

SUBMISSION TO THE EPBC ACT REVIEW

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Name

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Organisation

Indigenous Advisory Committee (IAC)

Areas of interest

The objects of the Act; Threatened species; International obligations; Indigenous Australians; Heritage; Matters of National Environmental Significance; Environmental Impact Assessments; Great Barrier Reef; Cumulative impacts; Climate change; Compliance and enforcement; Decision making; Biodiversity; Conservation; Commonwealth National Parks; Water

Attachment provided?

Yes

Do you give permission for your submission to be published?

Yes – with my name and/or organisation

SUBMISSION RESPONSES

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

Independent review of the Environment Protection and Biodiversity Conservation Act 1999

Submission by the Indigenous Advisory Committee to Professor Graeme Samuel AC in response to the Independent review of the EPBC Act 1999.

May 2020

Duane Fraser (Chair), Teagan Goolmeer (Deputy Chair), Robbie Dalton, Chrissy Grant, Stan Lui, Dr Leah Talbot and Dr Stephen van Leeuwen (Members).

Executive Summary

Introduction

The Indigenous Advisory Committee (IAC) is a statutory committee established in 2000, under Section 505A of the *Environmental Protection and Biodiversity Conservation Act 1999* (Act). The function of the Committee (Section 505B) is to advise the Minister on the operation of the Act, taking into account the significance of Indigenous peoples' knowledge of the management of land and sea and, the conservation and sustainable use of biodiversity. The IAC provides advice as requested by the Minister, excluding where an existing statutory committee exists to provide such advice.

In its response to the second independent review of the EPBC Act, the IAC was asked to focus on the following questions;

- 1. Indigenous science and knowledge is not being effectively brought together with western science to inform environmental protection or management decisions under the EPBC Act. What settings could support better integration of Indigenous and western-scientific knowledge?*
- 2. Aboriginal and Torres Strait Islanders are not being adequately engaged throughout decision processes under the EPBC Act, nor is their advice being transparently considered. What settings could promote more effective engagement of Indigenous Australians in decisions, for example in environmental impact assessment or Commonwealth Parks management?*
- 3. The EPBC Act is not adequately protecting culturally important values of Aboriginal and Torres Strait Islander people, including both tangible and intangible cultural values. What settings are required to provide more effective protection? What models should the review look to?*
- 4. The current settings for the IAC in the EPBC Act are insufficient to advise the government on Indigenous views relating to environmental and heritage issues given they are often place-specific and local scale in nature. What settings should the Act include to support better involvement of Indigenous Australians at different scales?*

The IAC has structured its response to these questions across seven broad reform themes (Recommendations for Reform). In addition, the IAC would like to emphasis four key enablers across these themes which are required for genuine reform and to support Indigenous Australians in their sustainable use, management and protect on their Country. The focus should now be to work with Indigenous Australians in the co-design, co-management, and co-benefit for the betterment of all Australians. The four key enablers are:

- Whole of government and society cultural shift;
- Alignment to international best practice;
- Strong governance and genuine collaboration and participation; and
- Innovative and robust policy design to suit and strengthen legislation.

Recommendations for Reform

Recommendation 1 – Definitions and Objectives within the Act

- The definitions currently used in the Act for cultural and/or natural heritage values should also take into account the Indigenous perspective of heritage as a holistic concept and that Indigenous Australians connection and relationship; and their rights, responsibilities and obligations are so intrinsically intermingled that they cannot be separated as one from the other.
- The language of the Objectives should be strengthened to be clear and explicit.
- The Objectives of the Act should mandate participatory co-design with Indigenous Australians and their knowledge.

Recommendation 2 – Better Alignment to International Obligations and Domestic Legislation

- The United Nations Declaration on the Rights of Indigenous Peoples and the Universal Declaration on Human Rights should be incorporated and implemented in the revised Act.
- The Act should contain principles of Respect, Rights, Recognition and Reconciliation up front to bring society, governments, NGOs, developers and other proponents along on the path to building respect, recognition, and acknowledgement of Indigenous Australians with their present and future work associated with a number of, if not all, of the Conventions that address Matters of National Environmental Significance (MNES) in the Act.
- The Free, Prior and Informed Consent (FPIC) principles should be explicit as a distinct requirement for interactions with Indigenous Australians in the revised Act. Indigenous Australians' intellectual property rights of their traditional knowledge of biodiversity and ecosystems across all environments should also be addressed so that they are not disadvantaged in any manner through the processes and actions of the Act. This would also need to be cross-referenced to the appropriate Australian legislation for the protection of intellectual property.
- Minimum standards are considered for the revised Act and the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (ATSIHP) be revised to bring it up to align with contemporary best-practice standards.
- Amend the ATSIHP Act independently and separately from the EPBC Review to deliver contemporary legislation that permits Indigenous Australians to apply as a 'last resort' to a Minister for intervention.
- The Act should take primacy over the standards for environment protection in all jurisdictions and provide a mechanism through which Indigenous Australians can seek protection over the Indigenous Estate with mandated participatory co-design standards across all jurisdictions.
- A reformed Act could take a 'standards-setting' or coordination approach, relying on endorsed jurisdictional processes to address specific impacts on MNES. When it comes to assessments and approvals bilateral agreements give state and territory governments the responsibility for undertaking environmental assessments and/or approvals.
- The Act has clear linkages between the preservation of Indigenous values (natural and cultural) and Native Title rights (determined and non-determined), with an underling support mechanism to assist in capacity building for Prescribed Body Corporates and Native Title holders to participate in the Act.

Recommendation 3 – Matters of National Environmental Significance

- The Act protects and manages Indigenous heritage values (which would include tangible and intangible cultural heritage values as well as natural values which have been separated from Indigenous values). Establishing a set of minimum standards consistent and in-line with the operations of jurisdictional Indigenous heritage legislation would further enhance the protection and management of those Indigenous heritage values.
- Underlying support mechanisms are developed with proper mandated processes for consultation, negotiation or engagement with Indigenous Australians in the Act; to safeguard consultation on matters of national significance as a legislative requirement rather than an administrative arrangement.
- The Act is amended to recognise place-based Culturally Significant Species as MNES.
- Subsequent listing of Culturally Significant Species should not impinge on any cultural practice of that species, including traditional take, sustainable use and other customary activities.
- The Act is amended to recognise Culturally Significant Sites as MNES.
- Subsequent listing of a site should not impinge on any cultural practice of that place or the customary activities of Indigenous Australians.

- The Act needs to make it clear that places like songlines or trade routes which are linked by a theme, or intangible heritage are eligible, as a group, for serial listing on the National Heritage List.
- The Act should mandate the integration of Indigenous Knowledge into all landscape-based management, protection, and planning mechanisms.
- The Act should be amended to allow for the entirety of a cultural site to be listed in future declaration of National Heritage or World Heritage properties.
- Indigenous Protected Areas (IPAs) to be listed as a MNES.
- The Act should support an on-Country classification system for the Indigenous Estate to enable Indigenous Australians to better participate in conservation and sustainable use.
- There is a need for innovative and forward-thinking legislative and policy design regarding both land and sea Country tenure.
- A robust legislative mechanism needs to be developed to secure Indigenous access to water, that will sustain and enhance Indigenous Knowledge, including: water rights for Indigenous Australians, laws to increase influence over water landscapes and effective inclusion of Indigenous Australians in water governance.
- Legislation should be developed that strengthens management agreements to recognise a range of cultural flows regimes, and which can become the platform for negotiations of water rights, and co-management of biodiversity conservation outcomes.

Recommendation 4 – Role and Function of Indigenous Advisory Committee

- An appropriate budget must be provided to the IAC to enable it to meet increased business demands and conduct its statutory functions in accordance with the Act. Decisions around budget priorities and allocation, in line with departmental finance guidelines and with coordination from the IAC Secretariat, are made by the IAC Chair.
- A review be undertaken to assess the proposed function of the IAC and comparative remuneration of other Commonwealth statutory Indigenous Advisory Bodies.
- The Remuneration Tribunal determination on the allowances and remuneration entitlements of the IAC should be increased accordingly.
- A guaranteed budget be provided to the IAC to meet its increased workload and conduct its statutory functions in accordance with the Act.
- Decisions around budget priorities and allocation, in line with departmental finance guidelines and in coordination with the IAC Secretariat, are made by the Committee Chair.
- IAC Chair and Members undergo appropriate level security clearance, adequate to the level of Ministerial briefings.
- The IAC is the authority responsible for the listing of Culturally Significant Species and/or sites.
- The IAC be given specific responsibilities for the assessment and declaration of new IPAs - as it relates to the National Reserve System (see Recommendation 3: Matters of National Environmental Significance).
- The IAC be given specific responsibilities for assessing and classifying IPAs under new suggested IPA guidelines (see Recommendation 3: Matters of National Environmental Significance).
- Linkages between the Department's statutory committees (IAC, Threatened Species Scientific Committee (TSSC) and the Australian Heritage Council (AHC)) be clearly articulated and embedded in the Act.
- The Act should safeguard Indigenous rights and interest in Ministerial decision processes through the amendment of Section 93 to mandate engagement with Prescribed Body Corporates (PBC) and/or Native Title Representative Bodies (NTRB) for referrals, consultations, advice and decisions under the Act.

Recommendation 5 – Improving Governance Structures

- The Act should safeguard and strengthen cultural governance and potential shared governance in its administration.
- The Act should mandate Indigenous and government partners to move toward more equitable and mutually-beneficially arrangements for genuine shared governance in all EPBC decision making processes.
- The Act should allow appropriate timeframes for effective Indigenous governance to be undertaken in all issues relating to MNES.

- Appropriate Indigenous Australian representation be mandated on all assessment, nomination, and approval processes for MNES.
- Appropriate Indigenous Australian representation be mandated on all statutory committees/sub-committees, at a minimum one male and one female representative.
- Amendments to the Act must mandate a change to how the Department performs its business and consequently direct that the Department significantly increases Indigenous representation on decision making and advisory instruments of the Act.
- The Act support the development of a National Indigenous-led strategic voice for the environment and heritage.
- Mandated participation with Indigenous Australians should be at both place-based and scale-based as directed by local Indigenous people.

Recommendation 6 – Management of the Indigenous Estate

- The Act should mandate the participation of Indigenous Australians and incorporation of Indigenous Knowledge into all business and operational practices of the Department.
- Indigenous Knowledge must be obtained from Elders or Indigenous representatives with the cultural authority to speak for Country and in-line with the FPIC principals.
- Protocols flowing from administrative and regulatory instruments created through the Act should mandate the incorporation of Indigenous Knowledge into all land, species and ecosystem planning and management documents.
- The Act should mandate the integration of Indigenous Knowledge in management plans for all protected areas.
- The Act needs to consider the wider aspirations of Indigenous Australians including in contemporary land management practices and knowledge such as sustainable farming, renewable energy, and other economical enterprises.
- Amendments made to the Act ensure that participatory co-design frameworks are mandate for all policy and business practices that impact on the Rights of Indigenous Australian.
- Amendments should ensure Indigenous Australian participate in all activities from policy design to on-ground actions that impact on cultural and natural heritage values of Indigenous Australian, especially in respect to the Indigenous Estate.
- Amendments should support and empower the drive to Indigenous-led frameworks where they protect and promote the rights and approaches of Indigenous Australian.
- Amendments need to support capacity building in the non-Indigenous community to confer a greater understanding of the nuances of working with Indigenous Australians.

Recommendation 7 – Policy and Program Design

- The Act needs to mandate the participation of Indigenous Australians in business processes to condition and design offset regimes and their on-ground delivery programs.
- The Act needs to adequately provide for the interests and participation of Indigenous Australians in the business processes to assess and give or withhold consent to a proposed development.
- Approval and regulatory processes under the Act must in part create benefits for Indigenous Australian landowners by better protecting land and sea through the delivery of high-quality offset programs that can support enterprise development opportunities for Indigenous communities.
- The Act needs to mandate the participation of Indigenous Australians in departmental business practices and operational processes such as selection panels and assessment processes, for example the appointment of Indigenous representative(s) to the National Environmental Science Program (NESP) 2 Expert Assessment Panel.
- The Act needs to mandate targets and measures to ensure the equitable participation of Indigenous Australians in conservation and representation of the Indigenous Estate in funding allocations.
- The Act needs to mandate the participation of Indigenous Australians in departmental policy and program design.
- The Act needs to mandate Indigenous based criteria in all assessment and approvals processes.
- The Act be amended to recognise climate change as a key threatening process for MNES.
- The Act mandates the involvement of Indigenous Australians in the development of policy, business practices and mitigation strategies that aim to mitigate impacts.

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Introduction

There is a clear need to strengthen the *Environmental Protection and Biodiversity Conservation Act 1999* - EPBC Act (Act) to protect Indigenous Knowledge explicitly and to recognise the role of the Indigenous Estate and 'people on Country' as a fundamental principle of biodiversity and heritage conservation. Although, it is also important to note that changes to legislation alone may not guarantee greater consideration of Indigenous interests. Therefore, we need to also consider how we can build greater accountability for the integration of Indigenous interests into policy decisions, management planning and reporting.

The scale of change requires an all of government and society cultural shift, to achieve true recognition of the enduring rights and interests of Indigenous Australians to Country. Much has changed in Australia in recent times with a deepening respect and understanding of Indigenous Australians, their culture, and the role they play in conservation and land/sea management, however the supporting legislation is lagging behind. The Indigenous Advisory Committee (IAC) believes in order to shift current perception of the value of Indigenous Australians and their Estate in conservation management and sustainable use, we need to start with formal recognition through legislative mechanisms.

Indigenous Australian are increasingly participating in international mechanisms for biodiversity and heritage conservation. However, amongst Indigenous Australians there is a growing frustration with the lack of recognition of these international obligations in domestic legislation and policy, this is underpinned by the lack of support for Indigenous Australians to meet their cultural obligations. Therefore, the IAC is recommending statutory requirements as cross-enablers for Indigenous participation using the following best practice principles:

- Free, Prior and Informed Consent (FPIC);
- Compliance with IP Australia and the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits; and
- Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) Code of Ethics.

We can only continue to move forward and in so doing close the gap and enable self-determination, if we understand and support the need for meaningful participation of Indigenous Australians and strong governance mechanisms to support such engagement. Thus, the IAC not only recommends the mandating of participation of Indigenous Australians, it also emphasises the need to build the authority and function of the IAC, to ensure its advice is hardwired into decision-making processes within the Act.

Finally, it is fundamental to ensure all current and future policy and programs support the amended legislation. Without innovative and robust policy and program design, that both reflects legislation and meets the needs of Indigenous Australians who own and manage the vast and rapidly growing Indigenous Estate, change through this process will be superficial at best. To strengthen current success in Indigenous biodiversity conservation and sustainable use, government policy and legislation needs to support Indigenous leadership and governance, and support Indigenous-driven planning, as intended in international frameworks.

Systemic change of the scale provided by this review, also presents an opportunity to rethink how we measure and report on biodiversity and heritage outcomes and consequentially, how

governments and other bodies identify impact measurements and criteria, as proposed through Indigenous designed matrix and determinants. Importantly, recent studies are advocating for evaluating success based both on biodiversity and cultural wellbeing indicators otherwise known as biocultural indicators. Further, there is a clear argument for national targets with place-based actions or indicators.

The IAC has focussed this submission around matters relevant to its functions. We have divided our submission into seven main themes with sub-sections.

Suggestions for Reform

1 Definitions and Objectives within the Act

1.1 Revise Definitions of Key Terms

The IAC proposes that there should be clear definitions within the revised Act, that are easily understood for Indigenous tangible and intangible, cultural and natural heritage and natural resources, to assist all stakeholders when referring to the Act.

1.1.1 Tangible and Intangible

Tangible Cultural Heritage is defined by the United Nations Educational, Scientific and Cultural Organization (UNESCO) with cultural and natural heritage as separate entities. Cultural heritage is defined as monuments, groups of buildings and sites which encompasses historical, aesthetic, ethnological or anthropological point of view.

Intangible Cultural Heritage is defined by UNESCO as traditions or living expressions inherited from our ancestors and passed on to our descendants, such as oral traditions, performing arts, social practices, rituals, festive events, knowledge and practices concerning nature and the universe or the knowledge and skills to produce traditional crafts. It is traditional, contemporary, and living at the same time; inclusive; representative; and community based.

Therefore, IAC strongly recommends that the definitions currently used in the Act for cultural and/or natural heritage values should also take into account the Indigenous perspective of heritage as a holistic concept and that Indigenous Australians' connection and relationship; and their responsibilities and obligations are so intrinsically intermingled that they cannot be separated as one from the other.

1.1.2 Cultural and Natural heritage

While Australia is not a Party to the *Convention for the Safeguarding of the Intangible Cultural Heritage*, for Indigenous Australians intangible heritage is regarded as their cultural heritage. Indigenous Australians do not separate tangible from intangible. So, when it comes to identifying cultural values, Indigenous Australians consider that both their tangible and intangible heritage values are as one.

“If you are looking across the landscape and there is a particular heritage site or place in the landscape, that’s a tangible thing. But associated with that site might be stories, song, dance, and they are all part of our Australian Indigenous cultural heritage. “If there were two sites in the landscape and there was a songline that went from one side to the other, and that was disrupted in some way with a gas pipe line or some other development, our cultural heritage values is most likely damaged or destroyed or even destructed. Even

though it's an intangible thing - you can't see that songline, it is an important part of the Indigenous heritage values across the landscape.”¹

The Act in Subdivision A – World Heritage, Section 12(4) simply defines **cultural heritage and natural heritage** as the meaning given by the World Heritage Convention listed below. There is no definition under Subdivision AA – National Heritage provided in the Act. We consider the following robust definitions are missing from the Act:

Cultural heritage is the indicators of the ways of living that a community develops, which are inherited from previous generations. It includes artwork, buildings, books, objects, songs, folklore, and oral history. Cultural heritage provides both tangible and intangible representations of the values, beliefs, traditions and lifestyles of prior generations. Though it comes from the past, cultural heritage is preserved in the present and valued by present generations. UNESCO has categorised cultural heritage as; **tangible** (*movable, immovable and underwater cultural heritage*); and, **intangible** (*the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage*). This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity.

Natural heritage is defined as natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view; geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation; and natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.

Recommendation 1.1

The IAC recommends that:

- The definitions currently used in the Act for cultural and/or natural heritage values should also take into account the Indigenous perspective of heritage as a holistic concept and that Indigenous Australians connection and relationship; and their rights, responsibilities and obligations are so intrinsically intermingled that they cannot be separated as one from the other.

¹ “Heritage Is Everybody’s Business,” Australian Institute of Aboriginal and Torres Strait Islander Studies, June 3, 2015, <https://aiatsis.gov.au/explore/articles/heritage-everybodys-business>.

1.2 Redefine Objectives of Act

Meaningful engagement with Indigenous Australians needs to occur thorough many facets of the Act from Ministerial decisions to on-ground conservation and sustainable use actions. While, the objectives of the Act require consideration of the “role and interests of Indigenous people in promoting conservation and ecologically sustainable use of natural resources” the language is not explicit in the need to engage with Indigenous Australians, consequentially Indigenous rights, responsibilities, interests and aspirations are not always considered. Therefore, the IAC recommends the following changes to the objectives of the Act.

Objects of Act

- (1) The objects of this Act are:
 - (d) to **mandate** a co-operative approach to the protection and management of the environment involving governments, the community, land-holders and indigenous peoples; and
 - (f) to **support** and **promote** the role of indigenous people in **biodiversity** and **cultural heritage** conservation and ecologically sustainable use; and
 - (g) to **mandate** the use of indigenous peoples’ knowledge of **biodiversity** and **cultural heritage led by** the owners of the knowledge.
- (2) In order to achieve its objects, the Act:
 - (e) enhances Australia’s capacity to ensure the conservation of its biodiversity by including provisions to:
 - (i) protect native species (and in particular prevent the extinction, and promote the recovery, of threatened species) and ensure the conservation of migratory species and **culturally significant species**; and
 - (iii) protect ecosystems by means that include the establishment and management of reserves and **Indigenous Protected Areas**, the recognition and protection of ecological communities and the promotion of off-reserve conservation measures; and
 - (g) promotes a partnership approach to environmental protection and biodiversity conservation through:
 - (iii) **mandating** and promoting Indigenous Australians’ role in, and knowledge of, the conservation and ecologically sustainable use of biodiversity
 - (f) includes provisions to enhance the protection, conservation and presentation of World Heritage properties and the conservation and wise use of Ramsar wetlands; and
 - (fa) includes provisions to identify places for inclusion in the National Heritage List to enhance the protection, conservation and presentation of those places **including culturally significant sites and objects**; and

Recommendation 1.2

The IAC recommends that:

- The language of the Objectives should be strengthened to be clear and explicit.
- The Objectives of the Act should mandate participatory co-design with Indigenous Australians and their knowledge.

2 Better Alignment to International Obligations and Domestic Legislation

2.1 International Obligations and frameworks

The *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) was adopted by the United Nations General Assembly in September 2007. The Australian Government officially endorsed the Declaration on 3 April 2009. It is important that UNDRIP is better supported as the intent of the Declaration still needs to be reflected in and implemented throughout Australian Government's laws and policies. The UNDRIP covers Indigenous Peoples' rights across many facets in life including the environment; FPIC; intellectual property rights; and Indigenous peoples fundamental human rights.

The *Universal Declaration on Human Rights* (which includes seven other United Nations Conventions) has had long standing support from Australia since 1945 and was adopted in law in 1948. The Universal Declaration focus is on people and while the Act focuses on the environment as a whole (e.g. natural and cultural values in landscapes, biodiversity, ecosystems, threatened species, etc), it still needs people to conserve, protect, restore and rehabilitate.

On a broader scope, there needs to be better alignment of Australia's international obligations to the conventions and treaties that come under the responsibility of the Act. These international conventions include the following which are directly related to the Matters on National Environmental Significance (MNES) triggers in the Act:

- *Convention concerning the Protection of the World Cultural and Natural Heritage, 1972;*
- *Convention on Wetlands of International Importance, 1971;*
- *Convention on Biological Diversity (CBD), 1993 and its Nagoya Protocol (not yet ratified);*
- *International Convention for the Regulation of Whaling, 1946;*
- *The Convention on Nuclear Safety, 1996;*
- *Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), 1976; and*
- *Convention on the Conservation of Migratory Species of Wild Animals, (and other bi-lateral Migratory Bird Agreements for JAMBA, CAMBA and ROKAMBA).*

The International Union for Conservation of Nature (IUCN) and the International Council on Monuments and Sites (ICOMOS) are required to report to the World Heritage Centre as the International Advisory Bodies to the World Heritage Committee on the assessment of Outstanding Universal Values (OUVs) for World Heritage nominations to the World Heritage List, Australia's Tentative List, and the State of Conservation for World Heritage Areas. While, there is no specific agreement with either of these international organisations, it is imperative that Australia works cooperatively with them for the purpose of World Heritage assessments of OUVs.

Further, the CBD is in the process of developing its Post 2020 Global Biodiversity Framework (GBF) and it is being asked by Parties and Indigenous Peoples and Local Communities (IPLCs) as well as other NGOs to acknowledge the contribution of Indigenous peoples to the

conservation of biodiversity and ecosystems and to be highlighted in the new Post 2020 GBF. Globally, IPLCs have been instrumental in developing submissions and inputting measures in line with the CBD, particularly Articles 8(j):

‘Subject to its national legislation, 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, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices’

and Article 10(c):

‘Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements’

As with all the Conventions that Australia is signatory to, Indigenous Australians have the right to expect that a rights-based approach is applied to respect First Nations Peoples and acknowledge the historically strong, eternal and continued connections across land and sea through, to put in simple terms, Caring for Country.

Recommendation 2.1

The IAC recommends that:

- The United Nations Declaration on the Rights of Indigenous Peoples and the Universal Declaration on Human Rights should be incorporated and implemented in the revised Act.
- The Act should contain principles of Respect, Rights, Recognition and Reconciliation up front to bring society, governments, NGOs, developers and other proponents along to build their respect, recognition, and acknowledgement of Indigenous Australians with their past, present and future work associated with a number of, if not all, of the Conventions that address MNES in the Act.
- The FPIC principles should be explicit as a distinct requirement for interactions with Indigenous Australians in the revised Act. Indigenous Australians’ intellectual property rights of their traditional knowledge of biodiversity and ecosystems across all environments should also be addressed so that they are not disadvantaged in any manner through the processes and actions of the Act. This would also need to be cross-referenced to the appropriate Australian legislation for the protection of intellectual property.

2.2 Improved linkages to domestic legislation

Within the Commonwealth legislative framework there is misalignment which creates confusion and conflict for management of the Indigenous Estate. The *Native Title Act 1993* and *Aboriginal Torres Strait Island Heritage Protection Act 1984* (ATSIHP Act) are key pieces of legislation that require better alignment with the Act.

2.2.1 Clear and robust linkages with ATSIHPA

Both the Act and ATSIHP Act provide protection for Indigenous heritage, which by definition is ‘tangible and intangible aspects of the body of cultural practices, resources and knowledge

systems' that have and continue to be 'passed on by Indigenous people as part of expressing their cultural identity'. This includes objects, as well as the more intangible features and elements of cultural identity, for example, landscapes in which there are cultural connections and songlines. Therefore, the ATSHIP Act has the ability to protect the Indigenous values of a threatened species and/or threatened ecological community (or other matters of national significance) if it is too embodied by cultural identity of the local community. This position conforms with the proposition of Culturally Significant Species discussed later in this submission.

This matter is important as some recent appeals to development proposals have occurred under the ATSHIP Act which had already undergone the required EPBC approvals. A case which is gaining national coverage is the Djab Wurrung peoples fight to save scared birthing trees from the Western Highway duplication in Victoria. Several appeals under the ATSHIP Act have been made and the dispute is yet to be resolved ².

The Western Highway project underwent the EPBC approvals process in 2010. The Minister for the Environment's delegate determined the project to be a Controlled Action that required assessment and approval under the Act ³. It was determined that the Environmental Effects Statement (EES) was to be applied as an accredited process under the Act in accordance with the bilateral agreement between the Commonwealth and Victorian governments. This agreement saw the Victorian EES process implemented to fulfil both the Commonwealth and State statutory requirements. The EES process included assessment of cultural heritage, social impacts, regional economy, noise, hydrology, biodiversity, geotechnical, landscape and visual impact.

The Minister determined in regard to biodiversity and habitat that "the project is likely to result in significant effects on biodiversity, including native vegetation, listed flora and fauna species and listed ecological communities". Therefore, a native vegetation offset management plan was required to be put in place. However, the scared trees were omitted from the EES, which devastated the local Indigenous people. Under a traditional management approach these trees are considered significant cultural assets central to the landscape and to the people. Consequently, protection of the trees would have necessitated several management actions to mitigate impacts from the project under an Indigenous-led management approach.

In the 2009 Hawke Review of the Act, the IAC provided advice on the need to have a separate review of the ATSHIP Act. The IAC also suggested that the ATSHIP Act revision needs to include a minimum set of standards such as those set out in the 1996 Evatt Review of the ATSHIP Act. Those minimum standards for Cultural Heritage Laws include such measures as Heritage based on significance; Blanket Protection; Aboriginal Cultural Heritage Bodies; Assessing Sites as a separate issue; State and Territory Planning Processes; Adopting DCA Guidelines; Confidentiality; Access to Significant Sites' and Effective Criminal Sanctions.

² Sian Johnson and Sarah Jane Bell, "Highway Upgrade Stalls Again after Court Upholds Appeal over Sacred Trees," Text, ABC News, December 6, 2019, <https://www.abc.net.au/news/2019-12-06/highway-upgrade-stalls-again-court-upholds-appeal-sacred-trees/11773142>.

³ Matt Mooney, "Western Highway Duplication Section 2 Beaufort to Ararat, Underestimation of Large Old Trees within the Environment Effects Statement" (Vic Roads, 2016).

For some jurisdictions, some of these measures may already be implemented through States and Territories legislation and policies. Some of the minimum standards recommended by Evatt in 1996 are now obsolete or out of date, however, there is opportunity for improvement and greater consistency which will enhance the implementation of laws that maximise the protection and management of Indigenous heritage values. It is possible that minimum standards would reduce the need for applications under the ATSIHP Act as the EPBC Act and jurisdictional legislation would be aligned and consistent for Indigenous heritage values.

Allowing the Act to take a ‘standard setting’ approach to the achievement of heritage outcomes, would permit greater flexibility and enable adaptive management, including in relation to emerging threats to the heritage values of places, such as from bushfires and climate change, both of which are key concerns to Indigenous Australians.

2.2.3 Clear and robust linkages with Native Title Act

While, the Act expressly acknowledges Native Title rights, including that of traditional take and other cultural activities where these activities would normally be restricted by relevant legislation, it is not progressive or holistic of the aspirations of Indigenous Australians.

Native Title holders have aspirations to manage decisions for Country including the regulation of public access to popular camping and fishing areas to protect cultural and biodiversity aspects of Country ⁴. With better alignment and linkages with the Act, Native Title holders could better utilise IPAs or other conservation agreements to manage biodiversity conservation outcomes, including permit systems to manage restricted areas and enforcement. This would be similar to the legal mechanism of other gazetted protected areas such as national parks ⁵.

⁴ Ben Collins, “Can Native Title Remove Public Access to Beaches?,” Text, ABC News, December 8, 2019, <https://www.abc.net.au/news/2019-12-08/high-court-beach-access-native-title-hearing/11760634>.

⁵ David Farrier and Michael Adams, “Indigenous -Government Co-Management of Protected Areas: Booderee National Park and the National Framework in Australia,” *Guidelines for Protected Area Legislation*, 2011, 1–40; Bruce Rose, “Indigenous Ecologies and an Ethic of Connection,” *Global Ethics and Environment*, 2002, 189–201.

Recommendation 2.2

The IAC recommends that:

- Minimum standards are considered for the revised Act and the ATSIHP Act be revised to bring it up to align with contemporary best-practice standards.
- Amend the ATSIHP Act independently and separately from the EPBC Review to deliver contemporary legislation that permits Indigenous Australians to apply as a 'last resort' to a Minister for intervention.
- The Act should take primacy over the standards for environment protection in all jurisdictions and provide a mechanism through which Indigenous Australians can seek protection over the Indigenous Estate with mandated participatory co-design standards across all jurisdictions.
- A reformed Act could take a 'standards-setting' or coordination approach, relying on endorsed jurisdictional processes to address specific impacts on MNES. When it comes to assessments and approvals bilateral agreements give jurisdictional governments the responsibility for undertaking environmental assessments and/or approvals.
- The Act has clear linkages between the preservation of Indigenous values (natural and cultural) and Native Title rights, with an underling support mechanism to assist in capacity building for Prescribed Body Corporates and Native Title holders to participate in the operations of the Act.

3 Matters of National Environmental Significance

3.1 Indigenous views on heritage

Regrettably, leading institutions such as UNESCO, World Heritage, from which our national legislation take its lead, do not take into consideration Indigenous Peoples' view of values. For Indigenous Peoples' globally and inherently domestically, cultural values also exist across the natural environment. For example, songlines, (ceremonies, dance, song etc.) exist across landscapes with natural features intrinsically embedded in their cultural identity. As they do not separate tangible and intangible cultural heritage, neither do they separate cultural and natural values as the very existence of Indigenous values is an interdependency of cultural traditions, practices, and innovations to the landscape, including all biodiversity and ecosystems.

Indigenous Australians regard the protection of cultural and spiritual landscapes and materials, including sacred sites and artefacts, both past and present, as vital to maintaining culture. For many years now, jurisdictions have been endeavouring to have some guidance about better protection and management measures in places for Indigenous heritage values. Unfortunately to date, the protection afforded to Indigenous cultural heritage has been piecemeal and often ineffective and ineffectual.

Recommendation 3.1

The IAC recommends that:

- The Act protects and manages Indigenous heritage values which includes tangible and intangible cultural heritage values as well as natural values that have been separated from Indigenous values. Establishing a set of minimum standards consistent and in-line with the operations of jurisdictional Indigenous heritage legislation would further enhance the protection and management of Indigenous heritage values.
- Underlying support mechanisms are developed with proper mandated processes for consultation, negotiation or engagement with Indigenous Australians in the Act; to safeguard consultation on matters of national significance as a legislative requirement rather than an administrative arrangement.

3.2 Culturally Significant Species

While many government and environmental bodies recognise species have significant cultural value to Indigenous Australians, currently there is no statutory mechanism to protect these species from threatening processes unless they are already EPBC-listed. Many Indigenous groups have lobbied for relevant laws to be amended to establish co-management as the preferred approach to managing the conservation and sustainable use of plants and animals which are of significance to Indigenous Australians.

The Act has the potential to be amended to afford protection for culturally significant species, acknowledging that this will require a different set of recovery, protection and sustainable use measures along with a different process and criteria for listing such species or ecological communities. It is equally important to note the Indigenous Estate is also impacted by key threatening processes that may not be considered a national priority.

There are many ways the Act could be amended to afford protection and sustainable use of Culturally Significant Species, including:

- The development of a new section under the Act which focuses on the Indigenous Estate and traditional knowledge, in which the listing of Culturally Significant Species would be a key protection and sustainable Indigenous use mechanisms. It is likely that Culturally Significant Species in this new section would trigger MNES status and this could be potentially mirrored for Culturally significant sites. The development of a new fit for purpose section allows for the most tailored and robust approach to protection and sustainable use of Culturally Significant Species and more broadly the Indigenous Estate.
- Listing under the heritage component of the Act by redefining the terminology of 'Indigenous cultural heritage' to encompass both 'tangible' and 'intangible' aspects of the body of cultural practices, resources and knowledge systems that have and continue to be passed on by Indigenous Australians as part of expressing their cultural identity. Thus, encompassing the tangible (the species themselves) and the intangible (the cultural connection to species/Country), the Act could be used to list a species as part of a National Sites of Significance.
- Listing under Section 190(1) of the Act, where there is a mechanism for the Threatened Species Scientific Committee (TSSC) to provide advice to the Minister concerning any action that is necessary to prevent a nominated species or community becoming threatened (if the Committee considers that the species or community is not currently eligible for listing). Therefore, Indigenous Australians could trigger conservation and sustainable Indigenous use actions for species that are culturally significant and perhaps imperilled, but do not yet qualify for listing as Threatened.
- Listing under Section 194D the Minister could name a new conservation theme as 'Indigenous Estate and Indigenous livelihoods on Country'. In 2009 the IAC suggested that this action could be achieved within the existing framework of the Act⁶. At a minimum, listing would act as a trigger to ensure the preparation of Conservation Advice, assuming listing of Culturally Significant Species entails similar obligations as that of Threatened species. Although this would only be a short-term solution. Significant forethought and the design of new business practices would be required with this amendment as the nomination and listing criteria for Threatened species, which is based on established IUCN protocols, could not be applicable to Culturally Significant Species.
- At a minimum consideration should be given to modifying the criteria and process of threatened species listing and recovery planning, to ensure Indigenous values and knowledge is considered in both listing and recovery planning. Australia can take lessons from Canada's *Species at Risk Act* (SARA) which more formally recognises the essential role of Indigenous Peoples in the conservation of wildlife⁷. SARA (Section 8.1) calls for the establishment of the National Aboriginal Council on Species at Risk which provides advice to the Minister (as per the IAC) and advice and recommendations to the Canadian Endangered Species Conservation Council. SARA requires that species at risk status assessments prepared by the independent Committee on the Status of Endangered Wildlife in Canada (COSEWIC) (TSSC equivalent) contain the "best available" Aboriginal Traditional Knowledge (SARA Section 15.2) and that Minister must consult Aboriginal

⁶ Indigenous Advisory Committee, "Submission by the Indigenous Advisory Committee to Dr Allan Hawke in Response to the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999," 2009.

⁷ Anon, "Species at Risk Act Annual Report for 2016" (Environment and Climate Change Canada, 2016).

organisation that are likely to be affected by recovery processes (action plans, recovery strategies, management plans) “to the extent possible” (SARA Section 39.1, 48.1 and 66.1). Interim status reports are shared with relevant groups including the Council to integrate Indigenous knowledge into the listing process and subsequent recovery plans.⁸

While thinking about Culturally Significant Species, it is important to remember within the Indigenous Australian community culture is not homogeneous and there may not be cultural consensus regarding what are Culturally Significant Species, even within the same community group. This recognition presents a challenge to the listing of Culturally Significant Species as MNES. Nevertheless, listing of Culturally Significant Species must be determined and supported by consensus among the members of a community with the cultural authority and knowledge to speak for community (typically Elders) for whom the species has spiritual, cultural or symbolic value.

Heterogeneity in Indigenous cultural values will require a place-based and scale-based approach to listing Culturally Significant Species as not all Indigenous groups will support the need to list certain species and this should limit those groups who want to offer protection to their Culturally Significant Species.

Further, the IAC understands the Indigenous Reference Group for the Threatened Species Recovery Hub has submitted a detailed paper on the Culturally Significant Species. The IAC are supportive of and endorse the proposals presented in that submission.

Recommendation 3.2

The IAC recommends that:

- The Act is amended to recognise Culturally Significant Species as MNES.
- Subsequent listing of Culturally Significant Species should not impinge on any cultural practice of that species, including traditional take, sustainable use and other customary activities.

3.3 Culturally Significant Sites

Indigenous customary lore incites obligations to protect, sustainably use and maintain the health of biophysical environments and connections with healthy environments sustain Indigenous culture and knowledge. These traditional management techniques emphasise the importance of holistic, integrated management of landscapes, which is a contradiction to the current approach under the Act.

Governments and policy-makers are testing integrated regional or landscape-scale management plans in partnership with other jurisdictions. Country-based approach to Indigenous land and sea management is based on culture connections to the Indigenous Estate which are consistent with bioregional and landscape-scale approaches to ‘connectivity conservation’. Indigenous Australians have been advocating for better protection of whole

⁸ Committee on the Status of Endangered Wildlife in Canada, “Cosewic / Cosepac - Assessment Process,” 2019, <http://cosewic.ca/index.php/en-ca/assessment-process>.

landscapes for decades as this will achieve better outcomes for the environment and heritage values.

Some Indigenous groups have had success in championing the landscape - Country-based approach in a western management framework for decades. The Gunditjmara people in Victoria have been working towards World Heritage Listing for the Budj Bim Cultural Landscape since 1989, in which they have a cultural responsibility to protect one of the world's oldest freshwater aquaculture systems, a system that was first constructed at least 6,600 years ago.

With the support of both the Commonwealth and State governments, Gunditjmara Traditional Owners have acquired a number of land parcels over the years and have actively managed them, including, 3,000 hectares of land declared as an IPA, and co-management agreement with the State government over the Budj Bim National Park.

In the 2009 Hawke Review the IAC said the Act needed to be more flexible and adaptable, when undertaking assessment, approvals and nominations⁹. In light of the then recent listing of Budj Bim as a National Heritage site, the IAC emphasised the need to consider complete cultural landscapes and environments in these processes, as guided by Traditional Owner groups. Again, it is important to acknowledge Indigenous Australians often see no distinction between the management of natural heritage and cultural heritage.

The Budj Bim Cultural Landscape encompasses three distinct tenure types, all of which have been declared part of the World Heritage Property. The Property also contains a range of significant plant and animal species and ecosystems that collectively have high conservation value and are cultural significant to the Gunditjmara people. Thus, in order to truly promote a landscape or Country-based approach and protect culturally significant sites, there needs to be a genuine commitment to 'no borders – tenure-blind' processes, as is key in traditional management approaches where cultural values can exist across Country through multiple tenures and jurisdictions (e.g. songlines). Further the Act needs to make it clear that places like songlines or trade routes which are linked by a theme, or intangible heritage are eligible, as a group, for serial listing on the National Heritage List.

Even though all nominations for the World Heritage list must first meet the criteria for listing on the National Heritage list, for the majority of natural and cultural values to be assessed, the IAC feel that it is crucial that Indigenous Australians are equal participants in the process from the early stages of considering nominations to the tentative listing of sites and subsequent assessments. It is also vital that the assessors have the authority and capacity to assess cultural significance of a place, the IAC's preferred approach being that such assessments must be undertaken in partnership if not led by Indigenous Australians with the cultural authority and experience to do so. This approach should be applied to all policy and business practices enabled by the Act – see discussion below regarding Indigenous cultural governance, representation in decision-making and participatory co-design.

⁹ Allan Hawke, "Independent Review of the Environment Protection and Biodiversity Conservation Act 1999: Summary of Public Submissions." (Canberra: Australian Government, 2009).

Recommendation 3.3

The IAC recommends that:

- The Act is amended to recognise Culturally Significant Sites as MNES.
- Subsequent listing of a site should not impinge on any cultural practice or sustainable use of that place or the customary activities of Indigenous Australians.
- The Act needs to make it clear that places like songlines or trade routes which are linked by a theme, or intangible heritage are eligible, as a group, for serial listing on the National Heritage List.
- The Act should mandate the integration of Indigenous Knowledge into all landscape-based management, protection, and planning mechanisms.
- The Act should be amended to allow for the entirety of a cultural site to be listed in future declaration of National Heritage or World Heritage properties.

3.4 Indigenous Protected Areas access to resources and classification

The IAC argue that the Act has not kept up with the growth of the Indigenous Estate, as tenure constraints and access to resources are impeding aspirations for the Estate and its management including sustainable Indigenous use, compliance and enforcement.

During the first review of the Act, there was only 28 dedicated IPAs covering an area of 20Mha, representing 25 per cent of the National Reserve System. In 2019, IPAs have since more than tripled in land area and doubled their representation in the National Reserve System (NRS). IPAs then and still do not have a formal legal framework in place, as is the case for legally gazetted protected areas. Notably, Indigenous Australians should not have to dedicate an IPA to participate in conservation efforts as IPAs only account for less than a third of the Indigenous Estate.

The growth in the number of IPAs over the past three decades has resulted in a large areas of high biodiversity value being incorporated into the NRS, areas that would not otherwise have been included under jurisdictional-based protection¹⁰. Importantly, the Indigenous Estate contains 376.9Mha of vital habitat for threatened species, this equates to 51 per cent of threatened species habitat nationally.

Even with the IPA Programme, Indigenous Australians only have a small number of formal co-management partnerships, equating to four per cent of the above-mentioned threatened species ranges¹¹. While, Indigenous Australians have negotiated to take part in conservation management across 32 per cent of these threatened species ranges, they are not the decision-making entity.

¹⁰ J. C Altman, G.J Buchanan, and L Larsen, *Environmental Significance of the Indigenous Estate, Natural Resource Management as Economic Development in Remote Australia* (Canberra : ANU, 2007., 2007); Dermot Smyth and Hanna Jaireth, "Shared Governance of Protected Areas: Recent Developments," *National Environmental Law Review*, no. 2012:2 (2012): 9.

¹¹ Anna R. Renwick et al., "Mapping Indigenous Land Management for Threatened Species Conservation: An Australian Case-Study," ed. Hugo Rebelo, *PLOS ONE* 12, no. 3 (March 14, 2017): e0173876, <https://doi.org/10.1371/journal.pone.0173876>.

Consequently, there is an ongoing trend for government and non-government bodies to consider Indigenous land and sea managers as co-operative managers rather than co-managers which has resulted in an crippling of true traditional management techniques and impeded Indigenous self-determination in respect to making decisions for community and Country ¹².

Land tenure complexities across the Indigenous Estate is an ongoing challenge experienced by many Indigenous Australians through their lack of access to Country which is held under other forms of tenure, in particular conflicts with pastoral lease tenure. Further, obtaining a claim or joint management arrangement for Sea Country can be challenging for many Indigenous Australians as there is a conceptual challenge in nominating the claim area out to sea, given that no fixed boundary lines exist under customary marine tenure. More recently there has been an emergence of IPAs based on Country rather than tenure which results in a multi-tenure framework for managing protected areas. As this is an emerging new approach to protecting Country there are significant gaps in current policy, legislation and business practices, particularly as they relate to Indigenous Australians who express a desire to declare multiple tenured properties or Sea Country. Typically, multiple tenured and Sea Country proposals are often deprioritised for funding in comparison to single (and simple) tenure proposals.

Not surprisingly, many Indigenous Australians are advocating for a renewed look at how conservation agreements recognise the aspirations of Traditional Owners to legally contribute to the NRS and to have a merit based approach to the classification of such agreements for the conservation or sustainable use of the Indigenous Estate. The IAC suggests developing new legislation and policy which would see a 'on Country classification' system designed specifically for the Indigenous Estate. Envisioning this classification system could mirror the existing IUCN categories. This sort of merit-based assessment of the Estate would offer Indigenous groups pathways for capacity building, empowerment to true 'sole management' and 'Indigenous-led management' and has the potential to secure greater sustainable funding.

Further the IAC envisions the committee would play a key role in the development of such a merit-based classification system for the Indigenous Estate. The subsequent assessment of parts of the Estate, IPAs or other conservation agreement properties, would then become a key mandate for IAC entrenched in the Act. At a minimum given the perceived limitations of the current process for IPA dedication the IAC should be give the authority and responsibility for the assessment and declaration of future IPAs.

Similarly, freshwater resources underpin livelihoods around Australia and competition for access is complex, political and economically entrenched. Indigenous water allocations deliver cultural and social benefits as well as environmental benefits, although to date there is limited legislative mechanisms that recognise Indigenous interest and rights to water ¹³.

¹² Farrier and Adams, "Indigenous -Government Co-Management of Protected Areas: Booderee National Park and the National Framework in Australia"; Smyth and Jaireth, "Shared Governance of Protected Areas: Recent Developments."

¹³ Emma Ligtermoet, "Maintaining Customary Harvesting of Freshwater Resources: Sustainable Indigenous Livelihoods in the Floodplains of Northern Australia," *Reviews in Fish Biology and Fisheries* 26, no. 4 (December 2016): 649–78, <https://doi.org/10.1007/s11160-016-9429-y>.

The 2019 Royal Commission into the Murray-Darling Basin found a substantial lack of Indigenous representation and control of water management, with Indigenous Australians voicing the need to be involved in water management planning to protect the natural and cultural values of water¹⁴. This is a sentiment echoed across the country by many Indigenous Australians who highlight the interest and rights of Indigenous people in water management. In the cross jurisdictional Murray-Darling case, the governing body's guidelines indicated there was no legal obligation to address Indigenous views.

Robust legislative mechanisms are vital to ensure secure access to water for cultural practice, which will sustain Indigenous Knowledge systems which are highly attuned to eco-hydrological relationships within catchments¹⁵. Promoting effective management from a 'healthy country' or landscape perspective to encompasses environmental flows and culturally appropriate and backed water allocation planning in a very important imperative to Indigenous Australians.

In addition, in cases where local Indigenous Australians reject proposed development ventures that require a water allocation, like the Iningai people in Western Queensland, who see the development of a waterski park as an irresponsible use of water, amendments to the Act should ensure that Indigenous Australians are identified as key stakeholders in water management planning and allocation and the subsequent develop of mutually acceptable solutions/offsets on their Country¹⁶.

There are three key legal and policy approaches to enable cultural water flows, including: water rights for Indigenous people, laws to increase influence over water landscapes and effective inclusion of Indigenous people in water governance¹⁷. Thus, there is an opportunity to strengthen the Act to mandate the participation of Indigenous Australians in water management, particular in Part 17A dealing with management of Ramsar wetlands which are MNES. Buttressing the Act in such a manner will assist Australia to meet its international obligations under the Ramsar Convention.

More broadly the IAC recommended in the first review of the Act, that the definition of 'natural resources' be amended to reflect that the environment and its ecologies are their own entities, this entity would include water in all its forms¹⁸.

Equally, conservation agreements (future and current) and possibly Indigenous Land Use Agreements should be strengthened under legislation to recognise a range of cultural flows regimes and become the platform for negotiations on water rights, and co-management of environmental conservation outcomes¹⁹.

¹⁴ Australia et al., *Murray-Darling Basin Commission of Inquiry Bill 2019*, 2019.

¹⁵ Emma Woodward et al., "Utilising Indigenous Seasonal Knowledge to Understand Aquatic Resource Use and Inform Water Resource Management in Northern Australia: RESEARCH REPORT," *Ecological Management & Restoration* 13, no. 1 (January 2012): 58–64, <https://doi.org/10.1111/j.1442-8903.2011.00622.x>.

¹⁶ Kirrin McKechnie, "'It Will Take Five Months to Fill': Waterski Park 'irresponsible' Say Locals Caught in Eight-Year Drought," Text, ABC News, December 18, 2019, <https://www.abc.net.au/news/2019-12-18/barcaldine-look-for-water-licence-to-build-lake/11792482>.

¹⁷ John Mackenzie et al., "Cultural Flows, Field Studies Final Report" (Melbourne: Cultural Flows Planning and Research Committee, 2017), <http://www.culturalflows.com.au/images/documents/Final%20report.pdf>.

¹⁸ Indigenous Advisory Committee, "Submission by the Indigenous Advisory Committee to Dr Allan Hawke in Response to the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999."

¹⁹ Mackenzie et al., "Cultural Flows, Field Studies Final Report."

Recommendation 3.4

The IAC recommends that:

- IPAs to be listed as a MNES.
- The Act should support an on-Country classification system for the Indigenous Estate to enable Indigenous Australians to better participate in conservation.
- There is a need for innovative and forward-thinking legislative and policy design regarding both land and sea Country tenure.
- A robust legislative mechanism needs to be developed to secure Indigenous access to water, that will sustain and enhance Indigenous Knowledge, including: water rights for Indigenous Australians, laws to increase influence over water landscapes and effective inclusion of Indigenous Australians in water governance.
- Legislation should be developed that strengthens management agreements to recognise a range of cultural flows regimes, and which can become the platform for negotiations of water rights, and co-management of biodiversity conservation outcomes.

4 Role and Function of IAC

4.1 IAC structure and mandate

The IAC is a statutory committee established in 2000 under Section 505A of the Act. The function of the Committee (Section 505B) is to advise the Minister on the operation of the Act, taking into account the significance of Indigenous peoples' knowledge of the management of land and the conservation and sustainable use of biodiversity.

The IAC provides advice as requested by the Minister, excluding where an existing statutory committee exists to provide such advice. Thus, unlike other statutory committees, for example the TSSC, the IAC does not have a clear mandate or remit and subsequent flow of advice relies heavily on the relationship between the IAC and Minister and/or Department. The lack of a mandated role for the IAC often results in poor uptake of advice or the IAC is omitted as a key stakeholder from whom the Department should seek advice.

For example, several recent, Senate inquiries have failed to engage the IAC in the submission process for matters relating to the Act, the outcomes of which would have significant impacts on the Indigenous Estate and its ability to participate in management across the country. Examples include:

- Australia's Faunal Extinction Crisis.
- Environment Legislation Amendment (Protecting Dugongs and Turtles) Bill 2019.
- Carbon Credits (Carbon Farming Initiative) Amendment Bill 2017 [Provisions].
- Great Australian Bight Environment Protection Bill 2016.
- Great Barrier Reef 2050 Partnership Program.

Further, there are other clear discrepancies that limit the function of the IAC including but not limited to:

- The IAC is solely dependent on the good will of the Department to provide adequate funding for the basic functions of the Committee, additionally the IAC has limited control over budget allocation. The committee does not have a dedicated budget to meet with concerned stakeholders - communities and Traditional Owners. This has been a significant gap impinging of the IAC's outreach abilities.
- The IAC is one of two senior, national Indigenous advisory bodies. The IAC is a part-time statutory committee. IAC membership entail significant cultural obligations and calls for specific and specialised skillset including the ability to respond to requests from the environment sector and Indigenous communities. There needs to be appropriate remuneration of IAC membership to ensure committee business is prioritised by members. At a minimum remuneration for IAC members should be on parity with the TSSC daily remuneration fee for holders of part-time public office as determined by the Remuneration Tribunal, ideally it should be aligned with the annual remuneration fee afforded to the Department's other statutory committee, the Australian Heritage Council (AHC).
- In the delivery of its statutory functions, under the pretext of limited security clearance, probity requirements and 'in confidence' dogma, the IAC is over confronted with an unwillingness by departmental staff to provide information related to particular

policies or programs the IAC are seeking to provide advice on and in many instance for which it was established to do so.

As suggested by the Hawke review there is a goodwill link via memorandum of understanding between the IAC and TSSC, in order to improve Indigenous participation in threatened species protection and recovery²⁰. However, the model fails short of regulating a more robust governance process in listing and nominating processes, as per the Canadian SARA process which more formally recognises the essential role of Indigenous Peoples in the conservation of wildlife. (see previous discussion under CSS).

Recommendation 4.1

The IAC recommends that:

- An appropriate budget must be provided to the IAC to enable it to meet increased business demands and conduct its statutory functions in accordance with Act. Decisions around budget priorities and allocation, in line with departmental finance guidelines and with coordination from the IAC Secretariat, are made by the IAC Chair.
- The Remuneration Tribunal determination on the allowances and remuneration entitlements of the IAC should be reviewed accordingly.
- IAC Chair and Members undergo appropriate level security clearance, adequate to the level of Ministerial briefings.
- The IAC is the authority responsible for the listing of Culturally Significant Species and/or sites
- The IAC be given specific responsibilities for the assessment and declaration of new IPAs - as it relates to the NRS (see section 3 – Matters of National Environmental Significance).
- The IAC be given specific responsibilities for assessing and classifying IPAs under proposed IPA classification system (see section 3 – Matters of National Environmental Significance).
- Linkages between the Department’s statutory committees (IAC, TSSC and AHC) be clearly articulated and embedded in the Act.

4.2 IAC Ministerial influence

The Australian Government’s Environment Ministers primary role under the Act is to protect areas of national environmental significance in accordance with the guiding principles of the Act, considering environmental decisions in the broader context of Australia’s social and economic needs. Unfortunately, Indigenous Australian’s rights, interests and aspirations for their environments, culture and heritage are often diminished in favour of more mainstream outcomes in areas such as economic gain.

More often than not Indigenous Australians seek to utilise the protection mechanisms provided for under the Act in competition with their respective jurisdictional governments. In practice, the IAC see decisions made by the Minister or the Department largely based on a superficial understanding of Indigenous culture. This ultimately does not confer favourable outcomes for Indigenous Australians.

²⁰ Allan Hawke, “The Australian Environment Act – Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999” (Canberra: Australian Government Department of the Environment, Water, Heritage and the Arts, 2009).

All too often the assessment processes of the Act tend to ignore the broader socio-economic and biodiversity conservation benefits arising out of Indigenous effective management and sustainable Indigenous use of the Indigenous Estate. This is particularly true in a political context when the Minister of the Environment has to balance political, social and economic influences in making decisions regarding the environmental and/or Indigenous matters relating to the Act which are often at conflict. Thus, the cultural maturity and understanding of the Minister as the primary decision maker has a significant impact on the on-ground implications for Indigenous Australians.

A test case under the ATSHP Act is currently underway with Gomerioi people mounting a legal challenge over the Minister for the Environment's decision to put potential mining jobs at Shenhua Mine before cultural heritage. Not too dissimilar to the Act, the ATSIHP Act allows the Environment Minister, on the application of an Aboriginal person or group of persons, to make a declaration to protect an area, object or class of objects from a threat of injury or desecration.

As such the IAC proposes structural changes in the governance of the Act to alter decision making and accountability processes. To safeguard Indigenous rights and interest in ministerial decision processes the IAC proposes the amendment of Section 93 to mandate engagement with Prescribed Body Corporates and/or Native Title Representative Bodies for referrals, consultations, advice and decisions under the Act.

Recommendation 4.2

The IAC recommends that:

- The Act should safeguard Indigenous rights and interest in Ministerial decision processes through the amendment of Section 93 to mandate engagement with Prescribed Body Corporates (PBC) and/or Native Title Representative Bodies (NTRB) for referrals, consultations, advice and decisions under the Act.

5 Improving Governance Structures

5.1 Indigenous cultural governance

Indigenous people's governance systems influence the application of Indigenous knowledge, and therefore the management of landscapes, including protected areas.

Indigenous models of country, community and regional governance are often based on sophisticated networks. These can be made up of interconnected layers of extended families and leaders, underpinned by their land/sea-ownership rights and interests. These cultural networks form the foundations for a wide variety of different governing structures, depending on what suits the particular Indigenous group. Sometimes these structures are legally incorporated; sometimes they remain informal and flexible.

Further, the approach to decision making is one of consensus and occurs across the layers of networks. Consensus is created through slow agreement which can change over time. It is important for the Act to recognise the authority to make decisions should sit with, those who are most directly associated with the issues and/or affected by the outcome. However, other decisions involving multiple groups need to be made at bigger, more centralised scales within a network.

In administration of the Act problems arise for a group's governance when the 'wrong' people are involved in making decisions or when factional interests undermine group consensus or when the statutory requirements for decision making contradict the consensus approach within the wider Indigenous community.

To move beyond current barriers, mandated mechanisms needs to be built into the Act to ensure engagement, consultation and participation of Indigenous Australians occurs in line with local Indigenous cultural governance practices. Further, legislation is required to mandate the integration of Indigenous Knowledge in management plans for jointly managed protected areas. Importantly, the application of traditional management actions, should only be by those nominated by the Traditional Owners, as possessing the relevant skills, and acting with their cultural authority and advice.

Ultimately, acknowledging that Indigenous Knowledge and its associated governance arrangements provide an essential foundation for local decision-making on current and future management of Country must be enabled by the Act.

Recommendation 5.1

The IAC recommends that:

- The Act should safeguard and strengthen cultural governance and potential shared governance in its administration.
- The Act should mandate Indigenous and government partners to move toward more equitable and mutually-beneficially arrangements for genuine shared governance in all EPBC decision making processes.
- The Act should allow appropriate timeframes for effective Indigenous governance to be undertaken in all issues relating to MNES.

5.2 Indigenous representatives in decision-making

The right Indigenous people to participate in decision-making through representation is a key component in achieving reconciliation between Indigenous Australians and the Crown. This participation seeks to redress the legacy of exclusion and marginalization from processes of the Crown that affect Indigenous Australians. The rights of Indigenous Australians to participate in and to shape their own futures is not only a human rights imperative, it is also essential to ensuring that decisions made by the Crown carry legitimacy, yield positive outcomes and promote equality in Australian society.

The participation of Indigenous Australians in decision-making as part of the routine operations of the machinery of government is essential as without genuine participation and proper engagement government would struggle to make enduring progress in improving the social and cultural wellbeing of Indigenous communities (Closing the Gap), maintain the State of the Environment and arresting the decline in biodiversity²¹.

The representation of Indigenous Australians on decision making and advisory instruments of the Act will permit Indigenous Australians to contribute to policy setting within the Department and hold the Department accountable for its performance. Representation would also enable Indigenous Australians to contribute and influence decision that affect the Indigenous Estate and MNES that impact of them and their well-being.

The benefits of greater Indigenous representation on decision making and advisory instruments of the Act within the Department include:

- Increased legitimacy and credibility for decision both within government and with Indigenous stakeholders.
- Greater transparency and accountable in the decision, advisory and policy making process and in financial accountability.
- Increased independence and robustness in the analysis and advocacy associated with policy development and advice.
- A culturally appropriate structure that provides a means for Indigenous Australians to get their messages heard by consulting with indigenous representatives.
- Increased opportunity to be truly representative of a diverse Indigenous stakeholder community by ensuring the participation of women and youth.

To ensure representation is not just a tokenistic action to fulfil mandated human resource diversity/equity quotas or targets the representation of Indigenous Australians should be based on FPIC principals and in accordance with culturally appropriate protocols for engaging with Indigenous stakeholders. Actions to ensure increased representation need to be soundly embedded in the corporate culture of the Department otherwise there is a risk the Indigenous Australians will view the strategy as a mean to pacifying requirements for Indigenous representatives and ultimately self-determination.

²¹ Council of Australian Governments, “Council of Australian Governments, Statement on the Closing the Gap Refresh” (Council of Australian Governments, December 12, 2018), <https://www.coag.gov.au/sites/default/files/communique/coag-statement-closing-the-gap-refresh.pdf>.

For example, there is a notable gap in engagement with Indigenous Australians through the nomination and listing process for both threatened species and ecological communities. By emphasising early and genuine engagement, Indigenous values and traditional knowledge will be better considered and represented. To date, there has been no successful Indigenous-led listing under the Act. The current process for listings is arduous and requires specialised skills and experts in the field to provide the relevant scientific evidence to support a listing.

In addition, many Indigenous Australians suggest the governance mechanism for the listing process of threatened species needs to be more robust and take into consideration the Indigenous Estate and values, this includes at a local and national level. A common goal across many Indigenous Australians stakeholders is to increase Indigenous representation on the assessment process for listing, with representatives who can assess the above-mentioned Indigenous values or advise other members of the cultural significance of species/communities.

It is acknowledged that the Department has taken steps to address the Indigenous representation deficit as demonstrated through the appointment in 2019 of the first Indigenous representative to the TSSC. Similarly, the inclusion of two members of the IAC on the Moderation Panel for the 2019 Competitive Grants Round of the 2019-2021 New IPA Program and the participation of the IAC Chair and Deputy Chair in the selection panel for senior executive positions are roundly applauded, as is the appointment of Indigenous Co-Chief and Contributing Theme Authors to the drafting of the 2021 State of the Environment report. However, more is required to ensure there is Indigenous representation at all levels of decision relating the Act.

Recommendation 5.2

The IAC recommends that:

- Appropriate Indigenous Australian representation be mandated on all assessment, nomination, and approval processes for MNES.
- Appropriate Indigenous Australian representation be mandated on all statutory committees/sub-committees, at a minimum one male and one female representative.
- Amendments to the Act must mandate a change to how the Department performs its business and consequently directs that the Department significantly increases Indigenous representation on decision making and advisory instruments of the Act.

5.3 Place-based engagement and decision-making

With over 500 Indigenous groups across the country a common theme amongst governments, proponents, researchers and alike is the lack of understanding of what are the common priorities of Indigenous Australians in biodiversity conservation and sustainable use. For over a decade Indigenous Australians have been discussing the need for a unified, collective 'voice' to government, through the establishment of a national land and sea body²². More recently studies and program design are acknowledging the need to align national conservation

²² Prepared Dermot Smyth et al., "A Workshop to Map Current and Future Research and Resource Needs" (Australian Institute of Aboriginal and Torres Strait Islander Studies, June 2014), <https://aiatsis.gov.au/publications/products/emerging-issues-land-and-sea-management>.

priorities and goals with locally-held conservation values of Indigenous Australians²³. Further, the post-2020 GBF highlights partnerships as a key enabling condition to leverage on activities at local, regional and national levels²⁴.

While, there are many platforms for biodiversity professionals to network, collaborate and strategically plan or lobby common agendas there are few focused on the interests and requirements of Indigenous Australians. Indigenous land and sea management has distinctly different challenges and aspirations which requires an ongoing dialogue across the country. A national Indigenous-led strategic voice supported by legislation, would enable strategic participation with Indigenous Australians whose land supports high biodiversity and heritage values, resulting in a better understanding of priorities in Indigenous-led management activities. Such a strategic voice would also be able to articulate the compound impacts to Indigenous Australians and ensure the weighting of stakeholder influence is equitable.

There is a clear gap in funding and need for a ‘national voice’ across the IPA network and Indigenous Estate. To date, a key challenge of developing and sustaining a ‘national voice’ has been funding and the ongoing ownership and function of such a body. By embedding such a voice into the objectives of the Act, its function and funding will be mandated.

A ‘national voice’ will reduce challenges for national engagement with Indigenous Australians and also afford Indigenous Australians a clear line of sight to the decision-making process in biodiversity conservation and sustainable Indigenous use. It is envisioned this ‘national voice’ will be supported by the IAC.

It is also important to recognise a ‘national voice’ is not a standalone solution. The Act also needs to support a place-based and scale-based local participation framework. Because when it comes to regional or localised scale of participation with Indigenous Australians the mandated engagement process needs to demonstrate flexibility as there is no one size fits all solution. Rather participation should be place-based and scale-based as determined by Traditional Owner groups. The changes to the Victoria governance model for the protection of cultural heritage is recognised as the most comprehensive and best resourced model in Australia. This model could easily be replicated for all matters associated with the Act.

Recommendation 5.3

The IAC recommends that:

- The Act support the develop of an independent National Indigenous-led strategic voice for the environment and heritage.
- Mandated engagement with Indigenous Australians should be at both place-based and scale-based as directed by local Indigenous groups.

²³ Renwick et al., “Mapping Indigenous Land Management for Threatened Species Conservation”; Sally Box, “Threatened Species Strategy Year Three Report,” Government Report (Canberra: Department of the Environment and Energy, 2019).

²⁴ Open-Ended Working Group On the Post-2020 Global Biodiversity Framework, “Zero Draft of the Post-2020 Global Biodiversity Framework” (Convention on Biological Diversity, January 6, 2020).

6 Management of the Indigenous Estate

6.1 The Role of Indigenous Knowledge in management and planning

Indigenous knowledge (also known as Traditional Knowledge (TK), Indigenous environmental knowledge (IEK), Traditional ecological knowledge (TEK), Indigenous bio-cultural knowledge (IBK)) refers to the understandings, practices, skills and cultural values, beliefs and philosophies developed and maintained by First Nation Peoples over millennia while interacting with their natural surroundings. This knowledge is adaptive, cumulative, holistic, intergenerational, invaluable, irreplaceable, unique and rooted in a community's responsibility for the well-being of the natural environment. This knowledge complements Western science and improves our overall understanding of how natural systems operate.

Indigenous knowledge does not require the validation of Western science and nothing Western science can do will replace or replicate Indigenous Knowledge. This can sometimes be a challenge for Western science and how Indigenous Knowledge systems should be recognised within the wider scientific community. Indigenous Knowledge is often met with scepticism or simply overlooked as 'traditional' – i.e. belonging to the past and is less legitimate in comparison to Western science²⁵, however such 'diachronic' systems can be of great value and complement the 'synchronic' systems on which Western science is based²⁶.

There are many examples of where Indigenous Knowledge is being incorporated through appropriate Indigenous-led design and cultural governance processes into management plans, most notably and inherently in the Indigenous land management sector, particularly in respect to management of the Indigenous Estate.

The best examples can be found in the proliferation of Healthy Country Plans (HCP) developed as part of the IPA program. Exemplars include the [Djelk Healthy Country Plan 2015-2025](#) for the Djelk IPA, the [Wet Tropics Aboriginal Cultural and Natural Resources Management Plan](#) for all Rainforest Aboriginal Peoples land estate (including Eastern Kuku, Yalanji Mandingalbay and Giringun IPA), and the [Bardi Jawi IPA Management Plan](#) for the Bardi Jawi IPA. Examples also exist for other parcels of the Indigenous conservation estate that are not IPA, such as the [Spinifex HCP](#) of the Pila Nguru Spinifex People of the Great Victoria Desert and the [Mayala Country Plan 2019-2029](#) of the Mayala Inninalang Aboriginal Corporation in the west Kimberley.

Incorporating Indigenous Knowledge into non-Indigenous-led but co-designed management plans is also becoming common practice, especially as Native Title determinations confirm the ownership and rights of Indigenous Australians over land/sea country forcing governments to enter into joint management arrangements to fulfil National Reserve System aspiration and international obligations association with the CBD, such as Aichi Strategy Goal C: Target 11, which addresses the efficient and equitable reservation of land/sea country of particular

²⁵ Nicholas Buchanan, "Which Fish? Knowledge, Articulation, and Legitimization in Claims about Endangered and Culturally Significant Animals," *Science, Technology, & Human Values* 42, no. 3 (2017): 520–542.

²⁶ Madhav Gadgil, Fikret Berkes, and Carl Folke, "Indigenous Knowledge for Biodiversity Conservation," *Ambio*, 1993, 151–156.

importance for biodiversity and ecosystem services. The [Eighty Mile Beach Marine Park Management Plan](#) is a contemporary example of such a co-designed plan.

The inclusion of Indigenous Knowledge in other management instruments designed to inform the conservation of ecosystems and biodiversity (species and ecological community recovery plans, conservation advisories, research and monitoring plans) are not as numerous although they do exist. An excellent example of a species recovery plan that incorporates Indigenous Knowledge and has been co-designed with indigenous stakeholders is the [Recovery Plan for the Greater Bilby \(*Macrotis lagotis*\) \(Draft\)](#).

For the inclusion of Indigenous Knowledge in research and monitoring plans, outputs from the Western Australian Marine Science Institution's [Kimberley Indigenous Saltwater Science Project](#) (KISSP) provides a stellar example of best-practice integration as outline in the [Mobilising Indigenous Knowledge for the Collaborative Management of Kimberley Saltwater Country](#) (Austin 2018) report. KISSP was responsible for the development of standard and agreed community processes and protocols and a research agreement template that underpins marine research in the Kimberley. It also advanced an implementation strategy that builds awareness in the Western science community of the need for genuine, FPIC participation.

On the other hand, the IAC often see failings in the true integration of Indigenous Knowledge, one example is the Night Parrot Recovery Team who have the role to ensure that research and management activities undertaken in support of Night Parrot conservation are aligned and coordinated. While, much of the presumed extant distribution of the Night Parrot occurs on Indigenous owned and managed lands, and extensive surveys are being undertaken by Indigenous Rangers for this species, unfortunately, there is not one Indigenous person represented on the 15 person Recovery Team. While, it is acknowledged that the Recovery Team have supported input from Indigenous Australians through participation in events such as the 2019 Species of the Desert Festival at Mulan on the Paraku IPA, and the 2018 Indigenous Desert Alliance conference in Perth the lack of indigenous representation is not tolerable.

As with land management plans the inclusion of Indigenous Knowledge through culturally appropriate and genuine participation of Indigenous Australians should be mandated for all other management instruments, i.e. species and ecological community recovery plans, conservation advisories, research and monitoring plans, especially where the asset(s)/object(s) being managed are of cultural significant to Indigenous Australians and/or the asset(s)/object(s) occur on indigenous managed lands.

Recommendation 6.1

The IAC recommends that:

- the Act should mandate the participation of Indigenous Australians and incorporation of Indigenous Knowledge into all business and operational practices of the Department.
- Indigenous Knowledge must be obtained from Elders or Indigenous representatives with the cultural authority to speak for Country and in-line with FPIC principals.
- Protocols flowing from administrative and regulatory instruments created through the Act should mandate the incorporation of Indigenous Knowledge into all land, species and ecosystem planning and management documents.

6.2 Collaborative management

A Key driver of success in Indigenous land and sea management activities is Indigenous leadership at multiple levels of decision-making, including management decisions for Country. Current Commonwealth legislation places Indigenous Australians on the periphery, with little consequence for the failure to engage Indigenous Australians in biodiversity conservation.

A key example is in the collaborative management framework of the Indigenous Estate. While, the Act contains detailed provisions relating to decision-making responsibilities, it also requires management plans to be consistent with government obligations under the IUCN conservation categories. The IUCN has drawn broad distinctions between types of collaborative management, these being:

- ‘collaborative management’, a form of shared governance where decision making rests with one entity but the entity is required to consult other stakeholders;
- ‘joint management’, where those involved in shared governance are part of a decision-making body and share legal authority for decision making; and
- ‘sole management’, governance by Indigenous peoples and local communities (Indigenous and community conserved areas or ICCAs).

Unfortunately, these distinctions are not consistent across the country nor across partnerships. Consequently, Indigenous groups are perceived not as collaborative managers but rather as cooperative managers who have limited authority to make decisions for Country, thereby crippling true traditional management of Country.

For example, the Commonwealth has established three jointly managed parks through boards of management, whose role it is to make decisions relating to management consistent with the park’s management plan. There has been some empowerment for Indigenous Australians through joint management arrangements, most notably the Anangu peoples decision to permanently close the Uluru visitor climb as of October 2019. However, this management action, supported in Australian law, took 34 years for Anangu aspirations to be realised.

Unfortunately, most joint management and/or co-management arrangements have failed to achieve commitments for levels of Indigenous employment or integration of Indigenous Knowledge. For example, since 2017, all three boards of management of the jointly managed Commonwealth national parks have requested a lease review, with the Booderee Board of Management issuing a formal notice of dispute.

Many Indigenous Australians groups under collaborative management agreements have expressed their aspirations for true ‘sole management’ of that Country. Even, IPAs which are coined as ‘sole or direct management’ arrangements, under current conditions are strongly influenced by external mediated management constraints because they rely heavily on government funding. This imbalance of power has a limiting effect on management of Country, especially when it comes to the wider aspirations of Indigenous Australians who may have alternative visions for Country outside of pure conservation. This includes aspirations to use contemporary land management practice and knowledge to promote and participate in sustainable farming, renewable energy, and other economical enterprises. This power

imbalance can also impinge on the customary and sustainable use of Country by Indigenous Australians.

To improve collaborative management, legislation should mandate the integration of Indigenous Knowledge in management plans for all protected areas. Ultimately, acknowledging that Indigenous aspirations and knowledge provide an essential foundation for local decision-making for management and sustainable use of Country and is the desired outcome of the IAC.

Recommendation 6.2

The IAC recommends that:

- The Act should mandate the integration of Indigenous Knowledge in management plans for all protected areas.
- The Act needs to consider the wider aspirations of Indigenous Australians including in contemporary land management practice and knowledge such as sustainable farming, renewable energy, and other economical enterprises.

6.3 Co-design and/or Indigenous-led

Indigenous Australians are eager for the adoption of participatory co-design approaches that establish a more equitable partnership between participants where Indigenous participants are viewed as experts of their experiences and as equal members in the partnership.

Participatory co-design is a collaboration, which shifts power to an outcomes-based process while maintaining the rights of all participants. Participatory co-design approaches and operations for outputs and outcomes enabled, developed, implemented, and delivered as a consequent of the Act need to be transparent, empathetic and responsive. Participatory co-design must be:

- Respectful of all stakeholders acknowledging Indigenous Australians as experts whose input is valued and has equal standing to other government and community stakeholders, especially researchers;
- Inclusive of Indigenous Australians as crucial stakeholders, who are empowered to participate in the framing of issues to developing solutions and subsequently monitoring of outcomes. The approach must require and utilise the advice from people with the cultural authority, lived experience, knowledge and skills to speak for community (Elders and those selected through community consensus). Indigenous Australians must be engaged in a way that is authentic, equitable, safe and meaningful;
- An iterative adaptive process where ideas and solutions are continually tested and evaluated with all co-design participants. It should be a natural process where taking risks and allowing for failure are permitted so long as participants are engaged on a continuous learning pathway; and
- Designed to achieve an outcome (outcome focused), where the potential solutions can be tested, effectiveness measured and where the spreading or scaling of solutions can be developed with stakeholders and in context to the setting.

In general, Indigenous Australians are seeking a greater say in how environmental (biodiversity, natural resource management, heritage) scientific services (research and monitoring) which are commissioned by the Department and delivered in collaboration with the Department's academic and other research providing partners.

For example, Indigenous Australians wish to co-design, co-deliver and evaluate NESP activities through the implementation of a new framework which repositions Indigenous Australians (and their Country) who in many cases are the objects of the research, to participants in the research. That is, Indigenous Australians want things done with and by them, not to them.

Participatory co-design, co-production and co-delivery of research services and associated efficiency and effectiveness evaluations represent a very powerful way in which Indigenous communities can be empowered. Similarly, for the NESP program it will generate communities of co-researchers where the focus is on developing capacity of Indigenous Australians to participate as co-investigators in developing, conducting, and disseminating environmental research and monitoring, consequently in part enabling many draft Closing the Gap targets, especially those related to Land and Water rights (Target 15), Education Pathways (Target 6), Youth Education and Employment Opportunities (Target 7) and Economic Participation and Development (Target 8) to be addressed²⁷.

The IAC acknowledge that the Department/Government has gone some way to promoting the concept of participatory co-design in the existing call for NESP2 Hub program proposals. This outcome has been achieved through the requirements on bidding consortia as outlined in the Grant Opportunity Guidelines. These Guidelines articulate the NESP2 Hub program objectives, outcomes and requirements such as "Enhanced environmental science and research capability amongst researchers, end-users and Indigenous Australians", "incorporate Indigenous research needs into research plans" and "foster and develop Indigenous research capability, skills transfer, knowledge sharing and increased cultural awareness across all parties" which are very supportive of a participatory co-design approach. Even more gratifying is the requirement for bidding consortia to support an Indigenous Facilitator who will be a member of the Hub's Steering Committee and has the key responsibilities to ensure Indigenous inclusion through activities such as Indigenous participation in establishing KPIs, assisting with the identification of Indigenous research needs and supporting Indigenous researchers. Further the proposed establishment of the Indigenous Facilitation Network as a cross-hub governance committee is also a progressive step to greater participation of Indigenous Australians in this internationally significant environmental program managed by the Department.

Ultimately, Indigenous Australians are ready to embrace and desire Indigenous-led co-design approaches as this is one important mechanism that will significantly advance self-determination when applied to areas of Indigenous policy. It will drive success in Indigenous policy-making far more so that participatory co-design approaches and deliver outcomes which are orders of magnitude more efficiently and effectively than engagement alone. Indigenous-led provides the ability for Indigenous Australians to design and implement their

²⁷ Council of Australian Governments, "Council of Australian Governments, Statement on the Closing the Gap Refresh."

own locally-led and perhaps innovative solutions, solutions where they lead and governments follow.

Indigenous-led research is research that is controlled and driven by Indigenous Australians, it is research that is responsive to the socio-economic needs, environmental and heritage values, and traditions of Indigenous Australians. The momentum towards greater control of research had been fuelled by decades of negative impacts from past research practices, in particular the failure by many researchers to follow FPIC principals, the obliviousness of many researchers to the AIATSIS Guidelines for Ethical Research in Australian Indigenous Studies and the neglect by most researchers to transfer knowledge back into Indigenous communities. Consequently, Indigenous Australians are increasingly determined to shape future research directions, questions and methodologies and enable the transfer of new knowledge.

Increasing the commitment to participatory co-designed and ultimately Indigenous-led will confront numerous challenges, pertinent ones being:

- The need to building cultural competence among non-Indigenous service providers, especially researchers who may be resistant to change;
- An appreciation that participatory co-design and Indigenous-led takes time, it only works when a strong foundation of trust and respect exists. This relationship is critical and conscious effort must be directed towards its maintenance. All participants must recognise and respect one another and ensure a culturally safe environment for knowledge exchange that gives equal weight to lived and studied experiences; and
- The process must be throughout the life cycle of the project/program, not just upfront in the conceptual thinking. It is an interactive, iterative process for the entire life cycle.

Recommendation 6.3

The IAC recommends that:

- Amendments made to the Act ensure that participatory co-design frameworks are mandate for all policy and business practices that impact on the Rights of Indigenous Australian.
- Amendments should ensure Indigenous Australian participate in all activities from policy design to on-ground actions that impact on cultural and natural heritage values of Indigenous Australian, especially in respect to the Indigenous Estate.
- Amendments should support and empower the drive to Indigenous-led frameworks where they protect and promote the rights and approaches of Indigenous Australian.
- Amendments need to support capacity building in the non-Indigenous community to confer a greater understanding of the nuances of working with Indigenous Australians.

7 Policy and Program Design

7.1 Indigenous Perspective on Offsets

Offsets are requirements imposed by regulators, such as the Department, on development proponents requiring them to take actions to ensure their activities cause no net loss to the environment, typically biodiversity (species and communities) and the quality of ecosystems (landscapes/seascape). Offsets are designed to deliver a net positive benefit to the environment by compensating for the unavoidable damage inflicted by a development or the residual impacts remaining following cessation of a development²⁸.

Given Australia's large and expanding Indigenous Estate, in particular the Indigenous conservation estate, as demonstrated by 76 IPAs and the continuing successful resolution of Native Title claims, confirming rights to land (through exclusive and non-exclusive determinations) the requirements for conditioning of and subsequent delivery of offsets must include the participation of Indigenous Australians in the process. This is particularly so for offsets that originate from activities on or are proposed to be delivered on the Indigenous Estate and anywhere where Native Title has been determined.

The ongoing recognition of offsets as a tangible approach to impact mitigation, albeit the last resort option, presents a significant opportunity to enhance and leverage existing funding instruments that support Indigenous ranger programs such as Caring-for-Country / Working-on-Country initiatives. This is particularly so for strategic offset initiatives that target landscape/seascape outcomes. The Strategic Environmental Assessment (SEA) of BHP's Iron Ore Expansion in the Pilbara, being undertaken in accordance with Section 146(1) of the Act, is a good example of the new opportunities that may be conferred to land management and Caring-for-Country programs by Indigenous Australians through offset programs. Through the SEA, BHP has committed to protecting new species and other MNES across the Pilbara landscape by investment in and coordination of offsets. BHP acknowledges this outcome will only be possible with the participation of and in partnership with Pilbara Aboriginal communities and their ranger teams²⁹. An operational example of offsets delivering beneficial outcomes to Indigenous Australians, is through the Great Victoria Desert Biodiversity Trust which was established as a condition of approval under the Act for the Tropicana Joint Venture gold mine³⁰. It is worth noting that the bioregional adaptive management plan delivered by the Trust was developed through a participatory process that included Pila Nguru and Pilki community members.

²⁸ "Biodiversity Offsets - Forest Trends," accessed May 14, 2020, <https://www.forest-trends.org/bbop/bbop-key-concepts/biodiversity-offsets/>; "ICMM • Independent Report on Biodiversity Offsets," accessed May 14, 2020, <http://www.icmm.com/en-gb/environment/biodiversity/managing-biodiversity/independent-report-on-biodiversity-offsets>.

²⁹ "Department of Agriculture, Water and the Environment," Department of Agriculture, Water and the Environment, accessed May 14, 2020, <http://www.environment.gov.au/protection/assessments/strategic/wa-pilbara-bhp>

³⁰ "The Great Victoria Desert | Biodiversity Trust," accessed May 14, 2020, <http://gvdbiodiversitytrust.org.au/>.

Ensuring the full participation of Indigenous Australians in offsets from program design to delivery must be obligatory, especially when it is the Indigenous Estate that is being impacted, either by the development or the subsequent delivery of offsets. The Pilbara Environmental Offset Fund (PEOF)³¹ provides an outstanding example of where Indigenous Australians are part of the design process and will be part of the on-ground delivery. PEOF aims to deliver environmental offsets (>\$90 million over 40 years) in the Pilbara through a strategic landscape-scale approach, building on regional programs including ranger groups, so that environmental offset outcomes are greater than the sum of individual offset contributions³². The design and delivery of PEOF is overseen by an Implementation Advisory Group that comprise 10 members two of whom are Pilbara Traditional Owners. The Term of Reference for the Advisory Group stipulate that Aboriginal cultural and traditional ecological knowledge along with knowledge, skills or experience in Native Title are required for membership of this Group³³.

Guiding principles for offsets promoted by the IAC include:

- Used only as a last resort, after consideration of alternatives to avoid, minimise or mitigate and restore or remediate impacts have been fully explored and exhausted.
- Consistent, transparent approaches to decisions are designed with Indigenous Australian participants to deliver certainty for proponents and potentially impacted stakeholders.
- Offset programs must maintain or improve environmental outcomes both for the assets impacted and for the Indigenous Australians on whose land a development may occur.
- Offsetting must achieve benefits in perpetuity, the outcomes must align with the residual impacts from a development.
- Offset arrangements must be legally enforceable and resilient to corporate business failures and redundancies.
- Offset program must complement existing species (and ecological community) recovery, threat abatement and area management plans.
- Delivery of offset programs through partnerships between land managers, regulators, local communities and researchers should be encouraged.

Recommendation 7.1

The IAC recommends that:

- The Act needs to mandate the participation of Indigenous Australians in business processes to condition and design offset regimes and their on-ground delivery programs.
- The Act needs to adequately provide for the interests and participation of Indigenous Australians in the business processes to assess and give or withhold consent to a proposed development.
- Approval and regulatory processes under the Act must in part create benefits for Indigenous Australian landowners by better protecting land and sea through the delivery of high-quality offset programs that can support enterprise development opportunities for Indigenous communities.

³¹ “Protecting the Pilbara Focus for New Offsets Fund,” accessed May 14, 2020,

<https://www.mediastatements.wa.gov.au/Pages/McGowan/2019/11/Protecting-the-Pilbara-focus-for-new-offsets-fund-.aspx>.

³² “The Pilbara Environmental Offsets Fund | Department of Water and Environmental Regulation,” accessed May 14, 2020, <https://www.dwer.wa.gov.au/peof>.

³³ “Pilbara Offsets Fund Governance | Department of Water and Environmental Regulation,” accessed May 14, 2020, <https://dwer.wa.gov.au/peof/governance>.

7.2 Indigenous Policy Settings

The IAC understands changes to legislation alone may not guarantee greater consideration of Indigenous interests in biodiversity conservation. Therefore, there is a clear role of robust policy design and programs, unfortunately in recent years Australia's policy design for the Indigenous Estate has lacked innovation and has become stagnant, with the suggestion that what has been achieved was all that was intended., anything more would be overreach.

To increase the participation of Indigenous Australians, the Act needs to consider the wider aspirations of Indigenous Australian including in contemporary land management practice and knowledge such as sustainable farming, renewable energy and other economical enterprises.

For example, today as a consequence of the limited consideration given to Indigenous aspirations and interests, many 'decision-makers' think Rangers positions are the key pathway for Indigenous Australians wishing to participate in biodiversity conservation. From a cultural perspective, the roles rangers undertake, traditionally would have been the responsibility of multiple specialists from a burning practioner, water knowledge holder to bush tucker expert, not unlike how Western science acknowledges the differ roles which can be played by a botanist, an forester and a biometrician in biodiversity conservation. Thus, when there is a true reflection of Indigenous Knowledge and roles in policy and program design, Indigenous people are likely to have a greater influence and opportunity at all levels of decision-making. As such innovative policy and program design, is needed to address and improve Indigenous employment and retention, this thinking will need to be two-fold to determine the appropriate roles, career pathways and supporting mechanisms for Indigenous Australians entering biodiversity conservation.

In addition, the IAC see the same narrow thinking applied to funding models. There has been a myriad of funding streams over the years supporting the conservation and sustainable Indigenous use efforts of Indigenous Australians, however shifts in the political landscape result in the withdrawal of funding or changes in policy design, with limited Indigenous consultation.

For example, the 2019 round of competitive grants for new IPAs which only secured funding up to \$320, 0000 per successful applicant for three years was part of an election commitment to increase the NRS. Thus, criteria were targeted at specific biodiversity outcomes accounting for 50 per cent of the weighting in the IPA grant assessment process. While, the intent of the biodiversity outcomes were robust, the competitive round of grants did not cater for the number of Indigenous groups with aspirations to dedicate or the value they held for their Estate to be dedicated as an IPA. Such political nuancing further separates the lower capacity groups from the groups who have been working in protected area management for a sustained period or whom can afford to employ agents with specific skills. More importantly, this political approach does not support Indigenous-led aspirations for Country as funding is determined by principles outside-of-the-control of Indigenous Australians.

Further, in February 2017, the Australian Government launched the Threatened Species Prospectus, designed to gain private and philanthropic investment of more than \$50 million in 51 recovery projects. The Prospectus articulated that projects delivered would be through

partnerships among state and territory government entities and non-government organisations including Indigenous groups³⁴. However, of the 51 projects only ten projects directly involved Indigenous groups. This was a missed opportunity to reflect on the size and value of the Indigenous Estate (45% NRS and 51% threatened species range), if this scale had been a criteria in the design of the Prospectus a minimum of 25 projects would have involved Indigenous groups, thus securing a future for Indigenous conservation and sustainable Indigenous use efforts.

Thus, amendments to the Act must mandate a change to how the Department performs its business and directs that the Department significantly increases Indigenous participation in decision making and advisory instruments of the Act. This is particularly important for Divisions within the Department whose operation and activities impact on Indigenous Australians and their interests (e.g. land, sea, water, Culturally Significant Species, threats to biodiversity). Key Divisions include:

- Biodiversity Conservation – recovery plans, conservation advice, threat abatement plans.
- Climate Adaptation and Resilience – implication of strategies on remote communities
- Commonwealth Environmental Water Office – cultural allocation of water, Murray-Darling Basin Policy.
- Drought and Bushfire Responses – altered fire regimes and impact on culturally significant species and sites.
- Environmental Approvals – impacts of controlled actions on culturally significant species and sites, better design/delivery of environmental offsets following impacts to the Indigenous Estate, participation in SEA.
- Heritage, Reef and Marine - international conventions, world heritage, national heritage, ATSIHP Act.
- Parks Australia – management of the jointly managed conservation estate, terrestrial and marine.
- Portfolio Strategy – State of the Environment, NESP, Closing the Gap.

Recommendation 7.2

The IAC recommends that:

- The Act needs to mandate the participation of Indigenous Australians in departmental business practices and operational processes such as selection panels and assessment processes, for example the appointment of Indigenous representative(s) to NESP2 Expert Assessment Panel.
- The Act needs to mandate targets and measure to ensure the equitable participation of Indigenous Australians in conservation and representation of the Indigenous Estate in funding allocations.
- The Act needs to mandate the participation of Indigenous Australians in departmental policy and program design.
- The Act needs to mandate Indigenous based criteria in all assessment and approvals processes.

³⁴ Gregory Andrews, “Threatened Species Prospectus” (Canberra: Australian Government Department of the Environment and Energy, 2017), <https://www.environment.gov.au/system/files/resources/86e2d7df-6523-44b4-bb7a-692576bd0d67/files/threatened-species-prospectus.pdf>.

7.3 Climate Change, an emerging issue

Climate change is a human rights issue, it is a pervasive and ubiquitous impact on the rights of humanity across the globe. Internationally, it is acknowledged that Indigenous Australians will be most affected by climate change, it is perhaps the single greatest looming threat to Indigenous culture and society.

In Australia there are several reasons why Indigenous Australians will be disproportionately affected by climate change, all of which are exacerbated by contemporary social-economic disadvantage, poverty and welfare disparities. Some of the reasons include:

- The disruption to the deep connections that Indigenous Australians have with Country, Country is family, culture and identity, Country is self. The consequence of climate change whether they be manifested as less rain, water scarcity, rising sea levels, increased disease, loss of biodiversity, increases in wildlife or invasion of introduced pests will impact on the mental and physical wellbeing of Indigenous Australians in profound ways.
- A community's inherent link to Country and their rights to Country will make it hard, if not impossible, for people to contemplate relocation, particularly away from their cultural, spiritual and ancestral lands – a Climate Change driven Stolen Generation is not desirable.
- Predicted shifts in the abundance and distribution of Culturally Significant Species and consequently the quality of landscapes/seascapes will impact on the ability of Indigenous Australians to undertake customary activities such as fishing, hunting and gathering of bush foods or medicines thereby affecting not only the quality of diets but also spiritual wellbeing.
- The remoteness of many Indigenous communities makes them vulnerable to the predicted increased occurrence of extreme weather events, such as tropical cyclones, droughts, and heat waves, which increase their risk of isolation and exacerbate existing poor housing and living standards.

Australia's key response to climate change has been through a process called 'adaptation', which refers to the practical changes that individuals and communities make to help them manage the issues that climate change will bring. Many of the adaptation pathways require additional investment, new resources and increase capacity within Indigenous communities, however existing socio-economic and welfare circumstances impinge on the ability of Indigenous communities to respond in an appropriate manner and with the inclusiveness required. Some adaptation pathways may also require further alienation of Indigenous Australians from their land through activities such as emissions offsetting, carbon sequestration, geo-sequestration and perhaps the compulsory acquisition of Indigenous interests in land to facilitate the relocation of settlements, businesses and government assets away from hostile and inhabitable environments (e.g. irrigated agriculture requirements for fresh water, people in the Torres Strait having to move to higher ground).

To date there has been limited engagement or participation of Indigenous Australians in the formulation of climate change policy, and in developing and applying mitigation and adaptation strategies. This is problematic, not only because it is a Human Right obligation and

Indigenous Australians will be the most affected people in Australian society but because the size of the Indigenous Estate should mandate the involvement of Indigenous Australians.

In acknowledging the disproportion threat climate change poses to Indigenous Australians and the magnitude of the Indigenous Estate that is threatened, it is critical to implement changes to the Act that result in climate change being listed as a key threatening process for MNES and/or climate change be included as a trigger for Controlled Actions. The IAC envisage that such a change would limit proposed development activities, especially those that impact on Indigenous Australians and their land/sea Country by contributing to, or exacerbating the drivers of climate change.

Recommendation 7.3

The IAC recommends that:

- The Act be amended to recognise climate change as a key threatening process for MNES.
- The Act mandates the involvement of Indigenous Australians in the development of policy, business practices and mitigation strategies that aim to mitigate impacts of climate change.

Reference

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