

# SUBMISSION TO THE EPBC ACT REVIEW

ANON-K57V-XQ28-Z

## Organisation

NSW Aboriginal Land Council

## State or Territory

New South Wales

## Areas of interest

The objects of the Act; Threatened species; International obligations; Indigenous Australians; Heritage; Matters of National Environmental Significance; Environmental Impact Assessments; Cumulative impacts; Climate change; Compliance and enforcement; Decision making; Public participation in decision making; Biodiversity; Conservation; Wildlife Trade; Commonwealth National Parks; Nuclear; 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.**

EPBC Act Review Secretariat  
Department of the Environment and Energy  
GPO Box 787  
CANBERRA ACT 2601

Via email: [epbcreview@environment.gov.au](mailto:epbcreview@environment.gov.au)



**New South Wales  
Aboriginal Land Council**  
ABN 82 726 507 500  
[alc.org.au](http://alc.org.au)

Dear Professor Samuel AC,

**RE: Independent Review of the EPBC Act – Discussion Paper**

The NSW Aboriginal Land Council (**NSWALC**) welcomes the opportunity to comment on the Independent review of *the Environmental Protection and Biodiversity and Conservation Act 1999 (EPBC Act)*.

**About the NSW Aboriginal Land Council**

NSWALC is the peak body representing Aboriginal peoples in NSW and with over 23,000 members is the largest Aboriginal member based organisation in Australia. NSWALC is an independent, self-funded non-government organisation with an elected governing Council, operating under the *Aboriginal Land Rights Act 1983 (NSW) (ALRA)*. We work to improve, protect and foster the best interests of Aboriginal peoples in NSW.

The ALRA recognises that *‘Land is of spiritual, social, cultural, and economic importance to Aboriginal Peoples’* and establishes 120 autonomous Local Aboriginal Land Councils that NSWALC supports. LALCs have similar to NSWALC which include land management, protection and promotion of Aboriginal culture and heritage, and supporting Aboriginal communities.

**Overarching comments**

At this time, our natural and cultural landscapes and our cultural heritage are under increasing pressure. Country is under threat right across the continent. The diverse range of legislative regimes across the states and territories are not adequately protecting Country. There is a need for a uniform national framework to protect our natural and cultural landscapes, to protect our cultural heritage and to protect Country. That legislative framework needs to incorporate strong Aboriginal cultural underpinnings and strong Aboriginal participation.

Australia’s key piece of national environmental law – the *Environment Protection & Biodiversity Conservation Act 1999 (EPBC Act)* – is not up to the task of providing that strong uniform framework. It does not adequately protect Country, or our cultural heritage, and does not appropriately recognise and provide for the rights and interests of Aboriginal people.<sup>i</sup>

**ALWAYS WAS ALWAYS WILL BE ABORIGINAL LAND**

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**Key recommendations:**

NSWALC calls for Australia's environmental laws and policies to:

1. Embed leadership and decision making roles for Aboriginal peoples, including the Aboriginal Land Council network in NSW,<sup>ii</sup>
2. Increase roles for Aboriginal people in land management and biodiversity stewardship, including formal recognition of Indigenous Protected Areas,
3. Recognise the unique status of Aboriginal peoples in Australia in all aspects of environment, biodiversity, land, heritage and natural resource management, including through effective partnership arrangements,
4. Acknowledge and support Aboriginal people's connection to Country and Traditional Ecological Knowledge in environmental and biodiversity management,
5. Enhance protection of Aboriginal cultural heritage, including landscapes and water,
6. Advance social, cultural, environmental and economic outcomes for Aboriginal communities,
7. Ensure that proposals for reform are developed in partnership with peak Aboriginal organisations and Aboriginal communities,
8. Ensure that all recommendations and proposals tangibly advance the rights and interests of Aboriginal peoples, and respect Aboriginal people's right to self-determination and free, prior and informed consent.

This review provides a key opportunity for the Commonwealth Government to implement enhanced mechanisms to both protect the environment, and provide Aboriginal communities with meaningful opportunities to protect and manage Country. This is in line with existing government commitments to Closing the Gap<sup>iii</sup> and will, in turn, benefit all Australians.

Further comments are provided below in response to key discussion paper questions.

**Question 3 – Objects of the Act**

Aboriginal people's rights and interests are not adequately supported or provided for in Australia's environmental laws.<sup>iv</sup>

**Recommendation:** Australia's environmental laws should be strengthened to recognise and provide for the rights and interest of Aboriginal people, including to:

- Better recognise and promote Aboriginal people's environmental management, stewardship, and consensual knowledge sharing, and
- Facilitate Aboriginal people's decision making in regulatory water and land management bodies, in line with requirements for free prior informed consent informed by the UN Declaration on the Rights of Indigenous Peoples (to which Australia is a signatory).

## **Question 5 – Reform priorities; Question 20 - community involvement in decision making; Question 21 – Governance arrangements**

Aboriginal people have not been formally included in water/land regulatory bodies. Engagement, transparency and reporting mechanisms are also inadequate.

NSWALC advocates for the principle of free, prior and informed consent to be embedded in all decisions affecting Aboriginal people. It is important to note that community engagement approaches are not equivalent to community consent. Approaches taken to date generally disempower Aboriginal communities. In our experience, significant improvements are needed to decision making, community engagement and community agreement processes.

The *Closing the Gap Clearing House* has provided recommendations for what works and what does not work in engaging with Aboriginal and Torres Strait Islander peoples, and has outlined a number of minimum requirements including cultural competency to respond to Indigenous history, cultures and contemporary social dynamics and to the diversity of Indigenous communities and valuing the cultural skills and knowledge of community organisations and Indigenous people.<sup>v</sup>

Other important principles and requirements regarding processes seeking community consent include time, recognition of the difference between community-level consent and individual-level consent, as well as embracing Aboriginal ways of knowing.<sup>vi</sup>

**Recommendation:** A key reform priority must be to formally recognise and involve Aboriginal people in environmental, land and heritage management, and decision making. Aboriginal-led initiatives should also be supported.

## **Question 6 - Operation of the EPBC Act**

The operation of the EPBC Act needs to be improved to better support the rights and interests of Aboriginal people. Aboriginal people should be involved in decision making, including as approval authorities. Greater emphasis should be placed on Aboriginal leadership and rights (including free prior informed consent requirements), land management and biodiversity stewardship, and formal legal recognition of Indigenous Protected Areas.

The EPBC Act should better recognise and support Aboriginal people's connection to Country, and the strong links to health and wellbeing.<sup>vii</sup>

Furthermore, the EPBC Act provides an important, yet undelivered, opportunity to provide social, cultural, environmental and economic outcomes for Aboriginal people.

**Recommendation:** The operation of the EPBC Act needs to be improved to deliver better social, cultural, environmental and economic outcomes for Aboriginal people, and involve Aboriginal people in decision making.

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

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

The EPBC Act must be refocused to ensure the purpose of making decisions is to protect and promote the environment, land and heritage. Oversight of the EPBC Act needs to be administered at a national level to ensure consistency and diversity are managed appropriately across all states and territories.

The discussion paper does not adequately canvass opportunities for improving environmental and heritage outcomes by increasing the role of the Commonwealth in regulation and management. Additionally, the discussion paper does not address opportunities for improving the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* in line with any improvements to the EPBC Act.

Reforms to the EPBC Act need to shift away from managing prescriptive processes to one that strongly and proactively protects, promotes and regulates environmental and heritage outcomes. In particular, there needs to be much stronger protection for natural and cultural sites important to Aboriginal people, not limited to those listed as matters of national significance. Currently there is minimal meaningful protection at a national level for areas important to Aboriginal unless they are formally 'listed' on the national heritage register. Furthermore, Aboriginal communities may be hesitant to record cultural sites with government due to the sensitive nature of the site or high levels of distrust in government.

Additionally, significant improvements are needed to oversight, monitoring, and reporting mechanisms. This should include mandatory monitoring and public reporting, increased availability of information, greater emphasis on public awareness, and greater involvement of Aboriginal people in oversight and monitoring outcomes.

**Recommendation:**

- The EPBC Act needs to include stronger powers for the Commonwealth government to proactively act to protect the environment.
- Environmental and heritage outcomes must be articulated in partnership with Aboriginal communities.
- The draft report should include further analysis and options for reforming environmental and heritage laws.
- Any options for reform must meet the standards set out in the *United Nations Declaration on the Rights of Indigenous Peoples* and the *Uluru Statement from the Heart*, as well as achieve strong environmental outcomes.

### **Question 11 – Indigenous land management practices**

**Question 12 - How can the EPBC Act adequately represent Indigenous culturally important places? Should protection and management be place-based instead of values based?**

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

Currently the EPBC Act does not adequately involve Aboriginal people in environmental, land or heritage management and decision making. While the Australian Government does support some communities via the Indigenous Protected Area (IPA) and Indigenous Ranger programs, improvements are needed to ensure initiatives are led by Aboriginal people and advance Aboriginal self-determination. Furthermore, the IPA initiative should be expanded, particularly in NSW, which currently has very limited projects. Addressing this shortfall will strengthen national environmental outcomes.

The recent large-scale bushfires and water crisis particularly in NSW, highlight the need for Aboriginal led land and water management practices. Working in partnership with Aboriginal people, for example, to embed cultural burning practices into land management, will not only provide employment opportunities for Aboriginal people, it will support improved fire and environmental management.

In NSW, the ALRA is a key mechanism to return lands to Aboriginal people for social, cultural, environmental and economic outcomes. Local Aboriginal Land Councils in NSW are active in managing lands for environmental outcomes. A number of Local Aboriginal Land Councils have IPAs and ranger programs, and work with other organizations to jointly manage lands for environmental and heritage outcomes.<sup>viii</sup> Australia's environmental management regime should support Aboriginal organizations and Aboriginal communities to achieve and deliver broad environmental, land and heritage outcomes.

Furthermore, there are a range of emerging opportunities for Government to support Aboriginal people and Aboriginal landowners to lead sustainable including land, fire and water management initiatives and reforms. Many LALCs have existing land and sea ranger programs that could be expanded and resourced by Government. This has added benefits of employment and economic outcomes for Aboriginal people.

There are a number of clearly identifiable benefits of engaging Aboriginal people in land management focused on environmental protection, including;

- health and wellbeing benefits,
- cultural and socio-political benefits,
- economic benefits,
- environmental benefits.<sup>ix</sup>

These benefits include, but are not limited to, reduced health risk factors, increased health outcomes (including mental health, transfer of knowledge (intergenerational and two-way transfer with non-Indigenous Australians), increased governance capacity, stronger biosecurity protection through

increased presence, and improved environmental outcomes, including improved condition of threatened species and habitats while reducing weed and pest infestations.

Additionally, significant improvements are needed to protect and promote Aboriginal cultural heritage. Successive 'State of the Environment' reports have highlighted the widespread destruction of Aboriginal cultural heritage and have observed that "*approved destruction*" and "*economic imperatives*" are key risks.<sup>x</sup> Fundamentally, reforms are needed to ensure Aboriginal people are empowered to protect and promote Aboriginal heritage, make decisions, and are resourced to lead this work.

**Recommendations:**

- The EPBC Act should include new mechanisms to better recognise and promote Aboriginal-led land, environmental and heritage management and consensual knowledge sharing. Such mechanisms should build on and strengthen existing land rights and native title.
- IPAs should be improved to support the rights and interests of Aboriginal people, and expanded to additional Local Aboriginal Land Councils and Aboriginal communities in NSW.
- Government must partner with Aboriginal organisations, including the NSW Aboriginal Land Council, Local Aboriginal Land Councils, and Aboriginal communities, to deliver environmental and heritage outcomes.

**Question 26 - Key principles for reform**

The proposed reform principle relating to Indigenous knowledge and experience should be strengthened in line with the key recommendations outlined at the beginning of this submission.

We are concerned by the proposed guiding principle of 'making decisions simpler' by 'reducing unnecessary regulatory burdens'. We urge caution in adopting this principle as it has the potential to weaken important safeguards and protection mechanisms. That is a particularly concern given the high rates of extinction, and the high rates of destruction of our cultural heritage. It is essential that important safeguards and protections remain and that avenues for Aboriginal people to protect Aboriginal cultural heritage and manage Country are not reduced.

Furthermore, the reforms should implement Australia's international obligations and commitments. In particular, NSWALC advocates that any reforms must support the rights, aspirations and interests of Aboriginal peoples, including those outlined in the United Nations *Declaration on the Rights of Indigenous Peoples*<sup>xi</sup>, of which Australia is a signatory, particularly:

- **Article 11 – Protection of Culture**

*Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature*

- **Article 25 – Connections to Country**

*Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.*

- **Article 29 – Caring for Country and the Environment**

*Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.*

It is also important to note that Article 8 (j) of the Convention on Biological Diversity already commits Australia to “*respect, preserve and maintain knowledge, innovations and practices of Indigenous ... communities ... for the conservation and sustainable use of biological diversity*”.

**Recommendations:**

- The proposed reform principle relating to Indigenous knowledge and experience should be strengthened.
- Australia’s environmental legislation must implement Australia’s obligations and commitments under United Nations instruments, including UNDRIP and the Convention on Biological Diversity.
- We urge caution in adopting a guiding principle that includes ‘reducing regulatory burdens’ as it has the potential to weaken important environmental and heritage safeguards and protection mechanisms.

We welcome the opportunity to provide further comment on the draft report. If you have any questions regarding the content of this submission, please contact the NSWALC Strategy and Policy Unit on [policy@alc.org.au](mailto:policy@alc.org.au) or (02) 9689 4444.

Sincerely,

The NSW Aboriginal Land Council

Date:

<sup>i</sup> See page 5, Australia’s Human Rights Score Card, Australia’s 3<sup>rd</sup> Universal Periodic Review, Joint NGO submission, April 2020, available at: <https://www.hrlc.org.au/universal-periodic-review>

<sup>ii</sup> Ibid. In particular note recommendation that “*Australia must amend all policy and legislative regimes that impact Aboriginal and Torres Strait Islander rights to practice cultural traditions; facilitate Aboriginal and Torres Strait Islander decision making in regulatory water and land management bodies*”

<sup>iii</sup> See: <https://www.coag.gov.au/sites/default/files/agreements/partnership-agreement-closing-the-gap.pdf>

<sup>iv</sup> See for example the National Water Initiative (See Virginia Marshall, Overturning Aqua Nullius: Securing Aboriginal Water Rights (AIATSIS, 2017) 120); Murray-Darling Basin Royal Commission’s findings that Aboriginal and Torres Strait Islander Peoples’ interests have been marginalized, and that the Water Act’s governance fails to provide for the interests of Aboriginal and Torres Strait Islander Peoples (see South Australia, Murray-Darling Basin Royal Commission Report (Report, 29 January 2019) chs 11 and 17).



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<sup>v</sup> See Janet Hunt, Closing the Gap Clearinghouse Issues Paper No.5, Australian Institute for Health of Welfare, 2013, *Engaging with Indigenous Australia— exploring the conditions for effective relationships with Aboriginal and Torres Strait Islander communities*, <https://aifs.gov.au/publications/archived/4715>

<sup>vi</sup> Professor Tony Dreise, *On our terms*, 2018 <https://www.aboriginalaffairs.nsw.gov.au/pdfs/new-knowledge/publications/on-our-terms-FINAL.pdf>

<sup>vii</sup> See [https://www.lowitja.org.au/content/Document/CtG2020\\_FINAL4\\_WEB%20\(1\).pdf](https://www.lowitja.org.au/content/Document/CtG2020_FINAL4_WEB%20(1).pdf) – page 7 & [https://aiatsis.gov.au/sites/default/files/products/report\\_research\\_outputs/benefits-cfc\\_0.pdf](https://aiatsis.gov.au/sites/default/files/products/report_research_outputs/benefits-cfc_0.pdf)

<sup>viii</sup> For example, see <https://ministers.pmc.gov.au/scullion/2018/new-indigenous-ranger-program-la-perouse-and-botany-bay>

<sup>ix</sup> Weir J, Stacey C & Youngetob K 2011. The benefits associated with Caring for Country: literature review (prepared by the Australian Institute of Aboriginal and Torres Strait Islander Studies for the Department of Sustainability, Environment, Water, Population and Communities). Canberra: DSEWPC.

<sup>x</sup> Australia State of the Environment Report 2016, Heritage Chapter, page 27

<https://soe.environment.gov.au/sites/g/files/net806/f/soe2016-heritage-launch-v27march17.pdf?v=1488844294> and Australia State of the Environment Report 2011, State of the Environment 2011 Committee, Independent report to the Australian Government Minister for Sustainability, Environment, Water, Population and Communities, Canberra, page 721 <http://155.187.2.69/soe/2011/report/heritage/pubs/soe2011-report-heritage.pdf>

<sup>xi</sup> See: <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>