

# **SUBMISSION TO THE INDEPENDENT REVIEW OF THE ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT 1999**

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## **INTRODUCTION**

This submission addresses the terms of reference of the Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) with a focus on the Act's interface with the Indigenous estate and the role of Indigenous land and sea management. This submission provides information and recommendations in support of our central argument that:

**the Indigenous estate, peopled landscapes, and Indigenous land and sea management are essential to the effective protection of matters of national environmental significance under the EPBC Act.**

We draw your attention to a number of submissions that have been made by one or more of us to closely related inquiries and reviews in recent times. These include submissions to:

- The Senate Standing Committee on Environment, Communications and the Arts Inquiry into the Operation of the Environment Protection and Biodiversity Conservation Act 1999 (see <http://www.anu.edu.au/caepr/topical.php#0868>)
- The Senate Rural and Regional Affairs and Transport Committee Inquiry into Natural Resource Management and Conservation Challenges (see <http://www.anu.edu.au/caepr/topical.php#0870>)
- The Senate Environment, Communications, Information Technology and the Arts Committee Inquiry into Australia's National Parks, Conservation Reserves and Marine Protected Areas (see <http://www.anu.edu.au/caepr/topical.php#0607>)
- The Indigenous Protected Areas Programme Review (see <http://www.anu.edu.au/caepr/topical.php#0607>)

We also draw your attention to a paper co-authored by Jon Altman and Geoff Buchanan with Ms Libby Larsen and published in 2007 that deals with issues that are of particular relevance to the Independent Review:

- The environmental significance of the Indigenous estate: natural resource management as economic development in remote Australia, CAEPR Discussion Paper No. 286/2007, available at <http://www.anu.edu.au/caepr/discussion.php#286>

The Centre for Aboriginal Economic Policy Research (CAEPR) at the Australian National University is currently undertaking a three to five year research project 'People on Country, Healthy Landscapes and Indigenous Economic Futures'. The authors of this submission are all researchers on this project. The People on Country (PoC) project involves collaborative research with a number of Indigenous land and sea management organisations in northern Australia. The project has direct relevance to one of the key Australian Government policy objectives guiding the Independent Review as its primary aim is to provide evidence of the contribution that Indigenous land and sea management makes to Indigenous well-being, the protection of biodiversity, and the maintenance of essential ecological processes and systems. The aims of the PoC project are also relevant in terms of the objects of the EPBC Act, namely:

- promoting a cooperative approach to the protection and management of the environment involving Indigenous people
- recognising the role of Indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity
- promoting the use of Indigenous people's knowledge of biodiversity with the involvement of, and in cooperation with, the owners of that knowledge.

Further details about the PoC project and participating Indigenous land and sea management groups can be found at:

< <http://www.anu.edu.au/caepr/country/index.php>>.

In this submission we provide a brief synopsis of recent submissions and recommendations made by Jon Altman and Sean Kerins (including their submission to the Senate Standing Committee on Environment, Communications and the Arts Inquiry into the Operation of the Environment Protection and Biodiversity Conservation Act 1999 in September 2008) and of CAEPR Discussion Paper 286. This is followed by responses to a number of the key questions raised by the *Independent Review of the EPBC Act Discussion Paper*.

## **SYNOPSIS OF PREVIOUS SUBMISSIONS: THE INDIGENOUS ESTATE, INDIGENOUS LAND AND SEA MANAGEMENT AND THE EPBC ACT**

The Indigenous estate, peopled landscapes, and Indigenous land and sea management are essential to the effective protection of matters of national environmental significance under the EPBC Act. Over the past 30 years, over 20 per cent of the Australian land mass has been returned to Indigenous Australians. This Indigenous estate is still growing—incorporating both marine and terrestrial environments—along with the role that Indigenous people play in protecting biodiversity and maintaining essential ecological systems and processes in the national interest. The Indigenous estate includes some of the most biodiverse and ecologically intact parts of Australia. However, this estate and its biodiversity face major threats from feral animals, exotic weeds, changed fire regimes, pollution, over-grazing, erosion and climate change. In the face of this, there is a vital need for further legislative, policy and program innovation in support of Indigenous community-based land and sea management.

Over the past 30 years, much management of the Indigenous estate and related sea country has been conducted informally by traditional owners living on country supported by Outstation Resource Agencies and Community Development and Employment Project (CDEP) organisations. These management efforts have generally been poorly recognised and remunerated. More recently, the IPA and Working on Country (WoC) programs have delivered significant symbolic and practical breakthroughs in support for Indigenous land and sea management on the Indigenous estate. However, there remains a need for more holistic and whole-of-government support for Indigenous land and sea management on the Indigenous estate, incorporating: (i) recognition of traditional owner rights to actively manage their land and sea country; (ii) investment in the development of Indigenous governance of land and sea country; (iii) support for the development of comprehensive Indigenous land and sea management plans; and (iv) a whole-of-government approach that alleviates administrative burdens caused by the reliance of Indigenous land and sea management organisations on multiple-agency funding.

In terms of strengthening the EPBC Act and the protection of matters of national environmental significance, Jon Altman and Sean Kerins recently recommended the following in their submission to the Senate Standing Committee on Environment, Communications and the Arts Inquiry into the Operation of the Environment Protection and Biodiversity Conservation Act 1999:

1. Recognition of the significance of 'people on country' as a fundamental principle of environment protection and biodiversity conservation in Australia.
2. Appropriate and equitable recognition and remuneration of Indigenous land and sea management and its contribution to the national interest.
3. Expansion of the IPA framework to include Indigenous management of protected areas of sea country.
4. Recognition of the role of institutions such as CDEP organisations and Outstation Resource Agencies in the protection of biodiversity and the maintenance of essential ecological processes and systems on the Indigenous estate.
5. Enhanced support for and investment in the development and operation of local-level Indigenous organisations for the governance of land and sea management.
6. A whole-of-government approach to Indigenous land and sea management.
7. Labour force planning to ensure that the Indigenous estate is peopled and managed by Indigenous Australians in the national interest.

## RESPONSES TO SELECTED QUESTIONS RAISED IN THE DISCUSSION PAPER

### SCOPE OF THE ACT

#### **Q1. What are your views on the following aspects of the Act:**

##### **(a) Are the objects of the Act appropriate to the Commonwealth's role in environment protection and management?**

The objects of the EPBC Act give welcome attention to the promotion and recognition of the role of Indigenous people and their knowledge in environment protection and biodiversity conservation. Importantly, this includes recognition of Indigenous people's sustainable use of biodiversity which forms a vital part of the customary economy and Indigenous livelihoods on country, particularly in remote Australia (Altman, Buchanan & Biddle 2006).

However, the Act's object of promoting the use of Indigenous people's knowledge of biodiversity with the involvement and cooperation of the knowledge owners appears to fall short of Article 8(j) of the Convention on Biological Diversity. The objects of the Act should broaden its focus to include the recognition of, respect for, and maintenance of Indigenous knowledge, innovations and practices including Indigenous systems of governance and/or management (e.g. customary marine tenure). As in the Convention on Biological Diversity, the use of Indigenous knowledge, innovations and practices should require the approval (or informed consent) of their owners as well as their involvement and cooperation. The objects should also encourage or require the equitable sharing of benefits arising from the utilisation of such knowledge, innovations and practices as stated in the Convention. Ideally, this should be in the form of proper resourcing and remuneration of Indigenous land and sea management efforts.

As mentioned in response to the recent Senate Inquiry, existing legal rights of traditional owners over natural resources are mainly rights of 'passive use' rather than of 'active management' (Altman & Kerins 2008). This situation restricts traditional owners' ability to effectively protect biodiversity and maintain essential ecological services on their land and sea country. In addition, Indigenous land and sea management has historically been under-resourced and poorly remunerated. Meanwhile, opportunities exist within emerging conservation and carbon economies to provide enhanced and equitable investments in Indigenous land and sea management based on greater recognition, rights and resourcing (Altman & Kerins 2008; Altman, Buchanan & Larsen 2007). Overall, a fuller recognition of the importance of the Indigenous estate and of Indigenous people's role in environment protection and the conservation and sustainable use of biodiversity is vital to the Act and needs to be better supported by the Act within and beyond its objects.

##### **(b) Are the principles of ESD appropriate to the Commonwealth's role in environment protection and management? Does the legislation provide an adequate framework to guide ESD decisions made under the Act?**

There is currently very limited data on the socioeconomic value of Indigenous people's customary use of wild resources (Altman, Buchanan & Biddle 2006). The Discussion Paper mentions that one of the ESD principles involves the promotion of improved valuations. To improve the assessment of long-term and short-term economic, environmental, social and equitable outcomes from development actions on the Indigenous estate, we recommend that further attention be paid to valuations of the customary use of wild resources to more completely assess economic impacts

on Indigenous people. We note that an economic valuation of the Torres Strait traditional dugong and marine turtle fishery was included in the draft strategic assessment (AFMA 2006). Recent work by CAEPR provides examples of how such valuations could be undertaken more rigorously in support of ESD and the assessment and approval of actions under the EPBC Act (see Altman, Gray & Halasz 2005; Buchanan *et al.* 2008). For example, recent collaborative research with the Bardi Jawi Rangers in the West Kimberley has provided an estimate of the economic value of dugong and marine turtle harvest by traditional owners that could usefully inform the current Kimberley Strategic Assessment. Greater recognition of the value of the customary sector, particularly on the Indigenous estate, is critical in terms of assessing economic impacts of development actions through a more holistic focus on sustainable livelihoods, rather than a narrow, mainstream focus on employment in and income from the market economy.

**(c) Are the existing matters of NES appropriate? Do you think that there should be any additional matters of NES, and if so, how should such matters be framed?**

We would support the inclusion of carbon emissions and climate change impacts as a matter of NES given the threat that this poses to biodiversity, including predicted increases in distribution and impacts of exotic invasive species and wildfires (Altman & Kerins 2008; Altman, Buchanan & Larsen 2007). As noted strongly in the submission to the recent Senate Inquiry and in CAEPR Discussion Paper 286, the Indigenous estate and Indigenous land and sea managers have key roles to play in the management of these threats and in adapting to climate change—a role that is currently being recognised through projects such as the West Arnhem Land Fire Abatement (WALFA) project.

**(d) Is the definition of an ‘action’ in the Act appropriate?  
AND**

**(e) What kind of impacts should be considered under the Act? Does the Act adequately encompass not just direct but also indirect impacts?**

We recommend investigating the practicality of including government policies and programs in the definition of an ‘action’ under the Act. Altman and Kerins (2008) highlight the impact that government policies and programs relating to Indigenous community development and employment and the resourcing of outstations have on the protection of biodiversity and the maintenance of essential ecological processes and systems on the Indigenous estate. The removal or further reduction of government support for CDEP organisations and Outstation Resource Agencies is an action that would have a significant impact on environment protection and biodiversity conservation across the 20 per cent of the Australian land mass that makes up the Indigenous estate.

The consideration of direct and indirect impacts of government policies and programs should form part of a whole-of-government approach to Indigenous land and sea management as recommended in the Altman and Kerin’s submission (see Altman & Kerins 2008).

## ASSESSMENTS AND APPROVALS

### **Q5. Does the Act provide appropriate scope for public participation and transparency in the assessment and approval process under the Act?**

We would support a review of the recent McArthur River Mine case as part of the Independent Review to explore how consultation processes with, and the interests of, traditional owners could be better managed by the referral, assessment and approval procedures under the Act. Based on the Discussion Paper there appears to be minimal scope for public participation outside of the provision of written submissions. This may not be equitable as it is likely to exclude some sections of the public that have limited access to communications technology and/or have limited literacy. Efforts should be made to ensure that processes are more open, inclusive and proactive, particularly ensuring appropriate processes are in place to facilitate involvement of traditional owners.

### **Q8. Does the use of strategic approaches, such as strategic assessments and bioregional plans, provide opportunities for streamlining Commonwealth involvement in environmental issues? Do such approaches provide an appropriate means for dealing with cumulative impacts?**

Strategic assessments and bioregional plans provide significant opportunities to enhance Indigenous involvement in land and sea management. The strategic assessment of the Torres Strait traditional dugong and marine turtle fishery provides an example of recognising the importance of the role of Indigenous people in conservation and sustainable use of biodiversity (AFMA 2006). Importantly this assessment is being followed up by the development of community-based management plans by Torres Strait Islanders. The strategic assessment also benefited from an appreciation of likely economic, social and cultural impacts on Torres Strait Islanders of any externally-imposed management of turtle and dugong. The inclusion of an economic value of this non-commercial fishery was a particular highlight. However, the valuation was simplistic and future assessments could benefit from more detailed economic or socioeconomic assessments (see response to Q1(b)).

The Kimberley Strategic Assessment also has had positive elements. One major limitation of such an assessment, however, is the paucity of important data on Indigenous populations and economies in remote Australia (see, for example, Morphy 2007). The Kimberley Strategic Assessment also shows how vulnerable traditional owners are to changes in the political climate in that a right of veto over development decisions granted by the Carpenter Government has been withdrawn by the current Barnett Government. There is a need for the development of a national (or nationally consistent) legislative mechanism strengthening traditional owners' rights and influence in all jurisdictions over decisions and actions that are likely to have significant economic, environmental, social and/or cultural impacts on their country.

Bioregional plans also have potential to enhance Indigenous land and sea management. The main submission provides support for the development of comprehensive Indigenous land and sea management plans as part of a holistic investment approach on the Indigenous estate. These plans should form part of any bioregional planning process. It is disappointing that the innovative, valuable and popular sea country planning scheme funded by the Australian Government's National Oceans Office as part of the marine bioregional planning process was not continued past its pilot phase. To fulfil the objects of the Act strategic assessments

and bioregional plans must properly recognise and support the role of the Indigenous people in conservation and sustainable use. To be truly cooperative, strategic assessment and bioregional planning processes should actively engage with traditional owners who have valuable first-hand knowledge of past, current and future ecological conditions and threats.

## **BIODIVERSITY**

### **Q9. Does the Act provide an effective regulatory framework for the conservation of Australia's biodiversity? If not, what improvements could be made?**

Greater recognition of and support for the role of Indigenous people—including their land and sea country, knowledge, innovations and practices—in the conservation and sustainable use of biodiversity needs to be built into the regulatory framework to make it more effective in the face of significant threatening processes and climate change impacts on the Indigenous estate.

### **Q10. What are your views on the process for nominating threatened species, ecological communities and key threatening processes?**

We recommend that the Indigenous estate and Indigenous livelihoods on country be included as a theme. This theme would assist in terms of identifying threatened species, ecological communities and key threatening processes on and adjacent to the Indigenous estate that threaten both biodiversity and the livelihoods of people on country. This would further assist in highlighting threats and impacts that could be better managed through enhancement of Indigenous land and sea management. This could form a cyclical theme or otherwise form part of a list of themes to be considered during any call for nominations.

### **Q12. What matters should the Minister consider when deciding whether to list a threatened species or ecological community?**

The Minister should consider impacts on Indigenous livelihoods and the role of Indigenous people in the identification, conservation and sustainable use of threatened species or ecological communities.

### **Q14. Are there opportunities to reduce duplication between Commonwealth and State and Territory listing regimes or do overlaps between the regimes provide additional protection for threatened species and ecological communities?**

During recent collaborative research on the socioeconomics of Indigenous management of dugong and marine turtles in northern Australia we have gained some insights into the complexity, fragmentation and dysfunction of existing, multi-jurisdictional institutional arrangements for the management of sea country (see Crase 2008). However, we also acknowledge the challenges involved in developing a national approach. For example, the Strategic Assessment of the Torres Strait traditional dugong and marine turtle fishery highlights a case where impacts on migratory marine species appear to be greater in some areas than in others. In this sense, some populations or stocks may be more threatened than others within the same jurisdiction or across jurisdictions. In the case of dugong and marine turtles, Indigenous people harvest from populations that migrate across state, territory and international boundaries making national and international coordination and consistency a logical response. Overall, and as bioregional planning processes

suggest, State and Territory boundaries are poorly matched to migration routes, feeding and breeding habitats, and impacts on marine and migratory species. Investment in the development of comprehensive, community-based Indigenous land and sea management plans would contribute to a more coordinated, cooperative and effective national approach to the conservation and sustainable use of marine and terrestrial biodiversity including dugong and marine turtles.

**Q15. What factors should be considered in setting priorities for recovery planning?**

**AND**

**Q16. Does the planning regime support the effective recovery of threatened species and ecological communities?**

As per our comments relating to the objects of the Act (see Q1(a)), recovery planning should involve Indigenous people in recognition of their role in conservation and sustainable use of biodiversity and should recognise, respect and maintain Indigenous knowledge, innovations and practices. In setting priorities, recovery planning should give high priority to recovery of species that are of economic, social and cultural significance to Indigenous people and include Indigenous land and sea managers as a core part of monitoring and management. Priority also needs to be given to enabling recovery plans. In particular, mechanisms should be put in place and funds should be established that adequately support any recovery plan. These mechanisms and funds should support Indigenous land and sea management by facilitating appropriate governance arrangements and adequately resourcing monitoring and management activities.

**Q17. Are there opportunities to improve the coordination between the Commonwealth and State and Territory recovery regimes? If so, what might these be?**

See Q14.

**Q18. Are the provisions of the Act for the protection and recovery of listed threatened species and ecological communities, migratory species, marine species and cetaceans effective? What alternative approaches might be available?**

See Q14. In addition, there is significant potential to further develop and support Indigenous community-based planning and management as well as Indigenous land and sea management networks that facilitate cross-regional communication and coordination of land and sea management activities.

**Q19. Does the Act provide an appropriate and responsive legislative framework for addressing climate change and other emerging pressures in the context of environment protection and biodiversity conservation? If not, how can such matters be considered when making decisions under the Act?**

See Q1(c). The WALFA project highlights the potential for Indigenous landowners to participate in and benefit from the inclusion of carbon offsets as an eligible (and high priority) environmental offset under the Assessments and Approvals provisions of the EPBC Act or as part of any Carbon Pollution Reduction Scheme (see Altman & Kerins 2008; Altman, Buchanan & Larsen 2007).

## PROTECTED AREAS

**Q25. What factors should the Minister have regard to when making a decision on heritage listing?**

**Q26. What are your views on the process for nominating and listing Commonwealth Heritage and National Heritage places?**

**Q27. What are your views on the effectiveness and utility of Commonwealth heritage strategies and management plans for protecting World, National and Commonwealth Heritage values?**

**AND**

**Q30. What are your views on the effectiveness of the operation of the provisions for Commonwealth reserves and the utility of management plans for those reserves?**

The nomination and listing of any heritage areas or Commonwealth reserves should include consideration of impacts on Indigenous livelihoods and the role of Indigenous people in their management. In areas that are owned by or that are of significance to traditional owners, heritage areas and Commonwealth reserves should ideally be nominated or established as IUCN Category VI (Protected area with sustainable use of natural resources) with Indigenous or shared governance (e.g. community-conserved areas as per the IUCN protected area matrix). Otherwise, acceptable and appropriate category and governance arrangements should be decided upon in negotiation with the traditional owners. The establishment, planning and management of heritage areas and Commonwealth reserves should allow continuity or re-establishment of traditional owner's economic, social and/or cultural connection to place. As recommended by Altman and Kerins (2008), place-based assessments of Indigenous jobs in management of these areas and reserves should form part of the planning process.

The current arrangement is that where a Commonwealth reserve consists wholly or mostly of Indigenous people's land, the majority of board members must be Indigenous people nominated by the traditional owners of the land. In these circumstances, a jointly managed reserve should be the minimum requirement and the Act should promote greater or sole Indigenous governance over reserves or those parts of reserves that are Indigenous owned. It needs to be acknowledged that majority representation on a Board of Management is not necessarily adequate or equitable if the system of governance and the management principles that it is based on are foreign and potentially counter to traditional owners' own governance systems, beliefs, interests and aspirations. Greater efforts should be directed towards developing culturally-appropriate governance structures, processes, planning and management in heritage areas and Commonwealth reserves. The IPA program has provided some guidance over the past decade on how this can be done successfully based on sole management by traditional owners. The management of such heritage areas and Commonwealth reserves should be underwritten by the extension of the objects of the Act to recognise, respect, maintain and equitably remunerate the contributions made by Indigenous people—their country, knowledge, innovations and practices—to the protection of biodiversity and the maintenance of essential ecological processes and systems.

## **INDIGENOUS INVOLVEMENT**

**Q32. Does the Act adequately support Indigenous involvement in the preparation of management plans for Commonwealth reserves? If not, what improvements could be made?**

**Q33. Do the processes under the Act facilitate the involvement and cooperation of Indigenous people as owners of knowledge of biodiversity?**

**AND**

**Q34. Does the Act make adequate provision for Indigenous tradition to be taken into account in decisions made under the Act?**

See Q25-30. While the objects of the Act provide significant statements in support of the facilitation of Indigenous involvement, subsequent components of the Act do not provide strong enough support for this.

## **COMPLIANCE AND ENFORCEMENT**

**Q35. Does the Act provide for the appropriate follow-up of environmental assessment and approval decisions, including the monitoring, evaluation and auditing of actions? If not, what other actions could be taken?**

**Q36. Are the offence and civil penalty provisions appropriately framed to encourage compliance with the Act?**

**AND**

**Q37. Does the Act contain a sufficiently comprehensive and appropriate range of enforcement mechanisms? Are those mechanisms capable of deterring and responding to contraventions of the Act?**

As with the operation of the EPBC Act generally, and in accordance with its objects, there is a need for greater recognition of and support for the role of traditional owners as active managers of their land and sea country. This includes a need for greater formal recognition of customary rights and responsibilities to care for country and greater support for the development and operation of local-level Indigenous governance organisations for land and sea management. Furthermore, it would advantageous if Indigenous land and sea management organisations had the power to fine offences relating to breaches of the EPBC Act that occur within their land and/or sea management area.

## **DECISION MAKING UNDER THE ACT**

**Q41. Does the Act provide the appropriate opportunity for external input and scrutiny of decisions made under the Act? Is there sufficient transparency? Are the periods for public consultation adequate?**

See Q5.

**Q44. What is an appropriate framework for assessing the performance of the Act? Do you have particular issues that should be considered during the review?**

The key message of our submission is that any framework for assessing the performance of the Act must include consideration of the Indigenous estate, peopled landscapes, and Indigenous land and sea management as essential components of the effective protection of matters of national environmental significance by the EPBC Act.

## REFERENCES

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