news/insight/indigenous-fire-practitioner-let-us-drive-for-a-change>.

[4] Fisher and Altman, 'The world's best fire management system is in northern Australia, and it's led by Indigenous land managers' (The Conversation, 10 March 2020) <https://theconversation.com/the-worlds-best-fire-management-system-is-in-northern-australia-and-its-led-by-indigenous-land-managers-133071>.

[5] Commonwealth of Australia, *The Australian Environment Act – Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (Final Report, October 2009).

It is disappointing that the implementation rate of recommendations flowing from the Hawke Review is almost zero, including the above recommendations. The second independent review of the EPBC Act provides an opportunity to rectify this. It is critical that the Government implements recommendations made by the review, within a reasonable timeframe, to improve outcomes for Indigenous Australians.

1.3 Context

Aboriginal people are significant stakeholders in the reform process. In the Northern Territory, they make up more than 30 per cent of the population and hold extensive rights and interests, including freehold tenure over around 50 per cent of the land mass and 85 per cent of the coastline, with much of the remaining land subject to native title. Traditional Owners and Indigenous rangers undertake substantial conservation work as custodians of their country. Activities include invasive species control, fire management, beach and ghost net clearance, environmental monitoring, research collaborations, sacred site protection and managing visitor access.

Of Australia's land area, over 40 per cent per cent is subject to Indigenous rights and interests.[6] This highlights the significant role for Indigenous people as owners, managers and major investors in policy and programs relevant to their cultural, economic, social and environmental interests.

Almost 80 per cent of Aboriginal people in the Northern Territory live in remote or very remote areas – the same areas where major development projects are most likely to have a substantial impact on biodiversity. This, taken together with the deep and personal ties that Aboriginal people have to their country, means that Aboriginal communities in remote areas are disproportionately impacted by significant environmental problems such as orphaned mines. Further, Aboriginal people living in remote communities often face structural and systemic barriers that make scrutiny of mining operations and government decisions extremely difficult. A lack of preplanning and rehabilitation investment bonds on major projects have added to this. As such, Traditional Owners – particularly those entering into land use agreements – hold significant risk in terms of environmental and social outcomes. There are numerous examples in the Northern Territory where regulatory deficiencies and poor project management have resulted in ongoing environmental legacy issues that could have been avoided but which Traditional Owners are left to live with, such as pollution and contamination of land, waterways, food sources and in some instance sites of significance. These also result in huge financial costs borne by government and community.

The Australian government has an obligation to implement its international commitments under treaties, conventions and other bilateral and multilateral agreements related to the environment. To that end, the NLC draws your attention to important international

[6] See, eg, Senior Officers Working Group, *Investigation into Indigenous Land Administration and Use*, *Report to the Council of Australian Governments*, December 2015.

commitments focusing on Indigenous Australians and their unique relationship to their lands and seas.

The Convention of Biological Diversity recognises the close and traditional dependence of Indigenous people on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components.

The Convention on Biological Diversity provides that 'each contracting party shall, ***as far as possible*** and appropriate: (j) Respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge' (emphasis added). Article 10 calls on parties 'to: (c) Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements ... (d) Support local populations to develop and implement remedial action in degraded areas where biological diversity has been reduced'. The NLC submits that Australia could do much more to meet its obligations under the Convention on Biological Diversity, particularly considering the public benefit and value attributed to Indigenous knowledge and expertise regarding our unique environment and landscapes. It is both in the interests of Indigenous people and the public interest to better access and value the experience and expertise accrued over tens of thousands of years.

Article 18 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) provides that Indigenous people have the right to participate in decision-making matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own decision-making institutions.

The UNDRIP contains an express obligation for states to: 'Consult and cooperate in good faith with the indigenous peoples … to obtain their *free and informed consent prior to the approval of any project affecting their lands or territories and other resources*, particularly in connection with the development, utilization or exploitation of minerals, water or other resources.' (Article 31(2)).

2. Effective inclusion of Indigenous interests

From the Discussion Paper, it is clear this review is seeking an improved model to include Indigenous people in environmental decision-making and implementation of the Act, and put into effect the objects of the Act.

The review should ensure that the very valid concerns of the NT's Aboriginal people, drawn from their experiences of a deficient environmental regulatory regime in the jurisdiction, are listened to and addressed.

This section of the submission proposes a new approach aimed at achieving the full participation of Aboriginal people and integration of their knowledge, under an improved EPBC Act.

2.1 Lessons from the Indigenous management approach

The poor achievement of the Act's objectives can be attributed in part to the conflict between the scale at which the Act is implemented (narrow/local) and the nature of Australian ecological systems and the events that influence them, such as fire, drought and rain (broad/regional/landscape scale). It is challenging to achieve the objectives of the Act while decisions are made on a project-by-project basis, especially when environmental values and biodiversity in the Australian environment are not evenly distributed in space and time. In contrast, Indigenous Australians generally have a holistic approach to environmental management, managing the environment as a system rather than as component parts.

As the driest continent, with largely depleted soils, areas with permanent water and higher fertility are very important in the productivity of the landscape and as refuges. Management actions, land use, fires and changes brought about by the introduction of new species also impact the environment and associated values. The recent drought in eastern Australia highlights the interconnectedness of the Australian environment and its susceptibility to climatic events. The difficulties in managing the Murray River demonstrate this clearly: events that take place upstream have consequences for users and the environment along the entire length of the system, with management and rainfall in the upper catchment in Queensland and New South Wales having consequences for wetlands, fish and birds as far away as Victoria and South Australia.

Lessons can be drawn from Indigenous land management practice and knowledge in protecting the environment at a landscape or catchment scale. The cultures of Indigenous Australians gave special recognition to important sites in the landscape. The sites were often associated with particular plant or animal species, with each site having specific people identified as custodians and specific management practices. The sites were connected across the landscape through songlines, which linked people and land management across vast areas. There was recognition that impacts on a particular site, or failure to carry out management of the site, could have consequences at a landscape scale. There was, in effect, a shared responsibility for management across the landscape. In this way, Indigenous land management – with its focus on the interrelatedness of components of the environment, and of one area to others – differs from the scientific reductionist approach currently used in the EPBC Act, which seeks to break things down into defined and measurable parts.

As well as management of important cultural sites connected by songlines, Indigenous Australians have substantially influenced the Australian environment through utilisation of natural and biological resources, the basis of the traditional economy. It is now widely recognised that Indigenous people managed the landscape, particularly through ceremony,

trade routes and the use of fire, to promote many of these important species.[7] Indigenous Australians had, and in many areas still have, an intimate knowledge of productive places and species that have economic value (as food, medicines and materials).

Indigenous land use and management has been a key driver of the nation's biodiversity. Protection of the environment and the promotion and use of Indigenous knowledge are inextricably linked and should not be seen as separate objectives. The important role of Indigenous knowledge in the management of country was highlighted most recently during the devastating 2019-2020 bushfire season, when the need for different approaches to land management was widely acknowledged and traditional fire management raised as a solution. Recognising the value of Aboriginal practices will likely be increasingly important as the effects of climate change become more apparent.

2.2 Holistic planning, assessment and management

The NLC believes that a more holistic approach to environmental management, consistent with the long established management of the environment by Indigenous Australians, would lead to more productive and resilient ecosystems and better protection of biodiversity.

As such, we propose a fundamental change to the current approach, reframing the view from one of protection of biodiversity and the environment (with a narrow focus on protecting species that are rare or in decline) to landscape-scale management and enhancement of biodiversity. This would involve identifying the places and areas that contribute most to a biodiverse and productive environment, understanding the processes that drive the associated ecosystems (including Indigenous land management), and implementing management regimes that best support the identified values. Indigenous people would need to play a key role in identifying these places and associated knowledge, and developing and implementing the management strategies that maintain and enhance the values.

An example of how this approach differs from the way the EPBC Act has been enacted comes from an experience with a flora and fauna survey conducted with Indigenous rangers as part of the preparation of an Environmental Impact Statement (EIS). The survey was conducted in the Tanami desert, in an area where a gold resource had been identified at considerable depth. The area was arid, the substrate stony and the vegetation community widely distributed in the region. When the Indigenous rangers arrived at the site, they viewed the area and concluded there was little biodiversity value. They suggested the survey be moved to an area several kilometres to the east, where there was permanent water and animals would be found. However, given the operation of the Act and its emphasis on project-based assessments, the survey was conducted at the original site, recording a few individuals of species known to be widespread. While this may have achieved the goal of assessing the impacts of the project, it is not an effective means of conserving biodiversity more broadly or meeting the objects of the Act.

[7] See, eg, Gammage, B. *The Biggest Estate on Earth, How Aborigines Made Australia*.

This anecdote highlights several issues. Firstly, valuable resources were used by a company in the survey of an area with low environmental value, while there were no resources for a nearby area with high environmental value – clearly not the most efficient use of limited environmental resources. Secondly, Indigenous knowledge was available but there was no mechanism for it to be utilised (despite the Act's object to promote the use of such knowledge). While an assessment process for individual proposals is essential, this needs to be subservient to, and directed by, a strategy put in place to promote and manage the region's biodiversity.

The recent Scientific Inquiry into Hydraulic Fracturing of Onshore Unconventional Reservoirs in the Northern Territory stated that bioregional planning based on strategic assessment is widely recognised as the most appropriate basis for limiting the impacts of regional development on biodiversity. The Act includes underutilised provisions for strategic assessments and bioregional planning, which could be expanded and better integrated to support the Act's objects. The NLC proposes that strategic assessments be carried out across Australia in collaboration with the relevant Traditional Owners, identifying areas of value and associated Indigenous environmental knowledge. This is also in line with Recommendation 6 of the Hawke review to increase the use of strategic assessment and bioregional plans. Assessments could then be used to develop a plan for promoting biodiversity and guiding sustainable development. Where a new industry is being considered, the strategic approach would enable this to be properly planned out at the landscape or regional scale. This would also break down the current adversarial approach, which sees conservation and the project assessment and approval processes as two completely separate – and often opposing – things.

Effective strategic assessments will depend on an understanding of baseline conditions and the potential impacts of activities. The Hydraulic Fracturing Inquiry highlighted the inadequacy of scientific knowledge and data relating to water and biodiversity for relevant regions of the Northern Territory. This gap impeded the ability to properly assess and minimise the risks of shale gas development, especially cumulative risks.

The limited understanding of the natural environment noted by the Scientific Inquiry is not unique to areas under exploration by the shale gas industry; rather, a lack of data is more the norm than the exception for much of the Northern Territory. A solid understanding of social and cultural impacts is also generally absent from project assessments, yet should be considered fundamental.

To address these limitations and enable informed decision-making, the Inquiry found that a strategic regional environmental and baseline assessment (SREBA) should be undertaken.[8] The SREBA extends beyond a physical and biological assessment to include public health, social and cultural impacts (the latter two incorporating early and ongoing community participation). The NLC believes a similar model could be utilised in the EPBC Act, which already allows for bioregional planning on Commonwealth land only (Part 12) and strategic assessments (Part

[8] Scientific Inquiry into Hydraulic Fracturing in the Northern Territory (2018), *Final Report*, Chapter 15.

10). These existing assessments are rarely used under the EPBC Act and therefore there is scope to expand and place greater reliance on these models.

If done in line with leading practice and with the full involvement of local communities, proactively undertaking assessments across regions would provide for improved conservation outcomes and genuinely sustainable development, enabling:

- informed decisions about activities in the region;
- strategic planning of any new industries;
- identification and minimisation of potential issues while maximising positive environmental, social and economic outcomes; and
- consistency of data to inform both conservation efforts and project assessments.

Jointly managed national parks and Indigenous Protected Areas, with governance structures already in place, may offer ideal pilot sites to begin the roll-out of integrated bioregional planning and strategic assessments.

The NLC also notes that the Act is deficient in that it does not require the Minister to consider the cumulative impacts from other projects that are not within the proponent's control.[9] In assessing the impacts of an action on the environment, it is inadequate to only consider one project in isolation from what is occurring more broadly within the project area. As noted in the State of the Environment Report (2016), 'many species and communities suffer from the cumulative impacts of multiple pressures'. The NLC is of the view that more rigorous strategic assessments will enable a detailed assessment of any cumulative impacts on the environment. However, the NLC also recommends the incorporation of cumulative impact assessments for projects that continue to be assessed on an individual basis.

It is important to note that the use of regional strategic assessments should not remove the requirement for individual project environmental impact assessments (EIAs), but would greatly streamline and support the assessment and approval process by providing robust baseline data, key information on values and potential impacts, and clarity around what the EIA must address. Assessment of proposals would be more focused around the known values, and any resulting conditions would be targeted and effective.

Involving Indigenous people in strategic assessment is also likely to have positive outcomes in areas such as employment and health, and contribute to achieving the Government's Closing the Gap targets. Thus, although significant resources would be required to undertake strategic assessments, we anticipate cost-savings in the long term through greatly improved outcomes for local communities and the natural environment, as well as efficiencies in the assessment and approvals system. The proposed approach also recognises that a healthy environment will provide for long-term economic opportunities well beyond the life of an individual project.

In addition, the increased community trust in government and industry that would be engendered by a transparent, inclusive strategic planning and assessment system should not be

[9] See *Tarkine National Coalition v Minister for the Environment* [2015] FCAFC 89.

underestimated. The mistrust many Indigenous people have towards industry, following a long history of exclusion, lack of engagement and damage to country, is a significant barrier to economic development that is seldom acknowledged. A robust EPBC Act that places regional/landscape planning and assessment at its centre and includes local communities in decision-making would go some way towards addressing this issue.

2.3 Matters of National Environmental Significance

As noted in the review's Discussion Paper, new matters of national environmental significance (MNES) have been added to the EPBC Act over time. It is the NLC's view, however, that these past changes have not gone far enough to:

a) recognise the vital role Indigenous Australians and their knowledge play in the conservation and sustainable use of Australia's environment and heritage (as per the objects of the Act); and
b) protect unique Indigenous land tenure arrangements.

As it currently reads, the EPBC Act does not give meaningful effect to Australia's international obligations. Although Indigenous heritage can be accounted for in national and world heritage places and properties, in the NLC's view the matters of national environmental significance, if they are to remain in a new legislative framework, require reframing to better reflect Indigenous property rights and intellectual property, and to comply with Australia's international obligations to Indigenous people. These matters are not only triggers for the environmental assessment processes under the Act, but also serve an important symbolic purpose, reflecting those matters that the Government considers nationally significant and in need of preservation and protection. It is indeed peculiar that three of the eight objects of the Act refer to Indigenous Australians but there is no specific reference to Indigenous interests in the list of MNES.

The unique connection of Indigenous peoples to their land and seas should be recognised as nationally significant. This should be consistent with existing legislation (particularly the Land Rights and Native Title Acts) and must not undermine the *Northern Territory Aboriginal Sacred Sites Act 1984* (NT). Developments proposed to take place on lands and waters traditionally occupied by Indigenous communities have been a source of concern to these communities because of the potential long-term negative impacts on their livelihoods and traditional knowledge.

At present, the EPBC Act does not value totem species, keystone species, or other species important for Aboriginal livelihoods (for example, in the Northern Territory, magpie geese and Kakadu plum). Culturally important species warrant specific attention under the EPBC Act as they are intrinsically linked with Indigenous land management, knowledge and wellbeing.

The NLC therefore suggests the addition of 'Indigenous livelihoods', covering Aboriginal land[10] and totemic species, together with environmental, social, cultural and economic impacts,

[10] For example, land that is defined 'Land Rights Land' and 'Native Title Land' under the *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) s 5.

as a matter of national environmental significance. Identification of elements that fall under this matter must occur in consultation with Traditional Owners and representative bodies, including land councils, to ensure Indigenous values and uses of land and resources are adequately reflected. Elements could be nominated and updated periodically, or identified through the bioregional planning framework.

Both Canada[11] and New Zealand[12] recognise Indigenous culture in their equivalent legislative provisions. The Canadian *Impact Assessment Act 2019*, for example, is triggered by an act that causes:

> with respect to the Indigenous peoples of Canada, an impact — occurring in Canada and resulting from any change to the environment — on
>
> (i) physical and cultural heritage,
>
> (ii) the current use of lands and resources for traditional purposes, or
>
> (iii) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance;
>
> (d) any change occurring in Canada to the health, social or economic conditions of the Indigenous peoples of Canada.

In addition, the NLC expresses the following views on the MNES more broadly:

a) The MNES should reflect the need for the Commonwealth Government to respond to threatening processes, including climate change, invasive species and fire.
b) The MNES should encompass impacts on water resources more broadly, rather than only impacts in relation to coal seam gas development and large coal mining development. There is an urgent need to, at a minimum, include unconventional onshore gas reservoirs in the water trigger, in order to implement Recommendation 7.3 of the Scientific Inquiry into Hydraulic Fracturing of Onshore Unconventional Reservoirs in the Northern Territory

As an example of deficiencies in the current MNES, the development of the open cut mine on the McArthur River in the Northern Territory involved the diversion of a substantial section of a major tropical river and the creation of stockpiles of waste rock and tailings on or very near floodplain and a sacred site. However, the conditions of approval under the EPBC Act for this project that resulted in major environmental disturbance were almost exclusively limited to impacts on a single species, the Freshwater Sawfish. There was no consideration of the impacts on Indigenous people who live downstream, or the environment more broadly.

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[11] *Impact Assessment Act 2019*, Government of Canada, accessed 6 February 2020, <https://laws-lois.justice.gc.ca/eng/acts/I-2.75/>.
[12] *Resource Management Act 1991*, Section 6 - Matters of National Importance, Environment Foundation, accessed 6 February 2020,<http://www.environmentguide.org.nz/rma/principles/section-6-matters-of-national-importance/>.

2.4 Indigenous-inclusive EIAs

The recognition and incorporation of Indigenous knowledge should be normalised in the environmental assessment process and in implementation of environmental management plans, with proponents documenting historical management and Indigenous use of the area, including important sites and contemporary context. This should be as standard as aspects such as erosion and sediment control or waste management are now. In itself, the valuing of Indigenous knowledge will encourage its preservation and dissemination.

It has been internationally recognised that environmental decision-making needs to go beyond merely looping Indigenous people into parts of the environmental assessment process and actually enable meaningful input by Indigenous people. One way to achieve this, and to accommodate Indigenous knowledge in the assessment process, is through mandatory Indigenous-led EIA.

In Canada, for example, the *Impact Assessment Act SC 2019* requires the relevant assessment agency to consider (s 22(1)):

> a) the impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada;
>
> b) Indigenous knowledge provided with respect to the designated project; and
>
> c) any assessment of the effects of the designated project that is conducted by or on behalf of an Indigenous governing body and that is provided with respect to the designated project.

The assessment report must set out how the Agency, in determining the effects that are likely to be caused by the carrying out of the designated project, took into account and used any Indigenous knowledge provided.

In considering the rights and obligations articulated in UNDRIP, it is clear that Indigenous-inclusive assessment processes could work to ensure that governments and industry are fulfilling their obligations under international law.

In line with the principle of free, prior and informed consent (FPIC), the NLC recommends that Indigenous communities likely to be affected by developments be adequately resourced and informed, in order to make decisions as part of the EIA process. For major project developments entailing longer assessment timeframes, such as assessment via the EIS or Public Environment Report (PER), the NLC recommends that Indigenous communities be given the opportunity to submit their own environmental assessments for consideration by the Minister. In both cases, the Minister should be required to take into account the communities' advice and recommendations and provide a statement of reasons back to the communities if their advice is not followed, with this being a reviewable decision.

Case study: The Squamish Nation process in Canada

The Squamish Nation are First Nations people in Canada whose population is scattered among nine communities, from North Vancouver to the northern area of Howe Sound. There are a number of major developments proposed in Squamish Nation territory and, in Squamish's view, the government-led environmental assessment processes do not provide a venue through which Squamish's consent, or input, for proposed projects could be secured. As a result, the Squamish Nation has developed and is now implementing its own independent assessment process for major projects proposed in its territory (the Squamish Nation Process).

The Squamish Nation Process allows the Nation to make an informed decision based on the best information available from its perspective, feedback from its members, and advice from independent consultants and scientists. If a project is approved through the Squamish Nation Process, proponents and the Crown will also have certainty that thorough consideration has been given to the proposed project, and the Nation's consent has been given for the project.

In order to get to consent, two key objectives must be met: an informed decision by the Squamish Nation and a shared decision-making process with the Crown. The Squamish Nation Process was designed to allow the Nation to make an informed decision about the impacts a proposed project may have on their lands and waters today, and for generations to come, and to assess whether those impacts are acceptable in light of the Nation's present and future goals and desires.

It has also created an opportunity for the Nation and the Crown to discuss their respective decisions on a project and the conditions of potentially approving a project, which may lead to a shared decision on a project.[13]

2.5 Indigenous-inclusive monitoring and compliance

The NLC also recommends post-approval Indigenous monitoring teams where Indigenous land is involved or Indigenous livelihoods may be affected.

Recent Australian National Audit Office reports indicate that administration of approved controlled actions is not being adequately transferred to the Department of Agriculture, Water and the Environment's compliance and enforcement team for ongoing monitoring activity.[14] This provides scope for Indigenous landholders or residents to work with the Department to provide information about proponents' compliance with their approval conditions. This could also include provision of training and resources for Indigenous-led compliance reports. Indigenous rangers are well placed to undertake this work, on a fee-for-service basis. Where projects are on Indigenous lands and waters or Indigenous livelihoods are affected, we recommend mandatory engagement of local Indigenous people for monitoring and compliance.

[13] Aaron Bruce and Emma Hume, *The Squamish Nation Assessment Process: Getting to Consent* (November 2015).
[14] Australian National Audit Office, Monitoring Compliance with Environment Protection and Biodiversity Conservation Act 1999 Conditions of Approval: Follow-on Audit (Auditor-General Report No 136, 2016-17) <https://www.anao.gov.au/work/performance-audit/monitoring-compliance-epbc-act-follow>.

In the NLC's region, Indigenous rangers and community members play a critical role as the 'eyes and ears' across the region, reporting incidents involving unlawful access and activities to a variety of government agencies. An example of Indigenous-inclusive monitoring and compliance activities can be seen in the Northern Territory Government Indigenous Community Marine Ranger Program, which supports a mechanism for rangers to be appointed as Fisheries Inspectors and Fisheries Officers to monitor compliance of the *Fisheries Act 1988* (NT).[15]

3. Meaningful consultation with affected Indigenous communities

Where Indigenous people are mentioned in the EPBC Act and Regulations, relevant provisions only require that the interests of Indigenous people be taken into account or to be otherwise considered.[16] The EPBC Act does not require genuine, culturally appropriate consultation with Indigenous peoples based on the principles of free, prior and informed consent.

The NLC is of the view that full implementation of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and the Convention of Biodiversity gives rise to an obligation to consult and accommodate affected Indigenous peoples. The UNDRIP principle of free, prior and informed consent (FPIC) can meaningfully inform the duty to consult and the environmental assessment processes in Australia.

In Canada, for example, recent case law has given effect to this principle. The Federal Court of Appeal's decision on the Trans Mountain pipeline expansion is the latest verdict in a long line of recent court decisions that carve out new legal space for Indigenous title and rights, especially in relation to the duty to consult. In *Tsleil-Waututh Nation v. Canada (Attorney General)*[17] the Federal Court of Appeal quashed an Order in Council that had approved a pipeline on the basis that the Canadian Government failed to adequately consult with affected First Nations. The Court held that meaningful consultation requires talking to gain mutual understanding, and 'testing and being prepared to amend policy proposals in the light of information received, and providing feedback'.[18]

Consultation with Indigenous Australians needs to occur at the pre-referral stage and be underpinned by principles of free, prior and informed consent. Proponents need to understand that engagement with Indigenous peoples can be time-consuming and costly due to factors including remoteness, climate and cultural obligations but overall will lead to improved relationships, project efficiency and effectiveness. In failing to fully consult prior to submitting a project proposal to be assessed, a proponent takes the risk of Aboriginal people taking an adversarial position against the proposal.

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[15] See, eg, NT Department of Primary Industry and Resources, *Aboriginal Fishing* (last updated 23 September 2019) <https://dpir nt.gov.au/fisheries/fisheries-strategies,-projects-and-research/indigenous-fishing>.
[16] See, eg, *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 49A(c), 368(3)(c).
[17] (2018) FCA 153.
[18] *Tsleil-Waututh Nation v. Canada (Attorney General)* (2018) FCA 153, [499]-[507].

The NLC has seen poor engagement processes with Traditional Owners lead to damage of sacred sites and other areas of cultural significance, resulting in distress to custodians of the land. Had genuine consultation been undertaken, deleterious cultural, social, and economic impacts would not have occurred.

3.1 Incorporating Provisions into the Act

Based on the Land Council's forty years of experience, obtaining free, prior and informed consent requires:

- **Careful planning,** including consideration of:
    - cultural and anthropological matters;
    - complexity of and late changes made to the information;
    - meeting structure and size;
    - local factors (e.g. language, culturally significant events, etc.); and
    - physical environment (remoteness and weather conditions).
- **Early engagement**, ideally during the planning and research phase and definitely prior to a referral being made to the Minister under the EPBC Act.
- **Effective engagement** - Information must be communicated in an accessible, linguistically and culturally appropriate, accurate and unbiased format such that people can understand and make informed decisions about proposed developments. People need adequate time to:
    - process the information, discuss (including in people's local language where necessary), consider a position, and express their views; and
    - identify likely impacts of proposals and potential measures to mitigate or manage negative impacts and maximise positive impacts (e.g. related agreements).
- **Local engagement and reporting back to communities** – It is critical that people are informed about how their advice has been considered and applied. It is also critical to communicate how, if the project proceeds, the social, cultural and economic impacts will be identified, managed, monitored and reported going forward and how communities can engage with that process. Aboriginal people should have a prominent role in determining the indicators of social, cultural and economic impacts to be monitored.

Currently, proponents rarely adopt these leading practice approaches, thus evidencing the need for additional legislative protections and sound guidance. Early engagement with affected Indigenous communities should be a pre-curser to any decision made by the Minister to approve a project. For example, under the *Aboriginal Heritage Act 2006* (Vic) for 'high impact activity', a proponent is unable to obtain other authorisations such as planning permits until a Cultural Heritage Management Plan has been completed and approved by Traditional Owners. This has the effect of mandating engagement with Traditional Owners at the front-end or pre-referral stage of the assessment process.

The NLC notes that guidelines were developed in 2016 to improve how proponents engage and consult Indigenous peoples during the environmental assessment process under the EPBC Act.[19] As a guideline, 'Engage Early' sets out the Department of Environment's expectations as they relate to Indigenous engagement but has no legal force. Indigenous peoples have unique rights and interests and should be considered as custodians of country, rather than simply another stakeholder group. As such, the NLC considers that requirements to engage and consult Indigenous peoples should be distinct from the public consultation/comment process and reflected in the EPBC Act itself rather than relegated to guidelines. This could be achieved by either including a separate section in the Act on Indigenous engagement principles and requirements, or by establishing specific and separate parallel requirements to the existing public consultation provisions. As a minimum, the EPBC Act should mandate that proponents identify and consult with relevant Indigenous people where the proposed action is likely to have a significant impact on Indigenous heritage values or 'Indigenous livelihoods' (refer to section **2.3**); is on Aboriginal land under the Land Rights Act; or will occur on an area that is, or could in the future be, subject to a native title claim or determination.

The NLC also views early engagement as an opportunity for proponents to negotiate a benefit-sharing regime, such that access to biological resources on Indigenous land would see benefits flow to Traditional Owners, such as employment opportunities or fee-for-service research activities. This would require amendments to Part 8A of the *EPBC Regulations* (2000) to extend beyond Commonwealth land and to also include non-commercial access to biological resources by project proponents.

It is crucial that this engagement with affected Indigenous people takes place at the pre-referral stage, prior to the project proponent investing large amounts of money in referral application fees and associated documentation. Schedule 2 of the EPBC Regulations should be strengthened to require proponents to identify relevant affected Indigenous people, to undertake consultations with Indigenous people on the basis of free, prior and informed consent during the planning and research phase, and document that genuine consultation took place as part of the proponent's referral documentation. Relevant provisions in the Act and Regulations should cross reference other State, Territory and Commonwealth land rights, native title and heritage legislation that requires proponents to consult with, and in some cases, gain the consent of, Traditional Owners in relation to a proposed action.

Moreover, the NLC is concerned that the minimum public consultation periods prescribed under the EPBC Act do not enable effective consultation with Indigenous people. For example, the Department publishes all referred actions on its website and these are available for public comment for a period of only 10 business days, or up to 20 business days for EIS/PER assessments. Timelines for public consultation must allow for factors such as cultural practices, weather and the logistics of consulting in remote areas, as well as for land councils to meet their obligations around consultations pursuant to the Land Rights and Native Title Acts. At

[19] Department of the Environment, Engage Early – guidance for proponents on best practice Indigenous engagement for environmental assessments under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) (Commonwealth of Australia, 2016).

present the public consultation period does not respect the fact that Indigenous peoples may need time to reach consensus. The NLC reiterates that the EPBC Act should provide for a separate requirement for consultation with Traditional Owners (through relevant land councils or representative bodies as appropriate), with extended timeframes in certain circumstances. While the proposed timelines may be adequate to comment on a relatively straight-forward project in an urban environment, they may be completely inadequate for a complex application for a project in a remote area with wide-ranging ecological, social, cultural and economic impacts.

3.2 Leveraging expertise from existing Indigenous representative bodies

The NLC has long-established, robust processes in place to consult with traditional Aboriginal owners and other interested Aboriginal groups under the Land Rights Act. The success of these consultations is underpinned by:

- identifying traditional Aboriginal owners and other interested Aboriginal groups in a proposed land use area;
- scheduling consultations that are respectful of time, location and relationships in and between clan groups;
- ensuring that proposals are comprehensive;
- enabling time for free, prior and informed consent to be given;
- ensuring proposed uses of land are reasonable, including use of traditional knowledge and relatedly, socio-economic benefits that may be derived from the project (i.e. education, employment and business outcomes);
- ongoing engagement throughout the life of the project; and
- provision of funding to effectively resource performance of relevant function(s).

The EPBC Act should draw on the expertise and processes of the NLC and similar bodies in supporting better engagement of Indigenous Australians in environment and heritage management. One of the ways the EPBC Act may facilitate this is through using Indigenous representative bodies as referral authorities during the environmental assessment process.

Referral authorities generally play an important role in assessing the integrity of project proposals under Commonwealth, State and Territory planning and environment legislation. For example, the Victorian planning permit process provides referral authorities with opportunities to have their views considered and incorporated into development, with a responsible authority required to give a copy of an application to every person or body that the planning scheme specifies as a referral authority for that kind of application.[20] The key purpose of the referral process is to give a person or body whose interests may be affected by a permit application the opportunity to provide advice to the responsible authority about whether a permit should be granted. Referrals are integral to the application process and avoid the need for referral

[20] *Planning and Environment Act 1987* (Vic) s 55.

authorities to establish their own separate land use and development assessment and approval processes.

The Act should refer proponents to the relevant land council or Indigenous representative body for all assessments at the commencement of the assessment process. This requirement should operate in tandem with clear information developed in close consultation with the land councils and other Indigenous representative groups to advise proponents of their obligations to effectively engage with Traditional Owners. Proponents should refer proposals to Indigenous representative bodies for comment before a decision is made, take this comment into account and issue a statement of reasons if it is not followed. In the event this does not occur, the Minister should be required to refer proposals to Indigenous representative bodies.

The NLC recommends an enhanced role of Indigenous representative bodies beyond land related processes by provision for:

1. Indigenous referral authorities where MNES trigger 'Indigenous livelihoods' may be affected;
2. Indigenous referral authorities for Indigenous heritage values of a national heritage place or world heritage property or other protected matter with Indigenous values; and
3. Funding required to perform 1 and 2 above.

Indigenous referral authorities should also be notified of proposed actions where there are relevant affected Indigenous peoples and communities living and residing in the proposed area.

4. Issues and concerns

4.1 Barriers to Indigenous land management

Indigenous land and sea management activities are hampered by a number of broad structural issues that, although not directly related to the operation of the Act, affect the extent to which its objects can be achieved and reduce its effectiveness. Given the broad terms of reference of the review, we raise these here.

The NLC is concerned that funding for Indigenous land and sea management projects continues to decline, significantly reducing the outcomes that can be achieved. While funding for employment has been secured for a number of groups across the NLC region, funding for the establishment of new ranger groups does not meet the demand and several 'gaps in the landscape' remain. In addition, adequate levels of funding for remote ranger program infrastructure (such as coordinator housing, ranger compounds and offices) and operational funding continues to remain a serious issue affecting the ongoing sustainability of these programs.

The CSIRO, for example, concluded that 'the majority of Indigenous land and sea management groups remain extremely fragile, under-resourced and reliant on a multitude of small, tied grant funding sources that only fund project costs, rather than wages or management and

infrastructure costs'.[21] The recent announcement of seven-year funding for Indigenous ranger programs was very welcome and long overdue. However, the funding levels will not be increased beyond CPI, so are insufficient to address the issues outlined above and provide stability and sustainability for the ranger groups.

There is vast opportunity for expansion of Indigenous land and sea management activities to better achieve the objectives of the Act. If the Government is serious about protecting Australia's natural and cultural environment and promoting sustainable development, as well as Closing the Gap on Indigenous disadvantage, funding for these programs should be substantially increased and core funding assured. It should be noted that in addition to improved conservation and biosecurity outcomes, Indigenous ranger groups provide numerous, independently documented benefits for their communities in terms of employment and career pathways, health and wellbeing, and economic development. Long-term core funding is also required for Indigenous Protected Areas, which are a critical component of Australia's National Reserve System, but without secure funding the significant values of these areas are at risk.

The NLC makes the following recommendations to support achievement of the objects of the EPBC Act with respect to Indigenous land management practices:

- Incorporate the utilisation of Indigenous land and sea management practices as conditions of the approval of projects. Conditions on approvals are flexible and could readily incentivise proponents to invest in ranger projects or build partnerships with Traditional Owners.
- Increase government funding for Indigenous land and sea management practices (this could be done through different government portfolios given that these practices generate multiple benefits beyond the environment, such as improved health, employment, business opportunities, and education);
- Increase opportunities to leverage funding from outside government in the corporate and philanthropic sectors, for example investment in Indigenous carbon abatement programs; and
- Support hybrid economy approaches, such as incentives for government-funded Indigenous rangers undertaking multiyear fee-for-service contracts.[22]

To ensure the effectiveness of all programs under the EPBC Act, funding also needs to be allocated for monitoring, evaluation, review and compliance activities. Currently, responsibility for this work is unclear. For example, there has been extensive independent social and economic analysis of working on country programs, but no formal framework through which programs can be reviewed. The NLC recommends establishing a monitoring and evaluation framework for the Act, including clearly assigned responsibilities and

[21] See, eg, Hill, R., P.L. Pert, J. Davies, C.J. Robinson, F. Walsh, and F. Falco-Mammone (2013*) Indigenous Land Management in Australia: Extent, scope, diversity, barriers and success factors* (Cairns: CSIRO Ecosystem Sciences) 55.
[22] Ibid, 3.

resourcing arrangements. Where work is being undertaken in association with development activities, proponents should cover these costs.

The NLC believes the movement of the Indigenous Protected Areas program from the Environment portfolio to the NIAA has been a failure. IPAs are first and foremost a conservation initiative and a pillar of the National Reserve System, and as such should be held within the Ministerial portfolio responsible for that system. The mainstream recognition accorded to IPAs as part of the environment portfolio empowered Traditional Owners, who drew authority and dignity from their involvement in a mainstream initiative. The shift out of the portfolio can be perceived by Traditional Owners as reducing the importance of IPAs to little more than a welfare delivery mechanism, thus risking the integrity of the program. Furthermore, removing IPAs from the context of the environment portfolio makes it harder to integrate their work with other aspects of national environmental management such as feral animal management, fire and weed control, threatened species management, environmental research and carbon abatement initiatives.

The NLC also supports Indigenous ranger programs being funded and managed as a mainstream core employment sector (similar to education or health services), rather than as a fringe program dependent on grant funding.

Finally, a barrier that is rarely acknowledged is that effective Indigenous land management requires the presence of people on country, together with the necessary infrastructure (such as roads, power and water, telecommunications and housing) to support that presence. Yet successive governments have implemented policies that actively discourage Indigenous people from remaining on their traditional homelands. The NLC recommends that 'People on Country' be recognised as a fundamental principle in the natural resource management of Australia.

4.2 Compliance

The NLC sees lack of compliance as a critical issue undermining the effectiveness of the Act, with the Act poorly enforced or not enforced at all. For example, compliance audits are undertaken to review compliance with conditions attached to approvals and identify any non-compliances. However, the number of compliance audits undertaken by the Department is very low, with four undertaken in 2015, 12 in 2017 and only three in 2019,[23] and only four infringement notices issued since June 2015.[24] This strongly indicates that compliance and enforcement of projects that have been deemed of national environmental significance are not being effectively monitored, thus potentially leading to deleterious environmental impacts.

In the current regime, compliance conditions for projects often take the form of monitoring programs, yet these are not linked to any desired outcome or objective. This should be

[23] Department of Agriculture, Water and the Environment, EPBC Act Publications and Resources, 'Compliance and Enforcement' (accessed 16 April 2020) <https://www.environment.gov.au/epbc/publications#compliance>.
[24] Department of Agriculture, Water and the Environment, Infringement Notice Register (accessed 16 April 2020) <https://www.environment.gov.au/epbc/compliance-and-enforcement/infringement-notice-register>.

addressed as a priority. Compliance conditions should align with regional strategic plans; include clear, beneficial objectives and outcomes for biodiversity; and be monitored against those outcomes and objectives. There should also be public access to compliance conditions and reports.

As noted in section 2.5 of this submission, wherever possible monitoring of environmental compliance should be carried out by Traditional Owners and Indigenous rangers on a fee-for-service basis. As per the data cited above, the need for enhanced monitoring of environmental compliance is clear.

Further, there is little or no accountability for proponents when they damage country. For example, defunct mining company Western Desert Resources was fined just $7,500 after constructing a 165km road through a remote area of the Northern Territory to the Gulf of Carpentaria, without Commonwealth approval.[25] Legislated requirements for remediation are needed urgently.

There are provisions under the Act by which Indigenous rangers may be granted compliance powers as honorary conservation officers; however, these are not currently enabled. The NLC recommends these powers be enabled immediately.

4.3 Protections for Indigenous culture and knowledge

It is important to recognise the sustainable use of natural resources remains an important component of the economy for many Indigenous people, and represents an avenue where Indigenous people could be more engaged in the broader economy. The EPBC Act should ensure that Indigenous people are supported to continue to utilise Australia's native plant and animal species, and that they benefit when Indigenous knowledge is used by others for commercial benefit.

As outlined throughout this submission (and recognised in the objects of the Act), Indigenous knowledge can and does make significant contributions to conservation and land management, including in addressing major threats and risks. Yet this knowledge is itself at risk. Protection of Indigenous knowledge through its appropriate documentation and incorporation into land management practices, with the consent of the owners of that knowledge, should be an urgent priority.

While the NLC strongly supports moves to incorporate Indigenous knowledge, values and engagement throughout implementation of the Act, it is essential that this be supported by rigorous protocols, including for data management, publication and intellectual property, to ensure the protection of Indigenous culture, knowledge, rights and interests.

[25] Daniel Fitzgerald, Controversial mining haul road leading to trespass and cattle stealing, Northern Territory stations owner says (ABC News, 8 April 2016) <https://www.abc.net.au/news/rural/2016-04-08/lorella-springs-disappointed-at-western-desert-haul-road-fine/7306526>.

5. Specific comments on the Act

5.1 Legislative intent

In 2018–19, 60 per cent of EPBC Act project decisions were made within statutory timeframes (a total of 2,161 decisions made, of which 861 were late), with similar figures for the previous year. The NLC understands that delays typically occur with high workloads and when working with project proponents to obtain additional information and reach acceptable environmental assessment outcomes.[26] This indicates that delays occur because the assessment process is flawed. A key issue is that projects deemed unacceptable at the commencement of the assessment process continue to form part of the Department's workload. Clearer and more accessible resources about the Act, in particular pre-referral requirements, should be available to ensure proponents submit project proposals that can either be refused or progress through the process without significant delays.

The NLC understands that the Department did not refuse any proposed actions referred to it under the Act in 2018/19. This indicates that only the most egregious approvals would fall foul of the Act. The EPBC Act incorporates too many opportunities for proponents to vary or tweak their applications and this process is designed to ultimately lead to projects being approved. Indeed, the EPBC Act can be considered as legislation which provides the conditions of approval rather than refusing proposals that carry unacceptable risks. Since the imposition of the Act in 1999, only 11 referrals (out of 6,403 referrals received) have not been approved by the Department.[27] Rather than incorporating cumbersome provisions aimed at reaching acceptable outcomes, projects that are clearly unacceptable, or that will have a significant impact on a MNES, should be rejected by the Department of Environment and Energy at the outset and not remain part of its ongoing workload.

The strategic regional approach proposed in this submission will also lead to a more streamlined process and enable timelines to be met more readily.

5.2 Essential components

The NLC regards the following as essential components of a robust environmental protection framework, and strongly recommends they be incorporated in the report of the independent review:

- *Stand-alone environmental assessment*: Having the Minister for the Environment (or the head of an independent statutory body) as decision-maker ensures that the level of scrutiny depends on the environmental significance of a proposal. Decisions must be guided by standards included in the legislation, guidelines or policy, rather than being at the discretion of the decision-maker.

[26] Department of the Environment and Energy, *Annual Report 2018-19* (October 2019).
[27] Department of Environment and Energy, *Annual Report 2018-19*, Appendix 4A<https://www.transparency.gov.au/annual-reports/department-environment-and-energy/reporting-year/2018-2019-57>.

- *Transparency*: The Act should contain substantive provisions relating to mandatory publication of reasons for key decisions or actions, key documents, and information obtained during assessment processes.

- *Access to justice*: Decisions under the EPBC Act should be subject to merits review, which 'will exist in any mature and robust regulatory system'.[28]

  Protection of the environment is inextricably linked to the public interest and this should be reflected in standing. The NLC therefore supports open standing for judicial review and broad standing for merits review, but at a minimum standing must be provided for impacted Indigenous people and Indigenous representative bodies, in order to support the rights of Indigenous people and mitigate risk. Communities have a strong, legitimate interest in ensuring that decision-makers are held to account, and that proponents are complying with development approvals.

- *Public participation*: Provisions for community consultation should be included across the Act, including at all key points in the EIA process. (For Indigenous people, this should be in line with recommendations covered elsewhere in this submission.) Proponents should be required to formally respond to and address concerns raised in submissions or during consultation processes with Indigenous people.

5.3 Broadening the scope of 'significant impact'

The addition of a new MNES relating to Indigenous livelihoods, in line with our recommendation above, will require new significant impact guidelines incorporating social and cultural impacts. Further, the NLC also recommends that across all MNES guidelines, the definition of significant impact be more clearly defined, less subjective, and inclusive of social and cultural impacts. Under the EPBC Act, an action requires approval from the Minister if the action has, will have, or is likely to have, a significant impact on a matter of national environmental significance.

The significant impact guidelines outline a 'self-assessment' process, including detailed criteria, to assist persons in deciding whether or not referral may be required. They provide that:

> A 'significant impact' is an impact which is important, notable, or of consequence, having regard to its context or intensity. Whether or not an action is likely to have a significant impact depends upon the sensitivity, value, and quality of the environment which is impacted, and upon the intensity, duration, magnitude and geographic extent of the impacts.

[28] Scientific Inquiry into Hydraulic Fracturing in the Northern Territory (2018), *Final Report*.

Most of these impacts refer to environmental impacts and do not adequately reflect the objects of the EPBC Act in relation to assessing impacts on economic, social and cultural values. For example, these may include consideration of:

- impacts to areas or sites of cultural significance;
- impacts to use and occupancy in the impacted region;
- impacts to transmission of culture and history; and
- community views on likely impacts.

The NLC strongly advocates for the integration of cultural, environmental, and social impact assessments to be conducted as an integrated process.

The Convention on Biological Diversity (CBD) requires an EIA of proposed projects that are likely to have significant adverse effects on biological diversity. Guidelines have been developed by the working group established under Article 8(j) of the CBD to implement the commitments and enhance the role and involvement of Indigenous peoples and local communities in the achievement of the objectives of the Convention.[29]

The guidelines define a cultural impact assessment as 'a process of evaluating the likely impacts of a proposed development on the way of life of a particular group or community of people, with full involvement of this group or community of people and possibly undertaken by this group or community of people'. In this way, a cultural impact assessment will generally address the impacts a proposed development may have on the values, belief systems, customary laws, language(s), customs, economy, relationships with the local environment and particular species, and traditions of the affected community.[30]

In determining the scope of a cultural impact assessment, the following should be considered:

(a) possible impacts on continued customary use of biological resources;
(b) possible impacts on the respect, preservation, protection and maintenance of traditional knowledge, innovations and practices;
(c) protocols;
(d) possible impacts on sacred sites and associated ritual or ceremonial activities;
(e) respect for the need for cultural privacy; and
(f) possible impacts on the exercise of customary laws.

The direct impacts of the development proposal on local biodiversity at the ecosystem, species and genetic levels should be assessed, particularly in terms of those components of biological diversity that affected Indigenous communities rely on for their livelihood, wellbeing, and other needs. Indirect impacts should be carefully assessed and monitored over the long term.

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[29] Secretariat of the Convention on Biological Diversity, Akwé: Kon *Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities* (2004) <https://www.cbd.int/traditional/guidelines.shtml>.
[30] Ibid.

The spatial and temporal scope of assessing whether a significant impact is likely should be expanded to incorporate the views of Traditional Owners. For example, an impact may be deemed insignificant by a project proponent if it may result in the exposure of a sacred site as opposed to direct physical interference with a sacred site. However, the exposure of the site may be just as, if not more, significant to the local community.

5.4 Delegating EIAs to States and Territories

Under the standards-based model presented as an option in the Discussion Paper, the NLC envisages that the Commonwealth Government would set national environment protection matters and relevant standards, with assessments to be carried out by individual States and Territories. The NLC is mindful of the *Water Act 2007* (Cth) whereby the Commonwealth Government is responsible for Basin-wide planning and management and the Basin States remain responsible for managing water resources within their own jurisdictions. To that end, the NLC notes that many stakeholders commenting on the review of the Water Act maintain that 'the arrangements are overly complex, difficult to understand, poorly coordinated and in some instances duplicative'.[31]

The NLC does not support any greater reliance on State and Territory processes to assess specific impacts on matters of national environment significance (MNES). We have significant concerns about the capacity and resourcing of the Northern Territory Government to address MNES. It would be grossly unacceptable for Northern Territory Government processes to be relied upon, at least until the new environmental regulatory framework has been operational and proven effective after being in place for a sufficient period of time. There needs to be stability, certainty and public trust in the new *Environment Protection Act 2019* (NT) before additional environmental regulatory responsibilities are delegated to the Northern Territory Government.

While the NLC supports the use of assessment bilateral agreements to streamline decision-making, we have numerous concerns about the existing Bilateral Agreement in place between the Commonwealth and Northern Territory Governments. Firstly, the objects of the agreement do not reflect the fact that 30 per cent of the population in the Northern Territory is Indigenous and not part of the decision-making process or signatory to the Bilateral Agreement. The objects should require Indigenous consultation; the use of Indigenous knowledge and assessments; support for affected Indigenous communities to undertake their own assessments; and ongoing co-design of environmental assessments and monitoring and compliance with Indigenous communities.

As noted by the Indigenous Advisory Council, the Agreement is significantly impaired by discretionary language. A striking example is that environmental impacts must be assessed 'to the greatest extent practicable'.[32] This is also evident is clause 7.1, which provides that the parties will (emphasis added):

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[31] *Report of the Independent Review of the Water Act 2007*, Commonwealth of Australia 2014.
[32] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 48A.

i. take all ***reasonable*** steps to obtain the views of Indigenous peoples in relation to any action under assessment that is likely to have a significant impact on any Matter of NES that relates to Indigenous cultural heritage or, that will occur on or directly affect land subject to native title rights and interests; and
ii. ***where appropriate***, treat the views of Indigenous peoples as the primary source of Information on the value of Indigenous cultural heritage.

Moreover, clause 7.3 provides that 'the advice of the relevant land council may be sought regarding the adequacy of any consultation carried out by a proponent with Indigenous people in relation to a proposed action'. One of the key functions of land councils is to 'consult with traditional Aboriginal owners of, and other Aboriginals interested in, Aboriginal land in the area of the land council with respect to any proposal relating to the use of that land'.[33] Therefore, proponents should always endeavour to seek the advice of the relevant land council for land use proposals on Aboriginal land. In addition, section 49A(c) of the EPBC Act requires the Minister to have 'considered the role and interests of Indigenous peoples' prior to entering into a bilateral agreement. This should be amended to require genuine consultation with Aboriginal people, including traditional owners of land and other interested Aboriginal groups. This should be undertaken in collaboration with the NLC and other relevant land councils.

The NLC also notes that the assessment bilateral agreement has not been reviewed in the five years it has been in operation, from 14 December 2014, in accordance with section 65(2) of the EPBC Act. Effective monitoring and compliance of bilateral agreements is crucial and, at present, such arrangements do not appear to be in place. The NLC calls for enhanced monitoring and compliance of bilateral agreements pursuant to Part 5 of the EPBC Act. Relying on individuals to contact the Commonwealth in relation to alleged contraventions of bilateral Agreements, as per section 57 of the EPBC Act, is wholly insufficient. The NLC appreciates that the Commonwealth Minister retains the authority to give final approval to projects assessed by the Northern Territory, however this process is not transparent and arguably lacks impartiality.

The NLC recommends that the Commonwealth retain its current responsibilities under the EPBC Act by not enabling States and Territories to have the final say on decisions relating to matters of national environmental significance via Approval Bilateral Agreements. These important decisions should rest with the Commonwealth. Existing bilateral agreements require stricter monitoring and compliance. The need to enhance monitoring of bilateral agreements is necessary in light of the inherent conflict of interest in cases where, for example, the Northern Territory Government is both the project proponent and charged with assessing project proposals.

The NLC is strongly opposed to broadening the accreditation of State and Territory processes under the EPBC Act by entering into approval bilateral agreements. However, if the review does recommend such a step, it is vital to put in place a range of minimum standards that States

[33] *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 23(c).

and Territories are required to meet before being accredited. With reference to the Northern Territory, the NLC proposes the following:

- The Northern Territory's new environmental protection legislation should be in place for a minimum of five years and its effectiveness proven by a process of independent review prior to any expansion of the Northern Territory's responsibilities under the EPBC Act.
- A comprehensive review and reform of the *Territory Parks and Wildlife Conservation Act 1976* (NT) should be undertaken, including ensuring appropriate protection of threatened species.
- The *Northern Territory Environment Protection Authority Act 2012* (NT) should be amended such that 1) at least one position on the NT EPA is reserved for a Northern Territory Aboriginal person nominated by the four land councils and 2) an Aboriginal Advisory Committee is established, with the NT EPA required to consider their advice when making recommendations to the Minister.
- The NT EPA should be independently resourced, with full control over its own staff.
- The Commonwealth should retain management of issues that cross State and Territory boundaries, including watersheds and threatening processes (e.g. weeds of national significance).
- Any conflict of interest must be avoided – for example, exclusion of the Northern Territory Government where they are the proponent or have a conflict of interest in a project.
- Decision-making must sit with an independent body or the Environment Minister.
- Minimum requirements must be in place for Aboriginal engagement and decision-making that includes Aboriginal values and is informed by Aboriginal knowledge.
- Regular monitoring and review of arrangements must be required, with expanded ability to suspend or cancel bilateral agreements in cases of non-compliance.
- Review of the existing Bilateral Assessment Agreement between the Commonwealth and the Northern Territory must be undertaken in consultation with Aboriginal Land Councils.

5.5 Joint management of Commonwealth reserves

For a long time in Australia, the creation of a reserve system has been seen as a major component for the protection of biodiversity. However, over time it has become increasingly apparent that simply designating an area as a reserve is insufficient to protect biodiversity. Even within very large reserves such as Kakadu National Park, there has been a continued decline in threatened species. Active management of the reserves is required, and in most cases this is best achieved through an understanding of Indigenous management practices and

implementation of similar management. The work done on using fire to improve habitat for the Partridge Pigeon in Kakadu is a notable example.[34]

Implementing Indigenous management and genuine joint management of reserves requires a shift in thinking by many of the people involved in conservation. Western land managers often perceive themselves to be separate from the environment, while Aboriginal people see themselves as part of it. The interconnectedness of utilising resources, carrying out cultural obligations and conservation needs to be appreciated and embraced.

In June 2019, the Australian National Audit Office (ANAO) undertook an assessment of the effectiveness of the Director of National Parks' management of Australia's six Commonwealth national parks.[35]

Relevantly, the report found that:

- The Director of National Parks has not established effective arrangements to plan, deliver and measure the impact of its operational activities within the national parks. The Director is therefore 'unable to adequately inform itself, joint managers and other stakeholders of the extent to which it is meeting its management objectives'; and
- Activities undertaken in the parks are not effectively measured, monitored and reported on. The Director's performance measures are not complete, and lack clear targets, baselines and descriptions of measurement methods.[36]

In each of the jointly managed parks, the ANAO was informed by Traditional Owners that 'they did not feel that they were fully participating as joint managers, thereby hindering the achievement of park management objectives'.[37] Key issues raised by Traditional Owners covered the following matters:

- deficiencies in communication, consultation, and the provision of information;
- lack of employment pathways and training for Aboriginal and Torres Strait Islander people to assist them to progress beyond entry level positions; and
- failure to implement park management plans, decisions of boards of management, and lease obligations.

Without effective joint management processes, Indigenous people are not actively involved in the management of their traditional lands, which has adverse impacts on cultural site protection, maintenance of traditional practices and the effective combining of traditional knowledge with contemporary western science.

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[34] Fraser, F., Lawson, V., Morrison, S., Christopherson, P., McGreggor, S., and Rawlinson, M. (2003). Fire management experiment for the declining Partridge Pigeon, Kakadu National Park. Ecological Management & Restoration 4, 94–102.

[35] Australian National Audit Office, Management of Commonwealth National Parks – Director of National Parks, Department of the Environment and Energy (Auditor-General Report No 49, 2018-19).

[36] Ibid.

[37] Ibid.

There is a pressing need for improved monitoring, oversight and review of joint management arrangements within Commonwealth Reserves. This could be reflected in the EPBC Act by requiring statutory review of joint management arrangements, with a recommendation for these to occur at least once every five years. This should occur together with expanding the function of the Indigenous Advisory Committee to support Traditional Owner members of joint management boards on an ongoing basis. The NLC considers that the establishment of an oversight committee is crucial to improving the joint management of Commonwealth Reserves, and in particular to enhance the decision making role of Indigenous people in the partnership.

In addition, the NLC raises concerns with section 379A of the EPBC Act, which gives the Director unfettered discretion to determine whether or not a person is a fit and proper person to be a member of the Board of Management. This decision should be made in conjunction with other members of the Board and according to strict criteria set out in the EPBC Regulations.[38]

5.5.1 Kakadu National Park

Eighteen Traditional Owner groups have country within Kakadu National Park, but the Kakadu Board is limited by the Act to only ten Traditional Owner positions. This can lead to groups not represented on the Board being left out of decision-making. To ensure the right people speak for country and to strengthen Aboriginal participation in line with the principle of free, prior and informed consent, the NLC supports a management structure that includes representation from all Traditional Owner groups. To this end, the Regulations need to be less prescriptive and embed more discretion to enable management boards to truly represent the interests of Traditional Owners on a reserve-by-reserve basis.

The Kakadu National Park Management Plan was developed in collaboration with Traditional Owners, and included extensive consultation across all Traditional Owner groups. It identifies environmental and cultural values and threats to those values, and sets out a detailed plan to protect values, manage threats and monitor effectiveness. This includes actions aimed at improving park governance, such as cross-cultural awareness training for all staff (including Aboriginal staff) and governance training for Board members. The Plan provides a robust framework for park management but is not always followed.

The Board has actively sought to increase Aboriginal employment in the park, including through the recognition of Aboriginal knowledge when assessing competencies, but these efforts have been restricted to some extent by the need to comply with Australian Public Service guidelines. Traditional Owners have expressed frustration with this, noting that it is hard for local Aboriginal people to rise beyond the lower levels of government employment.

Kakadu National Park attracts substantial interest each year from scientific researchers. Too often research is conducted with little Aboriginal participation and even less consideration of reporting findings back to Traditional Owners. Research is often ad hoc and disconnected. The

[38] See, eg, *Biosecurity Act 2015* (Cth) s 530 'Fit and proper person test'.

National Environmental Science program has offered a better model, with Traditional Owners driving research priorities and participating in the research through all stages, including taking a governance role through a research steering committee. The engagement of an Aboriginal research officer supports this work. While not yet fully realised, a strategic, Aboriginal-led approach to research could provide a solid grounding for evidence-based planning in the park and improve conservation and cultural heritage outcomes. This could be enabled via benefit-sharing agreements with proponents, discussed at section **3.1** above, requiring expansion of Part 8A of the Regulations to include non-commonwealth land and the use of biological resources for non-commercial purposes.

Based on the experiences of Kakadu, the NLC makes the following recommendations with regard to jointly managed Commonwealth reserves:

- Implement a joint management structure that recognises and incorporates traditional governance and decision-making, including:
    - amending the Act to provide for Traditional Owners to take a stronger decision-making role in jointly managed park Boards, including providing leadership and advice to the Director, where they choose to do so;
    - establishing independent secretariats for joint management Boards; and
    - introducing effective governance training that provides all Board members with the skills they need and includes two-ways learning.
- Implement compulsory cultural awareness training relevant to the local area for all staff of jointly managed parks and provide regular reports to the respective Boards of Management.
- Amend EPBC Act to require exemptions from certain requirements of the Australian Public Service guidelines to better support the employment and career progression of local Aboriginal people in national parks and other Commonwealth entities.
- Develop and implement an Aboriginal Employment and Development/Training Strategy that aims to achieve employment objectives of the Lease Agreements and provide regular reporting on progress to the Boards of Management.
- Resource jointly managed parks to develop and put in place effective management plans, with associated policies, processes and programs.
- Establish a formal process, linked to the Director of Parks' key performance indicators, whereby the Director must provide an annual report endorsed by the Board of Management to the Minister, detailing how Parks Australia is complying with the Management Plan and Board of Management decisions.
- Establish a research framework to support evidence-based planning (through coordinated research, effective engagement with Traditional Owners, integration of Aboriginal knowledge, and collation of data and information).

5.6 Environmental offsets

Environmental offsets must sit within a sound regulatory framework and hierarchy, be evidence-based and enduring, and be enforceable. To be effective, they must also be appropriate to the context of the region where they are being used.

As identified in the Northern Territory Government's draft offsets policy, the Northern Territory has unique characteristics that necessitate a different approach from that taken in the south of Australia. This includes 'relatively intact landscapes which mean that biodiversity loss cannot generally be averted in the Northern Territory by simply 'locking up' an offset area'[39] and instead require threat reduction at a broad landscape scale. There is opportunity for the EPBC Act and its offsets policy to better allow for such regional differences, recognising that the commonly used 'like for like' or 'equivalent value' approach may not be appropriate for northern regions or from an Indigenous perspective. When an 'equivalent value' approach is used, the values of Indigenous people and communities must be given equal weight to scientific values.

In the Northern Territory, protection of intact systems is likely to offer much greater 'bang for the buck' than restoration of degraded systems. Traditional Owners and Indigenous rangers, who have a deep and intimate understanding of their country, are ideally placed to take a leading role in the implementation of biodiversity offsets. They already undertake landscape-scale conservation and management, including under formal arrangements such as Indigenous Protected Areas, and have extensive knowledge and experience in management of threats such as fire, weeds and feral animals. There are untapped opportunities for offsetting to fund Aboriginal groups as a recognised workforce and industry to undertake identified activities, such as protecting the habitat of a species that may be affected by a development proposal.

The Northern Territory's unique land tenure arrangements – with around 50 per cent of the land held as Aboriginal freehold and most of the remainder made up of pastoral leases subject to native title – lend themselves to such a model, which is also in line with the strategic regional approach proposed throughout this submission.

Traditional Owners and rangers are also well placed to expand their workforce to contribute to a rigorous offset monitoring and compliance program. The marine mammal monitoring program undertaken in Darwin Harbour as part of the Inpex project's offset arrangements provides an example of this in practice – monitoring is undertaken as a partnership between the Northern Territory Government, Larrakia Traditional Owners, Kenbi rangers and an independent consultancy.

Participation in offset arrangements offers significant benefits for Aboriginal communities beyond reducing the environmental, social and cultural impacts of development activities. A well-designed offset framework will also support economic development in Aboriginal communities, provide employment, preserve traditional knowledge and generate other social benefits. This is recognised to some extent in the EPBC Act *Environmental Offsets Policy* which 'encourages' offsets that deliver social, economic and/or environmental co-benefits. The NLC recommends strengthening the policy to ensure offsets that benefit Indigenous communities are prioritised, for example by giving them additional weighting, or mandating a percentage of offsets from Indigenous providers. Where a development activity has direct impacts on an Indigenous community, application of offsets close to that community should be

[39] Northern Territory Government (2019), *Northern Territory Offsets Policy – Draft for consultation*.

a requirement, as should the engagement of local Indigenous businesses and/or employment if available.

In the Northern Territory, the involvement of Aboriginal people in the design and implementation of offsets is essential, given their rights and interests over land and resources, the disproportionate impact development projects have on Aboriginal people and their country, and their role as custodians and land managers.

It should be noted that Land Councils have legislated consultation obligations under the Land Rights and Native Title Acts. Where projects are being undertaken on Aboriginal freehold or native title land and are likely to involve offsetting of some impacts, discussion about these offsets should be conducted as part of land use agreement consultations. This goes to the reasonableness of a land use proposal, and could enable efficient resource allocation at the commencement of a project rather than costly remediation works being required at the project's completion.

There is also potential to draw on Indigenous knowledge to identify offset opportunities. The Indigenous carbon abatement industry has provided a great example of what can be achieved when traditional and western sciences come together, and may provide a model that can be utilised in other offset areas. The NLC recommends research is undertaken into how Indigenous knowledge could contribute to existing and potential new offset regimes.

Note that within this section we refer only to biodiversity offsets. The Indigenous Carbon Industry Network, of which the NLC is a member, calls for governments to consider carbon offset policy separately to biodiversity or other types of offsets. This is because carbon offsets already have a policy framework through the existing Commonwealth frameworks (Safeguard Mechanism thresholds under the *National Greenhouse and Energy Reporting Act 2007* and generation of Australian Carbon Credit Units (ACCUs) under the *Carbon Credits (Carbon Farming Initiative) Act 2011*).[40]

The EPBC Act *Environmental Offsets Policy* also allows for offsets to be considered for listed heritage values in some circumstances, noting that many types of heritage values are irreplaceable. The NLC's view is that offsets will generally not be appropriate in relation to impacts on listed Indigenous heritage values. If they are being considered, Indigenous stakeholders, including Traditional Owners, must lead decision-making and be the primary source of information on what offsetting activities are considered possible or appropriate.

5.7 Ecologically sustainable development

Ecologically sustainable development (ESD) is a long-standing and internationally recognised concept. In the context of the EPBC Act, it provides high level guidance to project proponents to assist with the development of their goals, objectives and principles. Indeed, annual reporting

[40] Indigenous Carbon Industry Network (2019) Northern Territory Parliament <https://parliament.nt.gov.au/__data/assets/pdf_file/0018/711081/94-2019-Submission-12-Indigenous-Carbon-Industry-Network.pdf>.

for Commonwealth entities must describe how the activities of, and the administration of, any legislation accorded with the principles of ESD (s 516A). Importantly, it stipulates that decision-making processes should integrate various considerations.

At present, section 3A(a) reads 'Decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations'. The NLC recommends the addition of cultural considerations to ensure the importance of Indigenous peoples' role in environment protection and biodiversity conservation. Without explicit reference to cultural considerations, decisions made under the EPBC Act will fail to give appropriate regard to traditional rights and interests and the invaluable land management role of Indigenous people, past, present and future.

In the NLC's view, equitable considerations are ambiguous and do not adequately recognise the vital role Indigenous Australians and their knowledge play in the conservation and sustainable use of Australia's environment and heritage. To this end, conditions on project approvals under the EPBC Act must, where possible, enable sustainable development that is compatible with Indigenous peoples' cultural characteristics and customary use of environmental resources (for example, Aboriginal carbon and fire management practices to offset greenhouse gas emissions).

With reference to the Discussion Paper question about the inclusion of cost benefit analysis in decision-making, any such mechanism would need to be planned in conjunction with Indigenous communities to ensure cost-benefit analyses fully reflect Indigenous values. It should be noted that many costs and benefits are difficult to quantify in a western economic sense, and in some cases it would not be culturally appropriate to do so, particularly with regard to cultural and/or spiritual service.

5.8 Objects of the EPBC Act

Subsections 3(d), (f) and (g) of the EPBC Act recognise Indigenous Australians as important contributors to environmental protection and biodiversity conservation. However, the language used arguably anticipates this role as being one of passive recipient rather than active participant. The language is also relative and not entirely clear. For example, 'to recognise the role of Indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity' provides unspecific guidance and does not reflect the reality that Indigenous peoples hold rights or interests over significant parts of Australia.

These interests are recognised in a number of ways, including communally held freehold or leasehold title under statutory land rights regimes, Aboriginal heritage sites, and exclusive and non-exclusive native title rights. The objectives should be strengthened to read 'to respect and provide for the leadership and stewardship role of traditional owners and other Indigenous people with rights or interests in the land, in the conservation and ecologically sustainable use of Australia's biodiversity'.

In addition, the NLC recommends the following amendments to the objects of the EPBC Act:

- To promote ***and provide for the culturally appropriate*** use of Indigenous peoples' knowledge of biodiversity with the involvement of, and in cooperation with, the owners of the knowledge; and
- To promote ***and provide for*** a co-operative approach between Indigenous people and the government, community and land-holders to the protection and management of the environment as it relates to Indigenous rights and interests.

5.9 Climate change

The final report of the first independent review into the EPBC Act recommended that:

> The act be amended to insert a requirement to consider cost-effective climate change mitigation opportunities as part of strategic assessments and bio-regional planning processes.[41]

The Government did not agree that this approach was 'the best way to address this issue'.[42] The NLC strongly recommends the current review consider whether the then Government's response is still reasonable in 2020. While climate change mitigation is largely addressed under other pieces of Commonwealth legislation, in the NLC's view the EPBC Act could incorporate climate adaptation and resilience opportunities over the life of a project. For example, an emerging concept of 'vulnerability assessment' could be included in the Act, as it requires an assessment of the impact of climate change on a project over time in order to determine its long-term viability and put in place measures to respond to emerging risks.

As stated in the 2016 State of the Environment Report:

> Climate change is an increasingly important and pervasive pressure on all aspects of the Australian environment. It is altering the structure and function of natural ecosystems, and affecting heritage, economic activity and human wellbeing. Climate change will result in location-specific vulnerabilities, and people who are socially and economically disadvantaged are most sensitive to climate change. Evidence shows that the impacts of climate change are increasing, and some of these impacts may be irreversible.[43]

Given that many of the NLC's constituents are located in remote areas of Australia and suffer significant social and economic disadvantage, climate change will result in Indigenous Australians being some of the most vulnerable people to the impacts of a changing environment. Indeed, this is already being seen.

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[41] Commonwealth of Australia, *The Australian Environment Act – Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (Final Report, October 2009).
[42] Department of Sustainability, Environment, Water, Population and Communities, Australian Government response to the independent review of the Environment Protection and Biodiversity Conservation Act 1999 (Commonwealth of Australia, 2011) 27.
[43] Jackson WJ, Argent RM, Bax NJ, Bui E, Clark GF, Coleman S, Cresswell ID, Emmerson KM, Evans K, Hibberd MF, Johnston EL, Keywood MD, Klekociuk A, Mackay R, Metcalfe D, Murphy H, Rankin A, Smith DC, Wienecke B (2016) *Australia State of the Environment 2016 Overview* (Australian Government Department of the Environment and Energy, Canberra).

Indigenous peoples' knowledge and views of their local environments are a key resource for adapting to climate change. For example, fire management plays a significant role in Indigenous culture. Early dry-seasons savanna burning by Indigenous peoples has reduced the damage that would have otherwise been caused by larger and more intense bushfires later in the season.

Case study: The Indigenous carbon economy

Savanna woodlands and grasslands cover about 1.9 million square kilometres, or about 23 per cent of the Australian continent.[44] The contribution of greenhouse gases due to hotter, more widespread fires in the savanna region of northern Australia is of global significance, representing about three per cent of Australia's total greenhouse gas emissions.

In the Northern Territory, savanna fires contribute about 35 per cent of the greenhouse gas footprint, making savanna carbon farming projects a particularly significant pathway for reducing the Northern Territory's total emissions.[45]

The Indigenous carbon industry emerged out of scientific research showing that significant savings could be made in carbon emissions by re-establishing traditional fire regimes in the landscape, which favor predominantly early dry season burning. These savings in emissions, when measured, could create carbon credits to offset the generation of greenhouse gas pollution by other industries.

Indigenous ranger groups are delivering benefits of global significance through savanna fire management across northern Australia. This in turn provides employment opportunities for Indigenous people in very remote areas where jobs are scarce; an opportunity to support access to country as well as intergenerational exchange of traditional knowledge; and an independent source of income for Indigenous land managers.

Over 1.2 million tons of greenhouse gas emissions were abated through fire management by Indigenous carbon industries in the 2017-2018 year alone, equivalent to around 10 per cent of Australia's total annual production of carbon credits, or 400,000 cars taken off the road for one year. Since 2012, the industry has abated 5,233,182 tonnes of greenhouse gas emissions, worth around $85 million in carbon credit production across north Australia.[46] About 68 per cent of production of Indigenous carbon credits occurs in the Northern Territory.[47]

[44] Department of Primary Industries and Regional Development (WA), Carbon Farming: Reducing emissions through savanna fire management (28 February 2020) <https://www.agric.wa.gov.au/climate-change/carbon-farming-reducing-emissions-through-savanna-fire-management>.
[45] Territory National Resource Management, *Carbon in the Northern Territory* (2016) <https://docs.wixstatic.com/ugd/da28f0_5bc40bcd562e4e8f9bd4cc7eb58f9008.pdf>
[46] Based on the current average ERF price of $16.14.
[47] Clean Energy Regulator, *Project and Contract Registers* (2020) <http://www.cleanenergyregulator.gov.au/ERF/project-and-contracts-registers>.

5.10 Indigenous representation on advisory committees

The proposal outlined in Section 2 of this submission is aimed at greater participation of Indigenous people in the implementation of the Act. Full participation of affected Indigenous people in all aspects of the operation of the Act will not be possible, however, and it is important that a national, high level Indigenous voice be enshrined in the Act.

At present the Indigenous Advisory Committee (IAC) is heavily constrained by vague terms of reference that allow it to provide strategic advice 'at the request of the Minister'. There is no requirement for the Minister to have regard to the committee's advice prior to making key decisions and it is unclear to what extent the extensive skills of the expert members of the committee are being utilised.

The IAC's role should be strengthened with the capacity to proactively provide advice on relevant matters, in particular support to joint management arrangements in Commonwealth parks and reserves, Indigenous heritage, biodiversity conservation, traditional knowledge and land and marine management.

Moreover, the IAC should be adequately resourced and supported to meet regularly. Summary minutes should be published on the Department's website, together with any advice provided to the Minister or the Department.

The first review of the EPBC Act recommended that formal links be established between the IAC and other statutory bodies. It would seem, however, that there remains little interaction between these groups. The NLC supports greater collaboration between the statutory bodies established under the Act.

Beyond the IAC, Indigenous representation should be required on all advisory committees.

It is important to note that Indigenous representation on high-level advisory committees must sit alongside Traditional Owner inclusion and oversight at a regionalised and local level.

6. Responses to questions in the Discussion Paper

The above sections have addressed major concerns with the EPBC Act and its implementation from the perspective of impacts on Aboriginal people in the Northern Territory, and in doing so have covered many of the questions raised in the Discussion Paper. This section will briefly respond to additional questions that are not included above but are of relevance to the NLC's constituents.

Q5. 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 NLC would support proactive mechanisms for landowners, particularly where they support the rights of Traditional Owners to undertake traditional practices, but would have some concerns if they were applied to all landholders. We would also be highly cautious about

removing the need for regulation. It is essential that if such mechanisms were introduced, they would include mandatory engagement with affected Indigenous communities and consideration of their rights, interests and values. There must also be protections for Indigenous culture, including for ongoing access and use. Such proactive mechanisms would be most effective if implemented as part of the strategic regional approach proposed in this submission, and if they provided for funding/pay-for-service for Indigenous land to be used for biodiversity conservation (for example, strengthening Indigenous Protected Areas).

Q8. Should the EPBC Act regulate environmental and heritage outcomes instead of managing prescriptive processes?

The NLC supports a focus on outcomes rather than prescriptive processes. Such a model must be based on a strong risk management framework and backed up by effective monitoring, evaluation and compliance regimes, with tough penalties in place for poor outcomes. The outcomes-based approach taken to occupational health and safety regulation in Australia's mining industry – which places responsibility for provision of a safe workplace on industry – may provide a useful model. It should be noted that more prescriptive regulations have been maintained in some areas, where stakeholders are not comfortable removing compliance requirements,[48] and this is also likely to be necessary in environmental regulation.

Q15. (a) Should low-risk projects receive automatic approval or be exempt in some way?

The NLC would be supportive of automatic approval for very low risk projects, where the consequences of any risk would be minor, on condition this was done within a robust framework that includes strong criteria and guidelines, public availability of all documentation with rights of appeal, and strong penalties for misinformation. Land councils and other Indigenous representative bodies should be involved with developing this framework.

The strategic regional approach proposed in this submission may also enable 'express' approvals for some projects, within rigorous criteria.

The NLC reiterates that consultation with Indigenous peoples needs to be strengthened under the EPBC Act. There is a risk that the introduction of automatic approvals or additional exemptions without having a framework in place for genuine consultation with Traditional Owners could lead to deleterious impacts on the environment, economy and Indigenous cultures and traditions.

Q15. (b) Should a national environmental database be developed? Should all data from environmental impact assessments be made publically available?

Notwithstanding the above comments on the first part of Q15, the NLC would support efforts to improve data and the development of a national database that would bring together information held by the various jurisdictions. There is currently little alignment, for example,

[48] Cliff, D (2012), *The Management of Occupational Health and Safety in the Australian Mining Industry*, International Mining for Development Centre.

between Commonwealth and State and Territory threatened species lists, and sometimes even clashes.

High level data should be publicly available and broadly accessible; however, protections are required for information at site-specific level. This includes ensuring culturally sensitive material is protected, as well as intellectual property and traditional knowledge belonging to Indigenous people. In addition, safeguards for ecological information must be in place to reduce the risk of this information being misused (for example, poaching of threatened species).

Q18. Are there adequate incentives to give the community confidence in self-regulation?

The NLC strongly opposes self-regulation without very strict processes and penalties being in place, which is not currently the case. We have recently seen the disastrous outcomes of self-regulation in sectors where the necessary safeguards are lacking. In 2019 alone, there were highly publicised national failures in the building industry and banking, while in the Northern Territory, the horrific death of a mine worker in the Bootu Creek mine collapse revealed major failings in self-reporting, compliance and enforcement.

Q26. Principles to guide future reform

The proposed principles provide a sound foundation to guide reform and strongly align with the model that we have proposed in this submission. The NLC makes the following comments, which we believe would further strengthen the principles, and better reflect what we understand to be the intent of the current review.

Making decisions simpler

The NLC recognises the need for legislative reform to provide clearer, more efficient processes and greater certainty. We also emphasise the importance of appropriate regulatory checks and balances that provide protections against the disproportionate risks faced by Indigenous people relating to development activities on their country. It is erroneous to take the position that regulation stifles investment; rather, the NLC sees a robust regulatory framework as an essential component of long-term, sustainable economic development and in the best interests of industry, government and the community. As such, we recommend removing the phrase 'reducing unnecessary regulatory burdens' and instead reframe this principle to reflect development of a modern, effective regulatory regime that incorporates necessary safeguards.

The NLC also wishes to emphasise that the majority of projects referred to the Department under the Act do not require assessment,[49] and therefore the majority of decisions are generally straight-forward. It is widely recognised that the EPBC Act has a very narrow focus and attempting to 'reduce regulatory burdens' at the expense of increased risks faced by local populations may do harm without much, if any, tangible benefits to project proponents.

[49] Department of Environment and Energy, *Annual Report 2018-19*, Appendix 4A<https://www.transparency.gov.au/annual-reports/department-environment-and-energy/reporting-year/2018-2019-57>.

Indigenous knowledge and experience

We are pleased to see the inclusion of the recognition of Indigenous people as a core principle for reform. We would like to see this expanded beyond 'managing' the environment, to encompass the participation of Indigenous people in all areas covered by the Act, in particular decision-making.

Community development

We recommend the inclusion of an additional principle for the use of a community development model in the implementation of ecologically sustainable development, including appropriate participation of all affected communities and free, prior and informed consent for Indigenous peoples.

Marion Scrymgour

Chief Executive Officer

April 2020