

SUBMISSION TO THE EPBC ACT REVIEW

ANON-K57V-XYV5-9

Name

Peter Yu

Organisation

Indigenous Reference Group to the Ministerial Forum on Northern Australia

State or Territory

Western Australia

Areas of interest

Indigenous Australians

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.

Indigenous Reference Group to the Ministerial Forum on Northern Development

17 April 2020

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

Dear Sir/Madam

Re: Submission to the review of the EPBC Act

I refer to the abovementioned matter.

The Indigenous Reference Group (the 'IRG') is a formal advisory group to the Ministerial Forum on Northern Development (the 'Ministerial Forum')¹. Established in August 2017, the IRG has, at the request of the Ministerial Forum, worked closely and intensively with relevant Commonwealth, Western Australian, Northern Territory and Queensland Government agencies, the not-for-profit and private sectors to develop a suite of policy initiatives that are designed to substantially enhance the engagement of Northern Australian Indigenous interests in the development of the Northern Australian economy, thus creating a pathway for Northern Australia to reach its full economic potential (the 'IRG Policy Recommendations').

Building entrepreneurial and business management capability in Indigenous organisations and businesses, and providing efficient access to the right sources of capital for that enterprise are key themes around which several of the IRG Policy Recommendations revolve.

This submission outlines how the IRG recommends changing the *Environmental Protection and Biodiversity Conservation Act 1999* to encourage and enable Indigenous people, corporations to engage in enterprise that harness their knowledge, natural and cultural assets and recognises the unique collective contribution that Indigenous people make to Australia's environment.

On behalf of the IRG, I would like to thank you for the opportunity to make this submission.

Yours faithfully,



Peter Yu
Chair
Indigenous Reference Group to the Ministerial Forum on Northern Development

¹ Further background on the IRG and Ministerial Forum is provided in the enclosed submission

**INDIGENOUS REFERENCE GROUP TO THE MINISTERIAL FORUM ON
NORTHERN DEVELOPMENT**

**Review of the *Environmental Protection and Biodiversity Conservation Act*
1999 (EPBC Act)
17 April 2020**

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1. Background

The Indigenous Reference Group was appointed in August 2017, as one of two formal advisory groups. The IRG's purpose is to engage directly with, and provide policy advice to the Ministerial Forum, ensuring Indigenous perspectives are included in its deliberations, contributing to the achievement of tangible and sustainable benefits. In the first instance, the IRG has been tasked with advising on aspirations and barriers relating to developing the Indigenous business sector, growing the capability of Indigenous land owners to engage in development, and supporting Indigenous innovation.

The Ministerial Forum is chaired by the Commonwealth Government Minister for Northern Australia and comprised of the Commonwealth Government Minister for Indigenous Australians, and Ministers from the Western Australian, Northern Territory and Queensland Governments whose portfolio responsibilities intersect with the North's Development Agenda. Its purpose is to provide oversight and direction on the development of Australia's North in accordance with the Northern Australia Strategic Partnership (an agreement between the Northern Australian jurisdictions regarding the development of the North) and more recently, the Northern Australia Indigenous Economic Development Accord.

Members of the Northern Australia Indigenous Reference Group

- **Mr Peter Yu (IRG Chair)**, Chief Executive Officer, Nyamba Buru Yawuru Ltd
- **Mr Lawford Benning**, Chair, MG Corporation
- **Dr Donna Odegaard, AM**, Chairperson, Aboriginal Broadcasting Australia
- **Mr Joe Morrison**, Managing Director, Six Seasons Pty Ltd
- **Mr Nigel Browne**, Chief Executive Officer, Larrakia Development Corporation
- **Cr. Vonda Malone**, Mayor, Torres Shire Council
- **Ms Fiona Jose**, Chief Executive Officer, Cape York Partnership
- **A.Prof. Colin Saltmere**, Managing Director, Indjalandji-Dhidhanu Aboriginal Corporation

The IRG is an expertise-based (rather than a representative based) committee comprised of Indigenous leaders across Northern Australia² that have broad expertise and significant experience in Indigenous business, community and government leadership in Northern Australia.

1.1. Focus of IRG

The IRG has maintained a disciplined focus with respect to its advice to the Ministerial Forum. The IRG has focused very specifically on addressing the sources of an evident market failure in the development of Northern Australia, being inadequate activation of the Northern Australian Indigenous economy (see Attachment 2). Indigenous Northern Australians comprise an average of 15 percent of the population of Northern Australia (compared to 2.5 percent in Southern Australia) with much larger Indigenous representation in the populations of northern Western Australia and Northern Territory (approximately 25 to 30 percent), and in populations outside of the main urban centres across Northern Australia (well in excess of 50 percent in many instances). As a result, Indigenous organisations are a key component of the government, industry and non-government-organisation institutional framework in Northern Australia.

Legally recognised Northern Australian Indigenous interests in the land and sea estate are more pronounced than they are in Southern Australia, with Indigenous interests owning or exercising some degree of control and property rights over more than 80 percent of the Northern Australian landmass, and considerable areas of sea country, including around 85 percent of the Northern Territory coastline. Very importantly, international conventions and increasingly the Australian judiciary are recognising that Indigenous interests extend beyond cultural rights and rights of occupancy, to rights over natural resources, intellectual property and a right to development. Trade with and investment from Asian interests are important drivers of the development of Northern Australia and Northern Australian Indigenous interests have a significant heritage with respect to particularly South East Asian trade, having conducted trade for centuries prior to European colonisation of the

² For the purposes of this Submission, 'Northern Australia' refers to that area of the Australian territory defined as 'Northern Australia' by the NAIF, with the term 'Southern Australia' referring to the remainder of the Australian territory.

Region. In this environment, Indigenous businesses' products and services are becoming increasingly important components of the trade profiles of many nations.

In other words, the size of the Indigenous population, importance of Indigenous organisations and extent of Indigenous interests in land, water, sea, natural resources and other intangible assets in Northern Australia, means that Indigenous Northern Australians are paramount stakeholders in the Northern Australian economy. **Unless Indigenous interests in the Northern Australian economy are optimally activated, Northern Australia will at best never reach its social and economic potential and at worst, fail to develop socially and economically.**

Furthermore, the current state/territory – Commonwealth fiscal arrangements that pertain to Northern Australia are not delivering the required progress. Rather than accelerating economic self-determination, much of the current public investment in Northern Australian Indigenous affairs is entrenching disadvantage, with the lack of visibility as to specifically how state/territory – Commonwealth financial arrangements are being invested and the specific Indigenous economic development outcomes achieved from that investment only serving to exacerbate frustration with the current system. **Unless there is fundamental shift toward a genuine self-determination model, a significant section of the Northern Australian economy and society will remain (and likely become increasingly) dependent on financial support from government that is ultimately derived from a taxation base that is located primarily in the Nation's south.**

Indigenous enterprises in Northern Australia face both the same generic structural challenges as all business in Northern Australia, as well as unique structural challenges relating to the particular circumstances and history of Indigenous people and the state. The generic structural challenges faced by all Northern Australian business include small and sparse local markets, remoteness (including limited access during the wet season), poor infrastructure, harsh climate and a degree of political irrelevance that is derived from the electoral imbalance between Northern and Southern Australia. In addition to these structural challenges, Indigenous business in Northern Australia also faces challenges that are the result of two centuries of discriminatory dispossession, oppressive and punitive policy that has resulted in widespread background of intergenerational socio-economic disadvantage among Indigenous Northern Australians. This manifests itself in many ways, including generally lower levels of education and income, limited inter-generational wealth transfer, relatively limited capacity to engage in the workforce or to own, successfully operate and grow commercial enterprise and to access the necessary networks, resources and support services required to achieve these outcomes.

Further, while well-resourced social programs are obviously critical to improving the dire health and education status of many Northern Australian Indigenous communities, reliance on government funding itself can often create perverse incentives, which in turn discourage enterprise (including through competition by government organisations with Indigenous managed NGOs in service delivery) and perpetuate ongoing dependence on services delivered and funded by governments. Without concurrent economic development and pathways to economic self-determination, a significant number of Indigenous Northern Australians will remain welfare dependent and continue to live with the negative impacts of dependency and passivity. Until Indigenous people are able to achieve economic independence, this welfare dependency will remain a significant fiscal burden for the Northern Australian government jurisdictions.

This means that the market failure in the development of Northern Australia that is the result of the generic challenges targeted by the Commonwealth's Northern Australia Agenda are greatly exacerbated in the case of the Northern Australian Indigenous economy. Developing policy initiatives that target the source of this unique market failure in the Northern Australian Indigenous economy with a high degree of specificity is the primary focus of the IRG.

The IRG Policy Recommendations and related initiatives, and the objectives and principles that underpin those recommendations and initiatives emulate world-best-practice for frameworks designed to support and

accelerate regional Indigenous economic development. This is evidenced by the policy recommendations of a recent study on international best practice undertaken by the OECD³ (see Attachment 3).

1.2. Consultation and IRG Recommendations

Since early 2018, the IRG has been working closely and intensively with senior officials in Commonwealth, Western Australian, Northern Territory and Queensland Government agencies, whose statutory and policy functions intersect with the Northern Australia Agenda and/or Indigenous economic development (refer to the table below for list of those consulted). This work has focused on establishing a policy framework designed to substantially enhance and accelerate the engagement of Northern Australian Indigenous interests in the development of the Northern Australian economy. The work commenced with a cross-jurisdictional policy assessment and development workshop in March 2018 which delivered 36 specific policy recommendations. The April 2018 Ministerial Forum endorsed 16 of those specific recommendations for implementation planning and referred the remaining 20 recommendations for further consideration.

Northern Australia Indigenous Reference Group Policy Development Consultation	
<p>Commonwealth Agencies – Prime Minister & Cabinet; Austrade; Agriculture and Water; Indigenous Business Australia; Indigenous Land Corporation; Office of Northern Australia; CRC for Development of Northern Australia; Northern Australia Infrastructure Facility; CSRIO; and Geoscience Australia.</p>	<p>The 16 recommendations can be broadly categorised as initiatives designed to:</p>
<p>Western Australian Government Agencies – Premier & Cabinet; Primary Industries and Regional Development; Jobs, Tourism, Science and Innovation; Water and Environmental Regulation; Training and Workforce Development; Communities WA; Planning, Land and Heritage; and Kimberly Development Commission.</p>	<ol style="list-style-type: none"> 1. Create jobs and foster labour participation, entrepreneurship and business acumen among the Northern Australian Indigenous population; 2. Develop knowledge management systems, decision support tools and commission research and development that is designed to improve the decision-making environment for Indigenous managers and business owners in Northern Australia; 3. Develop infrastructure that supports Indigenous economic development in Northern Australia; 4. Provide improved access to capital and international markets for Indigenous businesses in Northern Australia; 5. Initiatives to activate the economic value of land, water, sea and cultural resource rights and interests of Northern Australian Indigenous people; and 6. Give effect to institutional arrangements that work to activate, accelerate and optimise Indigenous economic development across Northern Australia
<p>Northern Territory Government Agencies – Chief Minister’s Office; Trade, Business & Innovation; Health; Northern Territory Solicitor; Tourism NT; Local Government & Communities; Environment & Natural Resources; and Land Resource Management.</p>	
<p>Queensland Government Agencies – Premier & Cabinet; State Development; Treasury; Employment & Training; Aboriginal and Torres Strait Islander Partnerships; Transport & Main Roads; Environment & Science; and Fire & Emergency.</p>	

1.3. Endorsement by the Ministerial Forum

The implementation plan was endorsed by the November 2018 Ministerial Forum, with six specific implementation actions currently underway. These specific initiatives include the development of a Northern Australian Indigenous Development Accord between the Commonwealth, Western Australian, Northern Territory and Queensland Governments, agreement on which was announced on 12th December 2019, as well as co-design work to scope pan-Northern Australian institutional arrangements (Northern Australia Indigenous Economic Development Body and Northern Australia Enterprise and Employment Hub network) to support the specific needs of the Northern Australian Indigenous economy, and the preparation of a Northern Australia Indigenous Commercial Research Roadmap.

³ OECD (2019) *Linking Indigenous Communities with Regional Development*, OECD Publishing, Paris

2. Introduction

According to the United Nations, there are 370 million Indigenous peoples worldwide across 90 countries. While Indigenous peoples comprise approximately 5% of the world's population, they make up 15% of the world's extreme poor and 33% of the rural poor. They comprise the majority of the world's cultural and linguistic diversity and are stewards of the vast majority of the planet's biodiversity, the largest carbon stocks, intact freshwater systems and marine expanses. These special places have and continue to persist because of complex knowledge systems based on place-anchored guardianship and customary obligations.

The IRG's focus on Indigenous Northern Australia is based on the following:

- Currently, Indigenous people comprise 15 percent of the total population of Northern Australia, and substantially more of the population outside of the main regional centres of Cairns, Townsville and Darwin;
- 50 percent of the working age population of Northern Australia will be Indigenous by 2050;
- Indigenous interests have legal rights to around 80 percent of the Northern Australian terrestrial landmass and large areas of coastline and marine areas, including approximately 85 percent of the Northern Territory coastline; and
- As a result, Indigenous people and their institutions perform key functions in the future sustainability of Northern Australia.

Northern Australia holds some of the most biodiverse and unique landscapes in Australia. They are also home to Indigenous people that have lived within and managed these landscapes for at least 65,000 years. These include the world's most intact tropical savannas, extensive wetlands and sandstone plateaus of Arnhem land and the Kimberley with Kakadu, Uluru-Kata Juta, Purnululu, Wet Tropics and the Great Barrier Reef World heritage listed National Parks. The region has 65% of the nation's freshwater runoff from relatively intact rivers.

The enormous bio-cultural diversity of northern Australia, together with long Indigenous traditions represents globally unique opportunities to achieve sustainable development alongside the guardians of these collectively held lands and waters.

Yet, Indigenous peoples continue to suffer marginalization, extreme poverty and structural exclusion. Some are being dispossessed of their traditional lands and waters leaving ancient belief systems, cultures, languages and sustainable ways of life threatened with increasingly higher numbers facing extinction.

Typical orthodox western approaches deal with complex systems by breaking them into silos and treating them separately, whilst Indigenous people continue to articulate the completeness, or wholeness, and the need to include all aspects into dealing with the special relationship between people, country and the spiritual world.

The IRG believes this orthodox approach is one of the fundamental challenges facing the future sustainability of Australia's unique environment and in particular, Indigenous society balance between development, sustainability and society.

The EPBC Act (EPBCA) is highly complex and inefficient legislation that fails to meet its aim of protecting the environment and conserving biodiversity. It is now 20 years old and is in need of extensive reform. The EPBCA intersects with Indigenous landowners and their communities throughout northern Australia, and it is this reason that it is not possible to cover all relevant issues in this submission. The submission presented here by the IRG is based around the Review's questions and discussion paper, therefore it focuses on issues of principle and fundamentals of desirable practice and how it may interact with Indigenous people in northern Australia.

We have also identified connections to other areas of policy that require attention. The objectives and content of the Act and the way it interfaces with other policy has important implications for the development of Indigenous lands by Indigenous peoples.

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

The Commonwealth's options to deal with environmental issues are constrained by the Constitution's narrow specification of the role of the commonwealth with the states and territories and the political appetite to pursue interventions.

We therefore view specific inclusions or gaps in matters of national significance as a lesser issue, the primary being a lack of a shared understanding of the conditions under which federal intervention is necessary and effective. We believe that current settings are over-prescriptive and cannot substitute for provisions setting out the federal role. Improving this function by defining criteria for federal intervention and description of federal roles would improve the functions of the Act.

However, the IRG also recognises that many inter-related issues benefit from federal led coordination across state and territory boundaries especially when matters of national significance, or when Australia's international obligations are concerned. Therefore, the Commonwealth must improve its capacity to provide the required leadership especially relating to complex or intractable issues that challenge technical, financial or political capacity of individual states or territories as well as define its role.

The IRG recommends that the Commonwealth take a leadership role and in collaboration with the states and territories enter into new bilateral arrangements to ensure the EPBCA is strengthened, particularly with respect to Indigenous people and their unique role in managing Australia's environment.

2. How could the principle of ecologically sustainable development (ESD) be better reflected in the EPBC act? For example, could the consideration of environmental, social and economic factors, which are core components of ESD, be achieved through greater inclusion of cost benefits analysis in decision making?

Firstly, the existing definition of ESD does not represent development decisions having social, cultural, economic and environmental implications. Formal cost-benefit analysis is a quantitative tool for attempting to compare elements of the full spectrum of benefits and costs across these and other dimensions. But it remains dependent on competing views about scales of assessment and reasonable trade-offs among national, regional, local and individual interests; as well as broader issues around the public versus private interest. The IRG believes that in northern Australia, Indigenous interests are not fully understood given the unique and long standing relationships and worldviews held by Indigenous people differ vastly to non-Indigenous people – that is, land, water and people are entwined.

The application of cost benefit analysis can be epitomised by 'fitting a square peg into a round hole' for many Indigenous people. In many developed countries, once the social, cultural and economic costs of environmental decisions are applied, the industry and political appetite for a comprehensive cost benefit analysis has waned, because taking this approach results in greater intervention of private activity in the wider public or national interest. Industry has responded by arguing to exclude co-benefits like public health improvements or, following longstanding policy inaction around climate change, reject evidence-based approaches. This leaves the cost benefit analysis tool as a source of contention. And in the process driven discussion into the hands of specialists at the expense of participation by those whose interests are less amenable to quantification such as Indigenous people.

The IRG recommends that Ecologically Sustainable Development include articles of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)⁴ that support Indigenous decision making processes and protocols.

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

The IRG believes that clearer framing of the EPBCA's objects as well as the objects themselves be more specific.

The IRG recommends a reframing of the EPBCA objects to:

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

Other parts of this submission will provide deeper advice in relation to the objects.

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

The IRG believe that the matters of national environmental significance should be substantially broadened and enhanced. It is important that the EPBCA recognise that matters of national environmental significance in conservation and environmental assessment are also linked with the social and cultural aspects of society. The current definition of MNES are western centric, narrow and are unhelpful in national and international settings. This is especially so for Indigenous Australians who have clearly articulated and advocated these links over a long period of time, especially where developers have gained approval and the development has led to trauma and varying kinds of stress on Traditional Owners and the community. In the northern Australian context

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

Considering some matters as important and implying that others are unimportant because they may not appear in an international treaty also suggests that a review of Australia's environmental law and policy require updating.

For Indigenous people to actively be involved in building the nation, their long standing values, aspirations and intellectual input must be embraced and harnessed.

To an Indigenous community, culturally significant aspects of a landscape will differ from western and science based aspects. The definition of matters of national environmental significance should be expanded to include intangible assets of a given landscape that is vitally important to Indigenous cosmology and tradition. The

⁴ https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf

conservation of Indigenous cultural heritage is paramount to the continuity of traditional stories and associated connections to the landscape for all Australians.

In order to protect and conserve such spaces, genuine engagement with communities, local authorities and industry alike is necessary. The resetting of the relationship between indigenous people and government will enable better cultural heritage protection leading to industry seeking to develop the land to be better informed.

The IRG recommends that matters of significance to Indigenous people feature strongly and explicitly in any meaningful set of MNES not only because they are required in international law, but because proper recognition of and response to Indigenous interests is essential in many other areas of national social policy. In many circumstances of northern Australia, customary law plays a substantial role in decision making processes that take into consideration a broad range of issues, questions and possible impacts.

The IRG recommends the establishment of an Indigenous working group to advise on the structure and wording required.

Neither Western Australia, Queensland or the Northern Territory have a focused Indigenous assessment process or criteria relating to development that affect Indigenous owned and managed lands and waters. In northern Australia where much of the region comprises Indigenous title or recognised interests, governments and industries have a long history of weakening Indigenous rights.

The EPBCA should address the availability of high quality, unbiased and relevant information at two broad levels:

- a) Indigenous access to information and analysis required to inform decision-making; and
- b) Information that regulators and developers need about Indigenous values, cultural obligations, knowledge and land management practice.

It is inappropriate to expect Traditional Owners or their organisations, including Prescribed Body Corporates to make informed decisions about major developments without (1) detailed information and analysis, (2) adequate financial, technical and human resources, and (3) the ability to make collective decisions as per their traditional decision making processes.

Informed decision making will require complex technical issues in social and environmental science, economics and finance, business development, social development, cultural expertise and analysis including GIS. There is no way in which such issues can be effectively translated, communicated and debated and their interactions even broadly understood in the timeframes sought and required in present law.

Indigenous access to information

North Australian Indigenous leaders have consistently called for inclusion into the development of the north⁵ and to engage with development through the creation of a prospectus⁶ that would greatly assist in the challenging space between Indigenous people and development. This is mentioned here because the challenges with the EPBCA and sustainable development on Indigenous lands and waters will require reviewing and reform.

Importantly, the EPBCA is about sustainable development, therefore limiting the Indigenous role in a nation where they are major landholders under title acknowledging enduring connections to, dependence on, and cultural obligations to specific areas of land. The present objects in regard to Indigenous people are inadequate to deal with a new global appreciation for the environment and Indigenous rights, including rights to development.

Of the EPBCA objects, two explicitly mention Indigenous people:

- *to recognise the role of indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity; and*

⁵ <https://nailsma.org.au>

⁶ <https://nailsma.org.au/resource-library/an-indigenous-prospectus-for-northern-development-setting-the-agenda>

- *to promote the use of indigenous peoples' knowledge of biodiversity with the involvement of, and in co-operation with, the owners of the knowledge".*

The IRG accepts that the intent may have been to require recognition of Indigenous views and values, but the attempt has failed. We are aware of no case in which Indigenous knowledge has strongly influenced the outcomes of an environmental assessment.

Over the course of two decades of operation in federally-administered national parks (including those listed on the world heritage list with 'cultural' values) located entirely within Indigenous-owned lands, genuine Indigenous involvement in such fundamental operations as fire management has been rejected in favour of weak re-interpretations of Indigenous practice applied wrongly by non-Indigenous staff. A more productive approach will require proper consideration of Indigenous values that goes beyond dressing up western conservation approaches. These approaches are inequitable and are failing.

The IRG believes that northern development must recognise Indigenous people as more than conservation practitioners, but also as potential developers, investors and partners in the economic use of lands in ways that are sustainable from the perspectives of traditional custodians.

Any new objects of the EPBCA must empower Indigenous landowners to make commercial decisions about land uses that can be managed in accordance with cultural obligations as well as social, cultural and environmental sustainability. New environmental law can make an immediate contribution by requiring development proponents to show, in their environmental impact analyses, how they have taken account of Indigenous values and how their proposals achieve management in accordance with those values. To do either of those things well will require genuine dialogue with Indigenous landowners and managers, including uplifting and amplifying the role of Indigenous knowledge. Governments can play critical leadership roles by making available the expertise of their resource management specialists to work with Indigenous landowners through the recommendations of the IRG (see above).

The EPBC Act should prioritise Indigenous involvement, partnerships and advice, and decision-making. Attention is required to shift the longstanding perspective and practice of treating Indigenous landholders and Traditional Owners as impediments to development and sources of risk. The advisory committees established under the Act should be required to consult directly with Indigenous land-owners relating to specific issues and accounting for their voice in decision-making. Partnerships with Indigenous communities, states, territories and private landowners should be transparent and a process to validate Free, Prior and Informed Consent.

The IRG recommends the objects of the Act be written to include articles of the UNDRIP and adequate resourcing in the operation of the act and engagement with Indigenous land owners and managers.

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

The IRG believes there is scope for improvement to the EPBCA that are of concern to Indigenous people including:

1. The absence of obligations to ascertain and prioritise maintenance of environmental, social and cultural values of particular importance to Indigenous people;
2. Lack of standardised obligations in environmental assessment that consider the natural, social and cultural values of importance to Indigenous people;
3. Availability of information in understandable language and content for Indigenous landholders requiring to make informed land use and related development decisions;

4. Indigenous people are commonly relegated to conservation practice rather than as decision-makers, investors and partners in sustainable development;
5. A failure to give effect to the current narrowly defined objects relating to Indigenous interests due to inadequate supporting provisions in the Act; and
6. Requirements for social impact that take too little account of the Indigenous social and cultural impacts and obligations that generate local benefits to compensate for often severe dislocation of relationships with country.

The IRG has focused its attention on changing the paradigm in northern Australia to enable Indigenous people, as landowners, the capacity to be developers rather than as 'stakeholders. It is with this approach that changes to the EPBCA will contribute to the direction the IRG is going, as well as to give effect to the recommendations. The role of the states and territories in land and resource management requires that a new national federal leadership is required to achieve goals that cannot reasonably be subordinated to local or regional imperatives, including the rights of Indigenous people.

The IRG is acutely aware that the Act has little to say about genuine sustainable development, as distinct from avoiding the worst impacts of development. The most recent bushfires in Australia should act as a reminder about sustainability and the need for new environmental legislation as well as leadership.

There is little to no information relating to the costs of administering the Act but are aware that Indigenous institutions in northern Australia are not well placed to engage with the legislation in a proactive manner. There must be more resources to enable localised Indigenous corporations to engage with sustainable development rather than continue to react to third party's wanting to develop lands, long fought for, and recovered from the crown.

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

The review should take full account of the recommendations of the IRG with respect to development of northern Australia, the need for a proactive institutional arrangement, international best practice and the growing international recognition that Indigenous territories are globally significant and require protecting and managing.

The IRG recommends that the review consider the following:

- *the existing and emerging role of Indigenous people and their lands in meeting Australia's international conservation obligations and the potential to expand;*
- *the socio-cultural, economic and environmental benefits of sustainable development of Indigenous lands, especially in northern Australia;*
- *Adoption and use of high quality, verified environmental offsets; and*
- *Application of Indigenous knowledge to environmental assessment.*

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

The IRG believes that incentives to obtain national environmental standards would be through expanding partnerships with Indigenous people. The Indigenous estate, particularly in northern Australia make a critical contribution to Australia's international obligations in the form of the national reserve system (national parks). The model of IPA's is based on the reality that landholders do not have to respond to all forms of commercial activity on their lands, but rather avoid uses that significantly impact the values that the area was designated to protect.

Whilst the IRG understands that the model of IPA's also require review, they typically do not need to be designated as Indigenous Protected Areas to work effectively to achieve a positive mix of socioeconomic and conservation initiatives to produce net environmental benefits. Preferences to the adversarial approach embodied in present environmental assessment practice, which privileges the polar views of environmental and industry lobby groups over the efforts of poorly-resourced local landowners to access unbiased advice should be taken.

The IRG recommends that the function of the EPBCA should be about management rather than control, so as to enable Indigenous communities, their corporations and other entities to manage their lands and waters not control them.

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 EPBCA enables the Commonwealth to take responsibility for national or international matters of significance even though many parts of Australia's environment and heritage continue to decline. In northern Australia, it would be essential to enable states and territory to work in partnership on ground with local communities and Traditional Owners to deliver protection of environmental and heritage sites, overseen by the Commonwealth. Continued maintenance and analysis of biodiversity and protected sites will ensure data is up to date and will inform conservation strategies. Such efforts will be effectively implemented by state, territories in cooperation with local communities, ranger groups and land-managers but it would be essential to ensure that reporting and ensuring that Australia's contributions to international agreements are adhered to, such as article 8(j) of the Convention on Biological Diversity⁷.

The IRG recommends and endorses the Commonwealth taking a leadership role in environment and heritage conservation and through formal arrangements be obliged to ensure that partnerships with Indigenous people are in place and active.

10. Should there be a greater role for national environmental standards in achieving the outcomes of the EPBC Act seeks to achieve? In our federated system should they be prescribed through:

- **Non-binding policy and strategies?**
- **Expansion of targeted standards, similar to the approach to site contamination under the National Environment Protection Council, or water quality in the Great Barrie Reef catchments?**
- **The development of broad environmental standards with the commonwealth taking a monitoring and assurance role? Does the information exist to do this?**

The IRG understands that environmental standards are desirable but difficult to frame and follow in practice, except where causal links are unusually clear and relationships between pressure and response are quantitatively well defined.

Well-funded protected areas such as Kakadu, remain unable to adequately report their progress in meeting their legislative objectives as well as Australia reporting on its international obligations. This and related challenges highlight that agreed standards and building monitoring systems for the design of targets for management strategies that involve Indigenous targets require considerable development. But firstly, recognising Indigenous landowners as essential stakeholders will require that the choice of targets for standards and the way they are indexed includes Indigenous views and knowledge.

⁷ <https://www.cbd.int/traditional/>

The IRG recommends use of environmental standards to inform decision-making processes, under the following conditions:

- *a properly funded program and process to consult, develop, apply and refine a national set of standards;*
- *formal recognition that standards must evolve and so cannot offer the illusion of certainty demanded by some in industry, but provide an orderly process for continual review, refinement and change;*
- *obligation to include targets identified by Indigenous interests and informed in design and application by Indigenous knowledge and practice;*
- *emphasising standards for rehabilitation of damaged lands (habitats); and*
- *consideration of the Native Title Act and Aboriginal Land Rights (Northern Territory) Act.*

11. How can environmental protection and environmental restoration be best achieved together?

- **Should the Act include incentives for proactive environmental protection?**
- **How will we know if we're successful?**
- **How should Indigenous land management practices be incorporated?**

The IRG understands that much of the northern Australian environment is relatively in-tact, but there is a great need (and urgency) to restore landscapes over vast areas damaged by the depopulation of landscapes resulting in poor fire management, feral animals and grazing. There is also a growing global recognition that Indigenous people own and manage some of the world's most biodiverse territories on the planet, as articulated by Garnett et al⁸ - Northern Australia is one of these important places.

The IRG recommends that relevant sets of provisions in the EPBCA should contain the following elements:

- *Incentivising landowners, industry, state and territory government agencies to participate in Strategic Environmental Assessment (SEA) and Bioregional Planning (BP);*
- *Ensuring restoration and rehabilitation in all SEA and BP mandatory;*
- *Ensuring restoration and rehabilitation options in all EIA through legislated offset provisions, including preference for offsets provided locally and demonstrably rehabilitating similar environments are mandatory;*
- *Dedicated resources for Indigenous landholders and managers to participate in SEA, BRP and development planning, including technical and language support to match their respective plans;*
- *Mandate incorporation of Indigenous views in all SEA and BRP; and*
- *Ensure the meeting of goals to be mandatory for all SEA, BRP and offsets arrangements.*

Environmental protection and restoration can be achieved through the guidance and incorporation of Indigenous knowledge and practice. Indigenous land and sea management practices can be incorporated by emphasising and prioritising roles for Indigenous peoples in environmental protection and restorations.

Within this framework, Indigenous cultural values in the targets, methods and evaluations of performance should be integrated.

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

⁸ <https://www.nature.com/articles/s41893-018-0100-6>

Indigenous values and place are inseparable and there are no incentives for Indigenous people to act on behalf of the national good as customary practices are not recognised by the wider population. The IRG believes that Indigenous heritage is best protected by those Indigenous people who have traditional responsibility for those heritage places. The EPBCA can contribute to this in three ways.

- 1) By requiring that Indigenous heritage values are identified and management obligations developed in context, rather than allowing sites to be treated as independent of each other and of physical and cultural linkages among them;
- 2) By supporting preparations of Indigenous landholders for development on their lands within frameworks for SEA or BRP, encourage practical planning to maintain heritage values in landscapes that may be subject to change in patterns of use; and
- 3) Incentivise proactive conservation of both natural and cultural values, favourable offset and environmental restoration provisions, facilitate access to the financial and other resources required to sustain active management.

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

The IRG does not believe that strategic assessments should replace individual assessments. Alongside the development of an Indigenous led prospectus across northern Australia through a comprehensive planning process, a realistic role for SEA and related BRP will be to:

1. commence land use and development planning with the evidence supporting their relevance to a designated region;
2. support Indigenous people to pursue sustainable development options;
3. identify potential and likely risks taking full account of the biophysical, social and cultural characteristics;
4. consider likely cumulative impacts;
5. set out priorities, standards, acceptable (preferred) management approaches to be applied to assessment of individual proposals based on:
 - recognition of values of local, regional and national significance
 - recurring issues or concerns for management of important values identified by Indigenous people and their organisations
 - avoidance of duplication of assessment effort.

The process should be proactive, streamlined and considerate of Indigenous land ownership and development aspirations.

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

The IRG believes that the MNES requires substantial reform to ensure it is as streamlined as possible. The following could assist in this process:

- Refine the MNES in the EPBCA;
- Allow for states and territories to develop supporting legislation where responsibilities are shared;

- Mandate the inclusion of Indigenous social, cultural environmental and economic considerations; and
- standardise guidelines for sites of national significance under the EPBC Act.

15. Should low-risk projects receive automatic approval or be exempt in some way?

- **How could data help support this approach?**
- **Should a national environmental database be developed?**
- **Should all data from environmental impact assessment be made publicly available?**

The IRG believes that low risk projects are those that are likely to impact on Indigenous people the most, therefore there should be no automatic approval processes. Indigenous decision making processes, Indigenous rights and customary responsibilities cannot be automated. In addition, there are sensitivities associated with knowledge held by custodians that cannot be shared, even amongst other members of the community or traditional owner group/s.

The IRG recommends that there be no automatic approvals or exemptions.

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

The IRG believes that the Commonwealth's regulatory role under the EPBC Act should focus on habitat management at a landscape-scale. Landscape-scale habitat management protects the entire functioning of the ecosystem while also improving the well-being of people and country. This is in accordance with Indigenous views of management, connected songlines and sacred sites. And it also allows for better development planning.

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

The IRG recommends that the Commonwealth retain a leadership role and oversight especially in relation to Indigenous peoples' roles, rights and interests.

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

We believe that incentivising industry, government and other sectors bring enormous risk to Indigenous communities who have been preoccupied with land claims and human rights, and the work of the IRG is focused entirely enabling Indigenous people to develop their lands and waters. For Indigenous people to be engaged in the economic development of their estates in northern Australia, they should be encouraged to apply their traditional knowledge and legally recognised customs without interference.

The IRG recommends that enterprise development be recognised as a mechanism to secure sustainable management practice, enhance skills and customary values, all of which would boost confidence within a community.

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

- **How can we best engage with Indigenous Australians to best understand their needs and potential contributions?**
- **What mechanisms should be added to the Act to support the role of Indigenous Australians?**

The IRG believes that Indigenous people have unique and unmatched roles as owners and holders of interests in Australia's land and coasts, they are much more than a stakeholder group. In addition to roles as skilled land and sea managers, Indigenous people are critical co-investors and partners in northern development. The EPBCA fails to recognise this unique history and relationship.

The IRG recommends the EPBCA:

- ***Recognise the deep and long standing relationships to land and sea by Indigenous Australians;***
- ***Recognise and adopt articles of UNDRIP especially relating to Free, Prior and Informed Consent and empowering Indigenous peoples in all aspects of decision-making including SEA, BRP and EIA;***
- ***Strengthening the Indigenous Protected Areas to be MNES and cover marine environments and provide strong legal protection above current status;***
- ***Strengthening joint management structures around Commonwealth reserves, particularly empowering Indigenous leadership, developing enterprises, engaging community into management of these reserves, improving consultation processes and transparency;***
- ***Mandated the creation of Indigenous prospectus across local, regional and national contexts to improve engagement, reduce response time and empower Indigenous people into the protection and management of their lands and seas;***
- ***Recognise, strengthen and provide supporting mechanisms for the on-going use, protection and management of Indigenous knowledge by custodians of that knowledge; and***
- ***Creation of a new position of Indigenous Commissioner to ensure above changes are consulted on and on-going compliance of Australia's domestic and international obligations are embedded, reported on and other functions of the Act are meeting agreed standards for Indigenous sustainable management and development.***

It follows that Indigenous people should be fully engaged in all facets of the revised Act.

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

The IRG believes that community involvement in decision making is similar to that of Indigenous people, but without the need to water down the special measures that Indigenous people hold and require. The standing committees of the EPBCA, Indigenous Advisory Committee, Threatened Species Committee and Biodiversity Advisory Committee have had various iterations and functions. The common thread with these committees is that they are reactive to the Minister's request for advice or, are disbanded (BDAC).

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

The IRG recommends that a 'Working Group' comprised of experts in the field of Indigenous land and sea management, environmental law, policy and development be established to work on improving the structure, reform and implementation of a new EPBCA.

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

The IRG recommends that the governance arrangements reflect the objects and design of the new Act with principles of Indigenous involvement, transparency and proactive management of our natural, cultural and social assets.

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

The IRG believes that Indigenous people in northern Australia developing their lands and waters require their recognition, enabling those Indigenous bodies, including PBC's through comprehensive planning that integrated approaches place greater emphasis on the opportunity to link developments to specific social, environmental, cultural and economic improvements.

In northern Australia, there is a contemporary conjunction of government and industry focus on accelerating development, many sites requiring rehabilitation of acute and more diffuse chronic degradation, Indigenous initiatives to consider business options built on land ownership, demographic, and demonstration of the traditional knowledge have enormous potential in the emerging environmental services industry through savanna burning projects.

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

The IRG believes that the success of Indigenous led and delivered savanna burning projects demonstrates the appetite for environmental products, especially where they also deliver social co-benefits. There is great scope to create other markets in water quality and availability, biodiversity, and landscape rehabilitation of many types also linked to socio-economic advancement for remote Indigenous groups and the use and protection of Indigenous Know

The IRG recommends that the commonwealth:

- *establish a base demand by legislating standards for various products;*
- *establish a fund to initiate the offset market and grow innovation*
- *establish and support a monitoring and reporting system that is transparent;*
- *incentivise SEA and BRP for environmental improvement as well as avoidance and repair; and*
- *mandate developers have environmental offsets aligned to the Commonwealth's IPP.*

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

The IRG recommends that the Working Group examine and provide detailed advice on the development of offsets and interactions with Indigenous land owners and managers. This should include leaders as well as rangers.

25. How could private sector and philanthropic investment in the environment be best supported by the EPBC Act?

- **Could public sector financing be used to increase these investments?**
- **What are the benefits, costs or risk with the commonwealth developing a public investment vehicle to coordinate EPBC Act offset funds?**

The IRG recommends that:

- *A public fund, including an appropriate amount for Indigenous enterprise be established to grow the offsets market and build confidence for the private sector;*
- *Allow for publicly funded programs, such as the 'Working on Country' program allow flexibility for them to better engage with enterprise without being penalised for generating incomes.*

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

No recommendations from the IRG, the Working Group will be able to provide greater detail in these tasks.

Overarching:

The above recommendations have been in response to the questions raised in the discussion paper. However, there are other aspects that are necessary to consider that relate to (a) the functions of the EPBCA and how it can better reflect the place of First Australians and, (b) consider important interactions relating to improving consideration of economic opportunities relating to use of natural resources and protection of sacred sites.

Wildlife

The EPBCA and the administration of it could be improved by better aligning with regional approaches to the use, management and protection of wildlife. Many species of plants and animals are listed due to a lack of information, using the precautionary principle. However, this does not always reflect with regional circumstances particularly in northern Australia where, for example the continual denial of allowing sustainable harvesting of saltwater crocodiles by Indigenous communities for safari based enterprises makes no sense to many remote communities where numbers are high, cultural sensitivities about use of totemic species is negotiated by Indigenous groups and there is a demand. It has been unfortunate that these unique and sustainable enterprises have been captured primarily by animal welfare debates.

Property Rights and collectively held land and water

The unique ownership of property in Indigenous lives differs from western forms of property. The ALRA and NTA both provide collectively held property rights through a process of decision making that usually. The timeframes for responding to development proposals as outlined in this submission do not consider the property regime on Indigenous lands and waters and does not consider the decision making process, especially as distinct from western processes.

Data

An important aspect of managing Australia's resources is having the information. Better recognition and use of data (data sovereignty) by first nations including equitable sharing and access arrangements that allow Indigenous Australians to use TK and western knowledge to create sustainable environmentally based livelihoods would create an enabling environment. Whilst the EPBCA does not directly deal with IP, copyright etc it would be useful to consider this issue broadly as it applies to other areas of Environmental law and protection. Particularly relevant is the issue of provision of permits for export that may or may not have taken consideration of Indigenous intellectual IP protection.

Preamble

The IRG believes that the long standing cultures and traditions of Indigenous people in Australia makes them unique in terms of the social, cultural economic and spiritual connection with Australia's environment. It is also useful to articulate that Indigenous connection to this environment, views about the use, development and protection of the environment may differ from the rest of society.

Transparency

There is an overarching issue relating to transparency of the operations of the EPBCA and its intersection with the lives of Indigenous peoples particularly as it relates to development and management of the environment. It would be advantageous to create an improved reporting mechanism against agreed criteria in addition to the annual 'State of the Environment' report card.

The IRG recommends that:

- The Working Group review the process of considering Indigenous use of wildlife with a view of enabling Indigenous management and protection of the environment as well as the cultural and economic values of wildlife based on consultation with those communities affected;
- Explicit recognition of Indigenous Australians unique and unmatched connection be a substantial feature of the preamble of the EPBCA.
- Better recognise and reconsider timeframes for responses to development proposals for Indigenous parties due to complex decision making processes.

3. Recommendations

The complete set of recommendations relating to the EPBCA Review are listed below.

1. *The IRG recommends that the Commonwealth take a leadership role and in collaboration with the states and territories enter into new bilateral arrangements to ensure the EPBCA is strengthened, particularly with respect to Indigenous people and their unique role in managing Australia's environment.*
2. *The IRG recommends that Ecologically Sustainable Development include articles of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) ⁹that support Indigenous decision making processes and protocols.*
3. *The IRG recommends a reframing of the EPBCA objects to:*
 - *more clearly determine the fundamental federal role, emphasising leadership and the maintenance of standards;*

⁹ https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf

- *commit to protection and good management of the full array of values (social, cultural, economic and environmental) of concern to all elements of Australian society, including Indigenous people;*
 - *develop and promote national guidelines for environmental monitoring and reporting, emphasising transparency; and*
 - *set out other principles that bound the need for federal engagement and help identify effective mechanisms for enabling an appropriate federal role.*
4. *The IRG recommends that matters of significance to Indigenous people feature strongly and explicitly in any meaningful set of MNES not only because they are required in international law, but because proper recognition of and response to Indigenous interests is essential in many other areas of national social policy. In many circumstances of northern Australia, customary law plays a substantial role in decision making processes that take into consideration a broad range of issues, questions and possible impacts.*
 5. *The IRG recommends the establishment of an Indigenous working group to advise on the structure and wording required.*
 6. *The IRG recommends the objects of the Act be written to include articles of the UNDRIP and adequate resourcing in the operation of the act and engagement with Indigenous land owners and managers.*
 7. *The IRG recommends that the review consider the following:*
 - *the existing and emerging role of Indigenous people and their lands in meeting Australia's international conservation obligations and the potential to expand;*
 - *the socio-cultural, economic and environmental benefits of sustainable development of Indigenous lands, especially in northern Australia;*
 - *Adoption and use of high quality, verified environmental offsets; and*
 - *Application of Indigenous knowledge to environmental assessment.*
 8. *The IRG recommends that the function of the EPBCA should be about management rather than control, so as to enable Indigenous communities, their corporations and other entities to manage their lands and waters not control them.*
 9. *The IRG recommends and endorses the Commonwealth taking a leadership role in environment and heritage conservation and through formal arrangements be obliged to ensure that partnerships with Indigenous people are in place and active.*
 10. *The IRG recommends use of environmental standards to inform decision-making processes, under the following conditions:*
 - *a properly funded program and process to consult, develop, apply and refine a national set of standards;*
 - *formal recognition that standards must evolve and so cannot offer the illusion of certainty demanded by some in industry, but provide an orderly process for continual review, refinement and change;*
 - *obligation to include targets identified by Indigenous interests and informed in design and application by Indigenous knowledge and practice;*
 - *emphasising standards for rehabilitation of damaged lands (habitats); and*
 - *consideration of the Native Title Act and Aboriginal Land Rights (Northern Territory) Act.*
 11. *The IRG recommends that relevant sets of provisions in the EPBCA should contain the following elements:*
 - *Incentivising landowners, industry, state and territory government agencies to participate in Strategic Environmental Assessment (SEP) and Bioregional Planning (BP);*
 - *Ensuring restoration and rehabilitation in all SEA and BP mandatory;*
 - *Ensuring restoration and rehabilitation options in all EIA through legislated offset provisions, including preference for offsets provided locally and demonstrably rehabilitating similar environments are mandatory;*

- *Dedicated resources for Indigenous landholders and managers to participate in SEA, BRP and development planning, including technical and language support to match their respective plans;*
 - *Mandate incorporation of Indigenous views in all SEA and BRP; and*
 - *Ensure the meeting of goals to be mandatory for all SEA, BRP and offsets arrangements.*
12. *The IRG recommends that there be no automatic approvals or exemptions.*
 13. *The IRG recommends that the Commonwealth retain a leadership role and oversight especially in relation to Indigenous peoples' roles, rights and interests.*
 14. *The IRG recommends that enterprise development be recognised as a mechanism to secure sustainable management practice, enhance skills and customary values, all of which would boost confidence within a community.*
 15. *The IRG recommends the EPBCA:*
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