

Submission To the EPBC Act Review

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Areas of interest

The objects of the Act; Threatened species; Indigenous Australians; Heritage; Biodiversity; Conservation

Attachment provided?

Yes

Do you give permission for your submission to be published?

Yes - with my name and/or organisation (if included)

SUBMISSION RESPONSES

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

Submission to the 2020 independent review of the Environment Protection and Biodiversity Conservation Act 1999

A case for Culturally Significant Species

Indigenous Reference Group of the National Environmental Science Program's Threatened Species Recovery Hub

The Indigenous Reference Group (IRG) of the Threatened Species Recovery (TSR) Hub ensures that Indigenous culture, intellectual property, traditional knowledge, and the priorities and values of Traditional Owners are respected and valued in all activities undertaken by the TSR Hub. The IRG reviews research proposals to ensure they are conducted to the highest ethical standards while respecting the values and beliefs of Indigenous Australians. In so doing the IRG promotes the effective and genuine participation through free, prior and informed consent (FPIC) obligations, of Indigenous Australians in the co-design and co-delivery of research that addresses the on-ground needs of threatened species and inherently species which are of cultural significance to Indigenous Australians.

Premise

This submission provides context on Culturally Significant Species (CSS) to the 2020 *Environmental Protection and Biodiversity Conservation Act 1999* (Act) review.

The submission presents the case for and discusses the policy, management and practice settings that need to change to enable the Act to address CSS as a Matter of National Environmental Significance (MNES).

The IRG aim is to raise awareness of CSS and their importance to the cultural stability of Indigenous Australian society and ensure CSS are respectfully considered in decision-making processes of the Australian Government. The IRG is further submitting through the TRS Hub a supporting document for the inclusion and protection of CSS that describes Protocols and Pathways.

Furthermore, the IRG believes that the recognition of CSS will contribute to the development of a more holistic perspective on biodiversity and ecosystems in Australia and provides all sectors of society with another avenue through which to emphasize the importance of species and communities to the state of the Australian environment.

Issue

- For Indigenous Australians, Country owns people and every aspect of life is connected to it, it is much more than just a place. Inherent to Country are vistas, landforms, plants, animals, waterways, and humans. Country is loved, needed and cared for and Country loves, needs and cares for people. Country is family, culture and identity, Country is self (Kwaymullina, 2005).
- Indigenous Australians attribute tremendous spiritual, cultural or symbolic value to many animals, plants and ecological communities (and landscape/waterscapes/seascapes), a value

that is critical in their identity and relationship with and adaptation to Country. The protection of these cultural and spiritual assets is fundamentally important to maintaining Indigenous culture, language and knowledge.

- CSS designate those species whose existence and symbolic value are essential to the stability of Indigenous culture over time. They are species which are spiritually or culturally important, they are totems, provide a source of bush food/tucker/meat or medicine, are used as materials for tools or implements to undertake customary activities, indicators of health of Country and are used in ceremonial activities. CSS feature prominently in Indigenous knowledge including the language, ceremonies, lore, identity and narratives of Indigenous Australians and are considered cultural icons.
- There is no international unified definition for CSS, although it is synonymous with the concept of Culturally Defined Keystone Species (CKS) (Cristancho and Vining, 2004) or Cultural Keystone Species (Garibaldi and Turner, 2004; Nuñez, and Simberloff, 2005), CSS can be described as species of exceptional significance to a culture or a people, and can be identified by their prevalence in language, cultural practices (e.g. ceremonies), traditions, diet, medicines, material items, and histories of a community.
- CSS is analogue to that of an ecological keystone species - those species that “*are the keystone of the [biological] community*” meaning that “*the integrity of the community and its unaltered persistence through time . . . are determined by the activities and abundance of these species*” (Paine, 1969). Keystone species have a disproportionate effect on the persistence of other species to the extent that their removal may lead indirectly to the loss of other species in the community (Vogt et al., 1997).
- The withdrawal or disruption of CSS can (and has) entail significant cultural disruption within the Indigenous community. This is particularly evident through the extirpation of Indigenous languages as Elders and community knowledge keepers pass. It is also evident through the sorry and deep spiritual loss expressed by many Indigenous community as a consequence of the unprecedented waves of mammal extinctions Australia (Woinarski et al., 2019) has encountered.
- CSS are dynamic and adaptive and may change over time as does culture. CSS may persist, can be retired or displaced, or may develop over time to replace former CSS that are no longer present. Changes in the significance of species accompanied by the cultural importance assigned to introduced species such as the feral cat (included in dreaming stories), European rabbit (bush meat) and donkey/camel (Christianity’s beast of burden that are associated with the birth of baby Jesus) are exemplars of how CSS can be dynamic and adaptive (Trigger 2008, Trigger et al., 2008, Celemajer & Wallach 2019, Deak et al., 2019).
- Within the Indigenous Australian community culture is not homogeneous and there may not be cultural consensus regarding what are CSS, even within the same community group. This recognition presents a challenge to the listing of CSS as MNES. Nevertheless, listing of CSS 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 CSS 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 CSS.

- The Department of Agriculture, Water and the Environment's (formerly DEWHA) Indigenous Advisory Committee (IAC) in its 2009 submission to the Hawke Review of the Act (Indigenous Advisory Committee 2009) raised the matter of CSS on two occasions:
 - *Under Paragraph 36 IAC members believed there needed to be some thought around seeking a process to identify and list plants of significance to Indigenous peoples where those plants were primarily used for medicinal and cultural purposes. The IAC suggested this would be a pre-emptive and proactive approach by the Australian Government, as the plants would be afforded protection before their numbers became threatened. It was envisioned that this list would be in addition to the threatened and endangered species list; and*
 - *Under Paragraph 56 the IAC declared that the Act was the national mechanism for the Australian Government to fulfil its Convention on Biological Diversity (CBD) obligations, however, the Act failed to acknowledge Indigenous peoples as part of the natural systems of the environment and treats the environment and cultural/spiritual significance as separate and disparate associations.*

Key Issues

Policy and Legislation

- While, government, environmental agencies and community organisations recognise that species have significant cultural value to Indigenous Australians, currently there are limited statutory mechanism to protect these species from threatening process unless they are already declared as listed species under the Act or similar jurisdictional biodiversity conservation legislation (e.g. *Western Australian Biodiversity Conservation Act 2016, Victorian Flora and Fauna Guarantee Act 1988*).
- Many Indigenous and non-Indigenous groups have lobbied for relevant legislation to be amended or enacted to recognise CSS. Key amendments seek to establish co-management or sole-management pathways informed by Indigenous Knowledge as the preferred approach to the conservation and management of CSS.
- There are many ways the Act could be amended to afford protection to CSS including:
 - 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 People 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.
 - Consideration should be given to modifying the criteria and process of Threatened species listing, to ensure Indigenous values and knowledge is considered in both listing and recovery planning for Threatened species. 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 wildlife (Government of Canada 2002).

SARA Section 8.1 mandates 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 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.

A recent review questioned how well Indigenous involvement in Canadian species at risk recovery processes were working with <50% Indigenous involvement in 477 approved recovery plans despite a legal requirement to consult Indigenous Peoples (Hill et al., 2019). Recommendations and the obstacles to improve legislated Indigenous involvement in SARA identified by Hill et al. (2019) are equally valid to the operations of the Act and any proposed amendments to recognise CSS and/or increase Indigenous participation in Threatened species listing and recovery planning.

- Listing under section 190(1) of the Act, where there is a mechanisms 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 TSSC considers that the species or community is not currently eligible for listing). Therefore, Indigenous Australians could trigger conservation 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 Act. At a minimum, listing would act as a trigger to ensure the preparation of Conservation Advice, assuming listing of CSS 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, would not be applicable to CSS. Nevertheless, this challenge presents a further opportunity to embed the views and values of Indigenous Australians in the operations of the Act.
- In line with Question 1 of the 2019 Review’s Discussion paper (Samuel 2019) which alludes to MNES, the Objects of the Act could be amended to deliver a focus on cultural values in line with the exiting focus on environmental values. Such a change would deliver a more inclusive Act as inherently cultural values are intrinsically linked to environmental values for Indigenous Australians. Currently the protection and conservation of culture is not explicitly identified in the Objects of the Act, although it is fundamental “to recognising the role of Indigenous people in the conservation and ecologically sustainable use of Australia’s biodiversity” and to promoting “the use of Indigenous Peoples’ knowledge of biodiversity with the involvement of, and in co-operation with, the owners of the knowledge” (Section 3(1)(f) and (1)(g), respectively) (Commonwealth of Australia 1999). The outcome of such an amendment would strengthen the Act, and ultimately recognise both tangible and intangible values which are circumscribed as Matters of National Environmental and Cultural Significance (MNECS).
- The development of a new section under the Act which focuses on the Indigenous estate and Indigenous knowledge, in which the listing of CSS would be a key protection

mechanism. The development of a new fit for purpose section allows for the most tailored and robust approach to protection of CSS and more broadly the Indigenous conservation estate.

Tangible and Intangible Aspects

- Indigenous cultural encompasses ‘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 their cultural identity’ (Janke and Quiggin 2005).
- While not rigid, tangible cultural objects includes objects such as plants, animals, ecosystems, landscape, art, sacred sites and artefacts, monoliths and rock formations, water bodies, fish and eel traps while intangible cultural objects includes lore, tradition, language, knowledge, song lines and landscapes/seascapes/nightsapes where there is a spiritual and cultural connection to Country.
- Capturing through legislative processes the cultural significance of tangible objects is possible through culturally appropriate engagement and participatory processes. The same is possible for intangible cultural objects however Indigenous communities may be extremely reluctant, and in some instances prohibited by cultural norms from sharing such knowledge (e.g. men’s business).

Nomination and Listing

- While the mechanics and business practices for nomination and listing CSS are still to be fully resolved, such activity must be enabled and driven through culturally and ethically appropriate protocols that adhere to the FPIC concept. This participatory process, ideally Indigenous-led, must ensure consensus within the Indigenous community for the species nominated for listing.
- For some species, the spiritual, cultural or symbolic value to the Indigenous community may be secret (i.e. initiated community members only) or privileged information (i.e. women’s business) which customary lore may preclude from sharing with the wider community. Business practices to deal with such nuanced and idiosyncratic circumstances will need to be developed.
- A key outcome of successful listing for CSS will be the identification of threatening processes that may deleteriously impact on CSS and the subsequent recovery actions (Recovery Plans, Conservation Advices, Threat Abatement Plans) to mitigate impacts. Such outcomes must also be Indigenous-led by those with the cultural authority to speak for community and the cultural significance assigned to the species. Such an outcome will further increase the acceptance and value ascribed to Indigenous Knowledge as a legitimate information source as important as Western science and will necessitate increased Indigenous participation in business practices.
- A supplementary outcome achieved through the recognition and listing of CSS will be the opportunity for Indigenous communities to identify potential impacts and seek to have them assessed as Controlled Actions. This outcome will ensure genuine Indigenous participation in subsequent impact assessments and approval processes, a desire that the Indigenous community has long held (Chalk, 1990; O’Faircheallaigh and Twomey, 2010; Muir, 2012; Marsh, 2020) especially when impacts impinge on CSS, the Indigenous estate, in particular Indigenous Protected Areas (IPAs), Traditional Use of Marine Resources Agreements (TUMRAs), and Indigenous Land Use Agreements (ILUAs), the pursuit of cultural and customary activities and/or the livelihoods and wellbeing (social, economic, cultural) of the Indigenous community.
- While not novel to DAWE, business practices that deliver a cultural perspective and enhanced the participation of the Indigenous community along with their knowledge in the environmental

review, impact assessment and decision-making advisory process to Government, are welcomed and would be an outcome that would be aligned with the United Nations Declaration on the Rights of Indigenous Peoples and article 8(j) of the Convention on Biological Diversity.

- Enabling greater Indigenous participation in local and policy-level decision-making processes associated with environmental approvals (Controlled Actions, Impact Assessments) will also deliver greater transparency and improved rigor for Strategic Environmental Assessments and environmental offset processes, especially when environmental offsets seek to deliver, through on-ground actions, landscape scale net biodiversity benefits.

Dual-listing

- CSS may include species that are already listed as Threatened (e.g. Gouldian finch, Bulburin nut (Macadamia)). CSS may also be species that are nationally/locally widespread and abundant (e.g. Emu, Bustard, Zamia palm) but to the local Indigenous community they are a species of special cultural significance that needs protection above and beyond that afforded by 'normal' jurisdictional biodiversity conservation legislation.
- The dual listing of species should not be perceived as a hindrance to the CSS concept as Threatened species can also be dual listed through their occurrence in Threatened Ecological Communities or on the Ramsar and World or National Heritage properties or in Commonwealth Marine areas such as the Great Barrier Reef (e.g. sea turtles).

Protection and Recovery

- CSS will need to be afforded protection and recovery under the Act, hence management actions for these species must be Indigenous-led. Recovery actions and management plan activities for CSS should aim to achieve mutual net benefits for both biodiversity conservation and Indigenous wellbeing. This can be achieved through the inclusion of Indigenous knowledge following FPIC principles to deliver participatory processes that appropriately recognise, acknowledge and remunerate Indigenous people.
- Amendments to the Act should include the mandated engagement of Indigenous people in all management activities including planning and on-ground actions. This includes mandating the integration of Indigenous knowledge into all CSS listing, protection and recovery planning.

Supporting Jurisdictional initiatives – Case Study

- Amendments to the Act should support and empower activities underway in the jurisdictions that confer a greater awareness of CSS and facilitate the capture of this matter in regulatory processes associated with biodiversity conservation and environmental management, especially where those activities also promote the greater participation of Indigenous Australians and their knowledge.
- The Western Australia Environmental Protection Authority's (EPA) assessment of Fortescue Metals Group's (FMG) Eliwana Iron Ore Mine and Railway (EPA Assessment Report Number: 1641 & 1633, Ministerial Statement 1109 & 1108) is an opportune case study.
 - Impacts to Social Surroundings is an Environmental Factor considered by the EPA in the environmental impact assessment process in Western Australia – *'Aboriginal heritage, matters of Aboriginal cultural associations, including traditional Aboriginal customs, directly linked to the physical or biological aspects of the environment, may also be considered significant'* (Environmental Protection Authority, 2016).
 - The EPA considered aspects of the development proposal comprise significant Social Surroundings receptors which were likely to be physically impacted by the proposal. The

EPA identified culturally significant flora and fauna to be one of those receptors and defined CSS as those plants and animals that may be utilised by Traditional Owners for food, medicine and ceremonial activities. The EPA considered the development proposal may impact on the ability of Traditional Owners to carry out traditional customary activities including hunting, gathering bush tucker, and ceremonies.

- Consequently, FMG undertook extensive consultation with the Traditional Owners, and commissioned ethnobotanical and ethnozoological surveys which were submitted as part of the environmental review and approvals process.
- Subsequently, the EPA concluded that the Eliwana proposal was unlikely to significantly impact any CSS, and thus considered the values associated with culturally significant flora and fauna could be managed to meet the EPA's objectives. The EPA considered that management of cultural values associated with flora and fauna would require on-going consultation with Traditional Owners through the design, construction, operation and decommissioning phases of the Eliwana proposal. The EPA recommended a Ministerial Condition (#14), be place on FMG requiring the proponent to manage impacts to cultural values, including impacts to CSS, through on-going consultation and co-operation with the Traditional Owners.

Recommendations

- Amend the Act to recognise CSS.
- Amend the Act to enable the listing of CSS as MNES.
- Recognition of CSS will mandate participation of Indigenous Australians in the nomination and listing process and subsequent policy and business process that flow from the listing process (e.g. recovery actions, conservation advices, management plans).
- Establish and have confidence in the processes required to identify and list CSS which must include participation of community members with the cultural authority to speak for Country and community consensus on the cultural significance of a species.
- Accept that the justification for assigning cultural significance to a species may be restricted to comply with cultural, spiritual or customary laws.
- An outcome that enables the recognition of CSS must acknowledge the nuances of assigning cultural significance will vary between Indigenous communities as culture is not a homogeneous construct that can vary between communities and with a community over time.
- Subsequent listing of CSS should not impinge on any cultural practice of that species, including traditional take and other customary activities.
- The concept of cultural significance and business practice mechanisms for listing must be expanded to Culturally Significant Landscape (e.g. monsoon vine thickets) in the fullness of time.

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