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Independent review of the *Environment Protection and Biodiversity Conservation Act 1999*

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Australian Human Rights Commission

Submission by the Aboriginal and Torres Strait
Islander Social Justice Commissioner to Mr Allan
Hawke in response to the Independent review of
the *Environment Protection and Biodiversity
Conservation Act 1999*

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1 Introduction

1. The Australian Human Rights Commission (the Commission) makes this submission to Mr Allan Hawke in response to the Independent review of the *Environment Protection and Biodiversity Conservation Act 1999*.
2. The Commission acknowledges that this Independent review of the EPBC Act is in accordance with s 522A of the Act. Section 522A requires that an independent review of the Act must be undertaken within 10 years of the commencement of the Act. The review must be provided to the Minister who is required to cause a copy of the report to be laid before each House of the Parliament within 15 sitting days of that House after the Minister receives it.¹
3. The Commission notes that the review will examine:
 - a. The operation of the EPBC Act generally.
 - b. The extent to which the objects of the EPBC Act have been achieved.
 - c. The appropriateness of current matters of National Environment Significance.
 - d. The effectiveness of the biodiversity and wildlife conservation arrangements.
4. The Commission notes that the review will be guided by key Australian Government policy objectives including:
 - a. to promote the sustainability of Australia's economic development to enhance individual and community well-being while protecting biological diversity and maintaining essential ecological processes and systems.
 - b. to work in partnership with the states and territories within an effective federal arrangement
 - c. to facilitate delivery of Australia's international obligations.
 - d. the Australian Government's deregulation agenda to reduce and simplify the regulatory burden on people, businesses and organisations, while maintaining appropriate and efficient environmental standards.
 - e. to ensure activities under the Act represent the most appropriate, efficient and effective ways of achieving the Government's outcomes and objectives in accordance with the Expenditure Review Principles.
5. With regard to the scope and intent of the independent review to assess the operation of the EPBC Act, the Commission will focus specifically on those

¹ *Environment Protection and Biodiversity Conservation Act 1999*, s 522A.

provisions of the Act and the chapters of the *Independent Review of the Environment Protection and Biodiversity Conservation Act 1999, Discussion Paper* (the Discussion Paper) that relate to Indigenous peoples and their rights and interests in their lands, waters and natural resources.

2 Summary

6. The Commission notes that the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) which commenced on 16 July 2000, is the Australian Governments central piece of environmental legislation.
7. The Commission acknowledges that while the EPBC Act goes a significant way to addressing Australia's international obligations and domestic concerns related to the protection and conservation of biodiversity, there are some areas that require further consideration. These include:
 - a. strengthening the current recognition of the role of Indigenous peoples in the conservation and ecologically sustainable use of Australia's biodiversity, and providing not only for the recognition and use of Indigenous knowledge, but also requiring the protection of this knowledge
 - b. extending the matters considered to be of national environmental significance to include more recent concerns such as climate change, land clearing and forestation, and water and promoting the consistent application of environmental and other relevant legislation across the country
 - c. promoting the full and effective participation and engagement of Indigenous peoples in the implementation of the EPBC Act, including by fully applying the principles of free, prior, and informed consent of issues that will have a direct or indirect impact on the lives of Indigenous peoples in Australia.

3 Recommendations

8. The Commission recommends:
 - a. Section 3A of the EPBC Act should be amended to:
 - i. link the Ecologically Sustainable Development principles (ESD principles) to the compliance and enforcement requirements of the legislation,
 - ii. introduce specific monitoring, assessment and reporting requirements as to the how the ESD principles have been respected and fully implemented
 - iii. include a specific reference to indigenous rights and involvement as a vital consideration.

- b. Section 3A(a) of the EPBC Act should be amended to read: ‘decision-making processes that should effectively integrate both long-term and short-term economic, environmental, social, cultural and equitable considerations.
- c. The Matters of National Environmental Significance (MNES) listed under Part 3 of the EPBC Act should be extended to include climate change, land clearing and reforestation, and water as MNES.
- d. Express provisions should be made in the EPBC Act to provide for indigenous involvement and consultation in the declaration and decision-making processes relating to Ramsar wetlands.
- e. The EPBC Act provide for the free, prior and informed consent, co-operation and involvement of the Indigenous peoples of a proposed protected area in:
 - i. the nomination of the area
 - ii. the development and implementation of management plans and other forms of agreement (including bilateral agreements).
- f. Sections 5-10 of the EPBC Act be amended to include the relationship between the EPBC Act and legislation concerning climate change as well as the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) and the *Water Act 2007* (Cth).
- g. The Review Committee should consider the need to strengthen the position of the Indigenous Advisory Committee (IAC) to have a more directive and authoritative capacity rather than limiting the IAC to an advisory role only.
- h. The Review Committee consider the inclusion of specific mechanisms that promote transparency in relation to the advice and deliberations of the Committee’s established under the EPBC Act.
- i. The EPBC Act should include provisions that relate to the appropriate engagement of Indigenous peoples, in accordance with the international human rights framework. In particular, that the Review Committee consider the Guidelines for engagement with Indigenous peoples, contained in *Engaging the marginalised: Partnerships between indigenous peoples, government and civil society*², in order to build upon and formulate an extensive set of principles for Indigenous engagement in the operation of the EPBC Act.
- j. In the absence of an international and national framework that provides for the protection and use of Indigenous knowledge, the Review

²Human Rights and Equal Opportunity Commission and United Nations Permanent Forum on Indigenous Issues, *Engaging the marginalised: Report of the workshop on engaging with Indigenous communities*, (2005) At: http://www.humanrights.gov.au/social_justice.

Committee and the Commonwealth Government should extend the objects of EPBC Act to recognise the importance of protecting, conserving and maintaining Indigenous knowledge.

4 Scope of the Act

9. As noted above, the EPBC Act, which commenced on 16 July 2000, is the Australian Government's central piece of environmental legislation.
10. In response to chapter 1 of the Discussion Paper the Commission will consider:
 - a. the appropriateness of the objects of the Act, particularly those concerned with the Commonwealth's role in environment protection and management.
 - b. whether the principles of Ecological Sustainable Development (ESD) are appropriate to the Commonwealth's role in environment protection and management, and whether the legislation provides an adequate framework to guide ESD decisions made under the Act.
 - c. whether the existing matters of national environmental significance (NES) are appropriate and whether there should be additional matters of NES, and how should they be framed.

4.1 The Objects of the Act

11. The Commission notes that the objects of the Act are to:
 - provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance (NES)
 - promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources
 - promote the conservation of biodiversity
 - provide for the protection and conservation of heritage
 - promote a cooperative approach to the protection and management of the environment involving governments, the community, landholders and indigenous people
 - assist in the cooperative implementation of Australia's international environmental responsibilities
 - recognise the role of indigenous peoples in the conservation and ecologically sustainable use of Australia's biodiversity
 - promote the use of indigenous peoples' knowledge of biodiversity with the involvement of, and cooperation with, the owners of that knowledge.
12. In light of the significant challenges we face in the immediate future as a result of the impacts of continued drought and climate change, the Commission supports and commends the Government's aim to ensure a legislative framework that promotes ecologically sustainable development through the conservation and ecologically sustainable use of natural resources.

13. However, while the Commission is of the view that the objects are appropriate in terms of the Commonwealth's role in the protection and management of the environment, the Commission is concerned that the current objects of the Act are not sufficient to ensure the protection and ongoing maintenance of Indigenous peoples rights and interests.
14. For example, the objects clearly identify issues related specifically to the protection and conservation of heritage³ and the role of Indigenous peoples in the conservation and ecologically sustainable use of Australia's biodiversity.
15. However, there is no clear link or guide as to the relationship between the EPBC Act and the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) as defined by ss 5-10 of the Act⁴. In order to adequately and consistently protect the heritage value⁵ of places of significance to Indigenous peoples and achieve the objects of the Act, clear linkages must be made between inter-related legislation, both state and commonwealth to ensure consistency of approach and application.
16. With regard to final object of the Act, the Commission notes that the object promotes the use of Indigenous people's knowledge of biodiversity. While it is positive and crucial that the Australian Government recognises the importance of Indigenous knowledge to the protection of Australia's biodiversity, the Commission is concerned that the object does not also provide for the protection of this knowledge. This issue will be addressed in more detail below in section 6.3(c).

4.2 The Human Rights Framework and Indigenous Peoples'

17. As the Government's central piece of environment legislation, the EPBC Act provides for the domestic implementation of Australia's international obligations under a number of international conventions relating to the environment, including:
 - a. The Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention)
 - b. The Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention)
 - c. The Convention on Biological Diversity (Biodiversity Convention).

³ World Heritage Convention, Article 1, provides that: 'For the purpose of this Convention, the following shall be considered as "cultural heritage": monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science; groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science; sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.

⁴ *Environment Protection and Biodiversity Conservation Act 1999*, ss 5 – 10.

⁵ *Environment Protection and Biodiversity Conservation Act 1999*, s 528.

18. However, in addition to implementing the above instruments, the Commission notes that the EPBC Act impacts on the implementation of Australia's obligations under a number of international human rights instruments, such as the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Convention of the Elimination of all forms of Racial Discrimination (CERD). These instruments create a number of obligations on Australia to ensure the full and equal enjoyment and exercise of human rights for its citizens, including Indigenous peoples.⁶

(a) *Overview of human rights obligations in relation to Indigenous persons*

19. As the first peoples of Australia, Indigenous peoples possess a number of distinct rights that relate to their lands, waters, and natural resources; self determination; and engagement and participation in government processes that directly or indirectly impact on their lives.

20. Indigenous peoples' special connection to land and waters is protected under international law which provides for the right to practice, revitalise, teach and develop culture, customs and spiritual practices and to utilise natural resources.⁷

21. The Committee on the Elimination of Racial Discrimination has also highlighted that the obligation to not discriminate on the basis of race requires that governments:

- a. provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics.
- b. ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent.
- c. recognise and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources...⁸

⁶ While a breach of these obligations is ultimately the responsibility of the Commonwealth government, being the government that has the international legal personality to enter into treaty obligations, it is clear that the laws of state and territory governments can put Australia in breach of those obligations: see art 50 of the ICCPR and art 28 of the ICESCR. It may be noted that the Australian Government can seek to protect against breaches of human rights obligations by legislating to override state laws: see, for example, *Commonwealth v Tasmania* (1983) 158 CLR 1.

⁷ See International Covenant on Civil and Political Rights, arts 1, 27; International Covenant on Economic, Social and Cultural Rights, articles 1, 15; Declaration on the Rights of Indigenous Peoples, arts 11-13, 26-31.

⁸ United Nations Committee on the Elimination of Racial Discrimination, General Comment 23: Indigenous Peoples, UN Doc: A/52/18, annex V, 18 August 1997, para 5.

(b) *The right to a healthy environment*

22. Environmental rights include the right of access to the unspoiled natural resources that enable survival such as land, shelter, food, water and air; the right to refuse development; and specific environment-related rights of Indigenous peoples.
23. Environmental rights are provided for by international instruments including the Convention on Biological Diversity⁹, the Ramsar Convention, the Rio Declaration¹⁰ and Agenda 21¹¹.
24. The Rio Declaration asserts that human beings are at the centre of concerns for sustainable development and that we are entitled to a healthy and productive life in harmony with nature.¹² It also recognises the vital role of Indigenous communities' knowledge and traditional practices in environmental management and calls on States to recognise and duly support the identity, culture and interests of Indigenous peoples and enable their effective participation in the achievement of sustainable development.¹³
25. Agenda 21 is a comprehensive plan of action to be taken globally, nationally and locally by organisations of the United Nations, governments, and major groups in every area where there are human impacts on the environment. Agenda 21 recognises that:
 - a. Indigenous peoples have developed over many generations a holistic traditional scientific knowledge of their lands, natural resources and environment.
 - b. the ability of Indigenous peoples to participate fully in sustainable development practices on their lands has tended to be limited as a result of economic, social and historical factors.
26. In view of the interrelationship between the natural environment and its sustainable development and the cultural, social, economic and physical well-being of Indigenous people, Agenda 21 asserts that Indigenous people and their communities shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination.¹⁴ It emphasises that national and international efforts to implement environmentally sound and

⁹ Australia ratified the Convention on Biological Diversity in June 1993. The Convention came into force in December 1993.

¹⁰ Australia was one of the 178 countries participating in the UN sponsored conference on Environment and Development held in Rio de Janeiro in 1992. That conference formulated the Rio Declaration on Environment and Development, a statement of 27 principles directed towards promoting sustainable development, including the protection of the environment. At <http://www.aph.gov.au/library/pubs/RN/1997-98/98rn04.htm>, (viewed 25 November 2008).

¹¹ *Agenda 21* was adopted by more than 178 Governments, including Australia, at the UN Conference on Environment and Development in 1992. At <http://www.un.org/esa/sustdev/documents/agenda21/index.htm>, (viewed 4 November 2008).

¹² The Rio Declaration on Environment and Development, Principle 1.

¹³ The Rio Declaration on Environment and Development, Principle 22.

¹⁴ *Agenda 21*, Chapter 18. At <http://www.un.org/esa/sustdev/documents/agenda21/index.htm>, (viewed 4 November 2008).

sustainable development should recognise, accommodate, promote and strengthen the role of Indigenous people and their communities. In particular, it provides for the protection and management of natural resources recognising the effects that climate change will have on Indigenous peoples.¹⁵

27. The Ramsar Convention provides for the conservation and wise use of all wetlands and their resources ‘through local, regional and national actions and international cooperation, as a contribution towards achieving sustainable development throughout the world.’
28. The Convention provides guidelines for establishing and strengthening local communities’ and Indigenous peoples’ participation in the management of wetlands focusing on the need for Indigenous engagement and participation, trust and capacity building, knowledge exchange, flexibility and continuity.
29. The objective of the Convention on Biological Diversity is to sustain all life on earth, including aquatic ecosystems, with the global goal to reverse and stop the loss of biodiversity.
30. The Convention is directly linked with the Ramsar Convention through the Conference of the Parties (COP) decisions as the two conventions overlap in dealing with similar subject matter.
31. Subject to national legislation, the Convention on Biological Diversity provides that each contracting Party shall, as far as possible and as appropriate:
 - a. respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge innovations and practices.¹⁶
 - b. protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements¹⁷
32. Additionally, many of the decisions of the COP call for the full and effective participation of Indigenous communities in order to achieve the global goal.¹⁸

¹⁵ *Agenda 21*, Chapter 26. Chapter 26 specifically relates to recognising and strengthening the role of Indigenous People and their Communities. At <http://www.un.org/esa/sustdev/documents/agenda21/index.htm>, (viewed 4 November 2008).

¹⁶ Convention on Biological Diversity, Art 8(j).

¹⁷ Convention on Biological Diversity, Art 10(c).

¹⁸ See for example Conference of the Parties to the Biodiversity Convention, *Marine and coastal biological diversity*, COP 9 Decision IX/20, Bonn, 19 - 30 May 2008. At <http://www.cbd.int/decisions/?m=COP-09&id=11663&lg=0> (viewed 1 September 2008).

(c) *The right to culture*¹⁹

33. Indigenous peoples across the world have a right to practice, protect and revitalise their culture without interference from the state. Governments have an obligation to promote and conserve cultural activities and artefacts.²⁰ The right to culture is entrenched in a number of international law instruments. Article 27 of the ICCPR protects the rights of minorities to their own culture. The Human Rights Committee's General Comment 23 makes it clear that this right applies to Indigenous peoples. The Committee also confirmed that this may require States to take positive legal measures to protect this right.²¹

34. The right to culture is also found in a number of other instruments including:

- a. the World Heritage Convention, which notes that cultural heritage and natural heritage are increasingly threatened with destruction not only by the traditional causes of decay, but also by changing social and economic conditions which aggravate the situation with even more formidable phenomena of damage or destruction²²
- b. Article 15 of the ICESCR, which upholds the right of everyone to 'take part in cultural life'
- c. the ICERD²³, which commits all states to 'ensure that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practise their languages.'²⁴ ICERD General Comment 23 also provides that 'no decisions directly relating to [Indigenous communities'] rights and interests are taken without their informed consent'²⁵
- d. Article 30 of the Convention on the Rights of the Child, which protects the rights of children to their culture
- e. Article 8 of International Labour Organisation Convention 169, which provides a specific protection for Indigenous peoples stating that: '[Indigenous peoples] shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental

¹⁹ See the Human Rights Education Associates website at:
http://www.hrea.org/index.php?base_id=157.

²⁰ See the Human Rights Education Associates website at:
http://www.hrea.org/index.php?base_id=157.

²¹ United Nations Office of the High Commissioner for Human Rights, *General Comment No. 23: The rights of minorities*, Art. 27, UN Doc CCPR/C/21/Rev.1/Add.5, 1994.

²² Convention Concerning the Protection of the World Cultural and Natural Heritage, was adopted by the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 16 November 1972, at Paris, France.

²³ Convention on the Elimination of All Forms of Racial Discrimination, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969. Australia ratified the convention on 30 September 1975).

²⁴ Committee on the Elimination of Racial Discrimination, *General Comment No. 23: Indigenous peoples*, 1997.

²⁵ Committee on the Elimination of Racial Discrimination, *General Comment No. 23: Indigenous peoples*, 1997.

rights defined by the national legal system and with internationally recognised human rights²⁶

- f. the Declaration on the Rights of Indigenous Peoples, which includes a number of rights related to the right to practice and revitalisation of their cultural practices, customs and institutions.²⁷

(d) *The right to economic development*

35. The ICESCR and the Declaration on the Rights of Indigenous Peoples provide for Indigenous peoples to access and use their lands, waters and natural resources for economic development and building sustainable communities.
36. The United Nations Declaration on the Rights of Indigenous Peoples provides in particular that Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and resources. It states that:

States shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilisation or exploitation of mineral, water, or other resources.²⁸

and that:

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.²⁹

4.3 Domestic Implementation

37. The Commission stresses the importance of applying a consistent approach to monitoring and adherence of international standards, particularly in relation to Indigenous peoples' rights and interests concerning land and resource management, and environmental and cultural heritage. This must include equitable involvement by Indigenous peoples in the development of these approaches.
38. The Commission considers that the implementation of Australia's international human rights obligations requires that the Government ensure that domestic

²⁶ Convention (No. 169) concerning Indigenous and Tribal peoples in independent countries (entered into force 5 September 1991).

²⁷ See United Nations Declaration on the Rights of Indigenous Peoples, GA Resolution 61/295, UN Doc A/61/L.67, 2007, articles 5, 8, 11, 12 and 25 among others.

²⁸ Declaration on the Rights of Indigenous Peoples, Article 32.

²⁹ Declaration on the Rights of Indigenous Peoples, Article 23.

mechanisms guarantee that the relevant rights discussed above are expressed, applied and exercised equally and consistently across the country.

39. Therefore, at the domestic level, Indigenous peoples' rights require legislative protection. In the development of legislative frameworks such as those relevant to land, water, and natural and cultural heritage, the following must be accounted for and protected:
- a. the full participation and engagement of Indigenous peoples in the development of policy and legislation that directly or indirectly affects their lives and their rights
 - b. the adoption of and compliance with the principle of free, prior and informed consent
 - c. the protection of Indigenous interests, specifically access to their lands, waters and natural resources
 - d. the protection of Indigenous areas of significance, biodiversity, and cultural heritage
 - e. the protection of Indigenous knowledge
 - f. access and benefit-sharing through partnerships between the government, private sector, and Indigenous communities
 - g. the principle of non-discrimination and substantive equality.

4.4 Principles of Ecological Sustainable Development (ESD)

(a) The ESD Principles

40. Section 3A of the EPBC Act identifies a number of Principles of Ecologically Sustainable Development (the ESD principles). These are listed as:
- (a) decision-making processes that should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations
 - (b) if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation
 - (c) the principle of inter-generational equity – that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations
 - (d) the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making

- (e) improved valuation, pricing and incentive mechanisms should be promoted.
41. The ESD principles were developed in accordance with Agenda 21 and are confirmed in the Commonwealth Government's *National Strategy for Ecologically Sustainable Development 1992* (NSES D). The objectives of the NSES D were identified as:
- a. enhancing individual and community well-being and welfare by following a path of economic development that safeguards the welfare of future generations
 - b. providing for equity within and between generations
 - c. protecting biological diversity and maintaining essential ecological processes and life-support systems
42. The NSES D defined ecologically sustainable development (ESD) as:
- using, conserving and enhancing the community's resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased.³⁰
43. The NSES D highlights the importance of considering these guiding principles and core objectives as a package. The Commission supports the position outlined in the NSES D that affirms that no objective or principle should predominate over the others and that a balanced approach is required that takes into account all these objectives and principles to pursue the goal of ESD.
- (b) *Need for specific ESD Principle relating to Indigenous interests*
44. Despite the reference to Indigenous interests in the Objects of the Act, the Commission is concerned that the role and involvement of Indigenous peoples is not adequately reflected or mentioned in the ESD principles in s 3A. This is a cause for concern because the ESD principles provide guidance in terms of the practical application of the Act. The omission of any explicit reference to Indigenous rights and interests discounts their significance and carries the risk that decisions made under the Act will fail to give appropriate regard to such rights and interests. In the Commission's view, this could effectively diminish the importance of Indigenous peoples' roles in environmental and biodiversity conservation efforts.
45. The Commission therefore recommends that the ESD principles in section 3A of the EPBC Act should be amended to specifically identify Indigenous rights and involvement as a crucial consideration.

³⁰ Ecologically Sustainable Development Steering Committee, *National Strategy for Ecologically Sustainable Development 1992*, Endorsed by the Council of Australian Governments December, 1992. At: <http://www.environment.gov.au/esd/national/nse/d/strategy/index.html> (viewed, 22 January 2009).

(c) *Need for specific reference to cultural considerations in s 3A(a)*

46. The Commission is also concerned that the ESD principle listed in s 3A(a) includes explicit reference to only three equitable considerations, being economic, social and environmental. Under this ESD principle, culture is not identified as being a specific consideration of any weight. This is despite the objects of the Act specifically promoting the role of Indigenous peoples in the conservation and ecologically sustainable use of Australia's biodiversity, and the use of Indigenous peoples knowledge's.
47. In the Commission's view, it is not sufficient to assume that cultural considerations will be adequately taken into account under the vague and amorphous reference in s 3A(a) to 'and equitable considerations'.

For Indigenous peoples, culture is the key to caring for country. Caring for country is in turn the key to the maintenance and strengthening Indigenous people's culture and well-being and ensuring that the principle of inter-generational equity is maintained or enhanced for the benefit of future generations. It is the active practice of Indigenous culture that promotes ecological sustainable development. Therefore, if Indigenous culture and the active engagement of Indigenous people is not considered in achieving ESD, the loss of cultural knowledge through the lack of engagement may pose a risk to the successful achievement of ESD.

48. The North Australian Indigenous Land and Sea Management Alliance in the development of the Western Arnhem Land Fire Abatement Project have worked towards producing 'quadruple bottom line outcomes' – economic, social, environment and cultural. The quadruple bottom line is an adaptation of the term 'triple bottom line', a term widely used in resource management to discuss a project in terms of its economic, social and environmental outcomes. The quadruple bottom line represents a more holistic means which expands the framework to include the cultural factors as well as the three other outcomes.³¹
49. The Commission therefore recommends that Section 3A (a) be amended to read: 'decision-making processes that should effectively integrate both long-term and short-term economic, environmental, social, **cultural** and equitable considerations' (emphasis added).

(d) *Lack of accountability and monitoring of ESD principles*

50. While the Commission commends the Governments initiative in promoting the principles of ESD, the Commission is concerned that as an object of the Act,

³¹ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission, 2008, p 268.

the ESD principles are undermined within both the NSESD and the EPBC Act as they are promoted as guiding only.³²

51. In the Commission's view, in order to truly reflect the significance and relevance of ecologically sustainable development, these principles must be linked to the compliance and enforcement requirements of the legislation and have specific, monitoring, assessment, and reporting requirements as to how these principles have been respected and fully implemented.
52. The Commission therefore recommends that Section 3A of the EPBC Act be amended to:
 - a. link the ESD principles to the compliance and enforcement requirements of the legislation, and
 - b. introduce specific, monitoring, assessment, and reporting requirements as to how the ESD principles have been respected and fully implemented.

4.5 Matters of National Environmental Significance (MNES)

53. The Commission notes that the EPBC Act provides a legal framework to protect and manage seven matters of national and international environmental significance, being:
 - a. world heritage sites
 - b. national heritage places
 - c. wetlands of international importance³³
 - d. nationally threatened species and ecological communities
 - e. migratory species
 - f. Commonwealth marine areas
 - g. nuclear actions.³⁴
54. The provisions of the EPBC Act are only triggered where there is a likely impact on one or more of the MNES listed above.

³² Ecologically Sustainable Development Steering Committee, *National Strategy for Ecologically Sustainable Development 1992*, Endorsed by the Council of Australian Governments December, 1992. At: <http://www.environment.gov.au/esd/national/nsesd/strategy/index.html> (viewed, 22 January 2009).

³³ Often called 'Ramsar' wetlands, as covered by the Ramsar Convention.

³⁴ Australian Government, *Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act) Fact Sheet*. At: <http://www.environment.gov.au/epbc/publications/pubs/epbc-act-fact-sheet.pdf> (viewed 29 August 2008).

55. The Commission notes that the Act aims to balance the protection of these crucial environmental and cultural values with our society's economic and social needs and supports the continued recognition of the seven listed MNES.
56. However the Commission is of the view that this list must also include more recent challenges and policy priorities including:
 - a. climate change
 - b. land clearing and reforestation
 - c. water.

(a) *Climate change*

57. With regard to climate change, the EPBC Act was passed prior to Australia's adoption of the Kyoto Protocol and Australia's Carbon Pollution Reduction Scheme. As a result there is currently no trigger or mechanism under the EPBC Act for addressing issues affected by climate change, including potential 'impacts'³⁵ and 'significant impacts'³⁶ arising from adaptation and mitigation strategies.
58. Additionally, the Commission is concerned that emerging climate change strategies focused on economic outcomes may also have an array of adverse environmental and/or cultural impacts, such as in relation to land clearing and forestation discussed below.
59. At the recent Conference of the Parties to the Convention on Biodiversity, (COP-9) held in Bonn, Germany, the Parties to the Convention were urged to:

[E]nhance the integration of climate change considerations related to biodiversity in their implementation of the Convention with the full and effective involvement of relevant stakeholders...and consider consumption and production models, including vulnerable components of biodiversity within these areas with regard to the impacts on indigenous and local communities.³⁷
60. Additionally, at an Australian Human Rights Commission, Human Rights Law Seminar on the impacts of climate change on human rights, von Doussa highlighted the need for governments to ensure that 'Indigenous people's custodial role over traditional lands, and the flow on impacts for environmental

³⁵ *Environment Protection and Biodiversity Conservation Act 1999*, s 527E. Definition also provided in Australian Government Department of the Environment, Water, Heritage and the Arts, *Independent Review of the Environment Protection and Biodiversity Conservation Act 1999 Discussion Paper*, 31 October 2008, p 9.

³⁶ Definition provided in Australian Government Department of the Environment, Water, Heritage and the Arts, *Independent Review of the Environment Protection and Biodiversity Conservation Act 1999 Discussion Paper*, 31 October 2008, p 9.

³⁷ Convention on Biodiversity, *Conference of the Parties- COP-9 – Decisions, Biodiversity and climate change*, COP-9 Decision IX/16 (2008). At: www.cbd.int/decisions/cop9/?m=COP-09&id=11659&lg=0 (viewed 1 September 2008).

protection and caring for country, are fully taken into account when developing strategies for mitigation and adaptation'.³⁸

61. This illustrates how important it will be for the Australian Government to ensure it takes a broad holistic perspective when determining its climate change policy, and what linkages are required to other legislative frameworks to ensure consistency. More broadly, the government must conduct a review of all domestic legislation to evaluate how existing mechanisms affect the response to climate change.

(b) *Land clearing and reforestation*

62. Environmental degradation and climate change have presented the market with the impetus to create large scale plantations in pursuance of new timber products and for the emerging carbon trade industry in Australia. However, the rapid proliferation of these plantations and other initiatives has raised a number of complex environmental and cultural concerns.
63. For example, as the Indigenous Peoples Organisation Network explained in their report to the Seventh Session of the United Nations Permanent Forum on Indigenous Issues in New York:

In Australia, the area under industrial-plantation forestry has increased by 6,000km² in the past decade. As a proportion of the total area of agricultural land, this is a small change, but in a few individual regions such as south-western Victoria and the Riverina in the Murray Darling Basin, new plantation forestry represents a significant change in land management.³⁹

In northern Victoria and southern NSW, particularly in the high country, there have been large scale pine and blue gum plantations, which because of declining rainfall and their fast growth rate, are the most attractive trees for plantations in this region. However monocrops like these create particular environmental problems, for example:

- a) there is an enormous native vegetation removal and concomitant native animal removal
- b) monocrops are feral animal havens
- c) many of these crops experience herbicide application

³⁸ J von Doussa (President of the Australian Human Rights Commission), *Climate change and human rights: a tragedy in the making*, Australian Human Rights Commission, Human Rights Law Seminar, Sydney, 20 August 2008. At: <http://www.humanrights.gov.au/legal/seminars/index.html>, (viewed 26 August 2008).

³⁹ Benyon and Doody, 'Impacts of tree plantations on groundwater in south-eastern Australia', *Australian Journal of Botany*, 54(2), p 181. As cited by Indigenous Peoples Organisations Network, *Oil Palm and Other Commercial Tree Plantations, Monocropping: Impacts on Indigenous Peoples' Land Tenure and Resource Management Systems and Livelihoods – Indigenous Peoples Organisation of Australia Response*, Response to Item 4 of the Seventh Session of the United Nations Permanent Forum New York 21 April – 2 May 2008.

- d) young tree growth in areas where they are not grown naturally has significance adverse affects on water supplies and ground water levels
- e) impacts on ground water including increased salinity problems in already degraded eco-systems.⁴⁰

64. The Indigenous Peoples Organisation Network also rightly pointed out that commercial tree plantations have potential for creating a viable economic base for Indigenous Australians whilst also utilising Indigenous cultural knowledge in the development of effective and sustainable land management strategies. This may offer a particularly viable option for consideration in areas of the country where economic development opportunities are scarce. Some plantations also have excellent potential to create biodiversity areas that sustain traditional cultural economies and restore degraded ecosystems.
65. However there are concerns in Australia that the opposite is occurring, with large tracts of land being set aside for commercial interests that exclude Indigenous rights and interests, as well as the planting of monocrops that do not support Indigenous cultural economies.⁴¹ Balancing the economic, social, environmental, and cultural interests in such development will be crucial to maintaining the integrity of the environment.

(c) *Water*

66. With regard to water, the Commission notes that the Commonwealth Government has become more engaged in water management through the Water Amendment Act 2008, specifically in the Murray-Darling Basin. The Commission supports the governments' efforts to enable a stronger cross-jurisdictional approach to water management that results in greater consistency in the application of legislation, and greater cooperation between the States and the Commonwealth.
67. However, the Commission is concerned about the current implementation of the Ramsar Convention through the EPBC Act.
68. Section 3 of the EPBC Act provides the domestic legislative framework in implementing Australia's obligations under various international instruments including the Ramsar Convention.⁴² Australia currently has 64 Ramsar sites.
69. The Commission is concerned that that there is no express provision under the EPBC Act that requires the Minister to consult with Indigenous peoples before making a Ramsar wetland declaration. Furthermore, the Commission is

⁴⁰ Indigenous Peoples Organisations Network, *Oil Palm and Other Commercial Tree Plantations, Monocropping: Impacts on Indigenous Peoples' Land Tenure and Resource Management Systems and Livelihoods – Indigenous Peoples Organisation of Australia Response*, Response to Item 4 of the Seventh Session of the United Nations Permanent Forum New York 21 April – 2 May 2008.

⁴¹ Indigenous Peoples Organisations Network, *Oil Palm and Other Commercial Tree Plantations, Monocropping: Impacts on Indigenous Peoples' Land Tenure and Resource Management Systems and Livelihoods – Indigenous Peoples Organisation of Australia Response*, Response to Item 4 of the Seventh Session of the United Nations Permanent Forum New York 21 April – 2 May 2008.

⁴² Section 3(2)(f) of EPBC Act

concerned that there are no provisions in the EPBC Act that provide for Indigenous involvement in the declaration of Ramsar wetlands.

70. The Commission recommends that express provisions be made in the EPBC Act to provide for Indigenous involvement and consultation in the declaration and decision-making processes relating to Ramsar wetlands.
71. The Commission also notes that, as with the EPBC Act, one of the objects of the *Water Act 2007* (Cth) is to 'give effect to relevant international agreements'⁴³, including:
 - a. the Ramsar Convention
 - b. the Convention on Biological Diversity
 - c. any other international convention to which Australia is a party that is:
 - (i) relevant to the use and management of the Basin water resources
 - (ii) prescribed by the regulations of the *Water Act*.⁴⁴
72. As there is a direct link between the EPBC Act and the *Water Act*, the Commission considers that activities conducted in accordance with the *Water Act* should also be required to comply with and be assessed against the principles and requirements of the EPBC Act.
73. The Commission therefore recommends that the MNES listed under Part 3 of the EPBC Act, be extended to include climate change, land clearing and reforestation, and water as MNES.

5 Protected Areas

74. In response to chapter 5 of the Discussion Paper the Commission will consider:
 - a. what factors the Minister should have regard to when making a decision on heritage listing
 - b. the process for nominating and listing Commonwealth Heritage and National Heritage places
 - c. the effectiveness and utility of Commonwealth heritage strategies and management plans for protection World, National and Commonwealth Heritage values.
75. The Protected Areas under the EPBC Act include

⁴³ To the extent to which those agreements are relevant to the use and management of the Basin water resources). *Water Act 2007* (Cth), s 3 (b).

⁴⁴ *Water Act 2007* (Cth), s 4.

- a. World Heritage properties
 - b. National Heritage properties
 - c. Commonwealth Heritage properties
 - d. Wetlands of National importance (Ramsar wetlands)
 - e. Biosphere reserves
 - f. Commonwealth reserves and conservation zones
76. The EPBC Act provides for the listing of natural, historic or Indigenous places that are of outstanding national heritage value to the Australian nation, such as the Brewarrina Aboriginal Fish Traps (Baiaime's Ngunnhu), New South Wales, as well as heritage places on Commonwealth lands and waters or under Australian Government control.
77. A declared World Heritage property is an area that has been included in the World Heritage List or declared by the Minister to be a World Heritage property. World Heritage properties are places with natural or cultural values which are recognised to have outstanding and universal value, such as the Great Barrier Reef.⁴⁵
78. The Commission notes that each year the Minister makes a general call for nominations to the National and Commonwealth Heritage Lists. Anyone may nominate a place in response to this call.
79. The Commission recognises that the listing of a heritage place under the EPBC Act aims to ensure that the values of the place will be protected and conserved for future generations. However, the Commission is concerned about the affect on the rights and interests of Indigenous peoples, particularly the right of Indigenous peoples to the ownership and control of their lands, territories and natural resources, and to give - or not give - their free, prior and informed consent over developments on their land. This includes a right to determine and develop priorities and strategies for the development or use of their lands and resources.
80. Firstly, the Commission considers that the EPBC Act requires amendment to ensure that Indigenous people must be engaged throughout all phases of nomination through to management of heritage listed areas including, the planning, nomination, and management phases of declaring and managing heritage listed areas. For example:
- a. The Commission notes that s 315 of the EPBC Act provides that in relation to the listing of a property on the World Heritage List, the Minister must give notice in the *Gazette* of the submission of the property for listing. In order to ensure that Indigenous peoples have

⁴⁵ Australian Government Department of the Environment and Water, *The Environment Protection and Biodiversity Conservation Act - Guide to the EPBC Act*, Commonwealth of Australia, 2007. At:

access to this information and are in the best position possible to respond to the submission, the EPBC Act should include a requirement specific to the notification of Indigenous peoples.

This might require notification to the relevant Land Council or Indigenous representative body under a similar mechanism to that provided under the ‘future act regime’ in Part 2 of the *Native Title Act 1993* (Cth).⁴⁶ This would ensure that the Indigenous peoples have full access to the notification and listing process and are not overlooked or merely engaged as an afterthought.

The Commission considers that this notification mechanism should also be applied to provisions relating to the nomination of Commonwealth and National Heritage properties.

- b. The Commission is concerned that in the development of bilateral agreements, s 49A(c) of the EPBC Act requires the Minister to only have *considered* the role and interests of Indigenous peoples in promoting the conservation and ecologically sustainable use of natural resources in the context of the proposed agreement, and in accordance with Australia’s obligations under the Biological Diversity Convention.

The limitations of this provision contravene Indigenous peoples’ right to give their free, prior, and informed consent on decisions that have a direct or indirect impact on their lives. Additionally, the discretion of the Minister to only consider the role and interests of Indigenous people is very broad and therefore not readily amenable to effective judicial review. As a result, Indigenous interests can too easily be discounted in favour of other priorities. The current provisions also fail to afford Indigenous peoples with any formal opportunity to make submissions to the Minister prior to his or her making relevant decisions under the Act that may impact on Indigenous rights and interests.

- c. The Commission notes that the provisions that relate to the management of Protected Areas in Part 10 of the *Environment Protection and Biodiversity Conservation Regulations 2000* do not provide adequate provisions to ensure the full and effective engagement or participation of Indigenous in the development or implementation of management plans.
- d. While regulations 10.01D (c)(ii) and 10.03C(c)(ii), for example, provide that the publication of notice about management plan for National and Commonwealth Heritage places must invite comments on the draft from Indigenous people with rights and interests in the place, neither the Act nor the Regulations include provisions that require the participation of Indigenous peoples in the actual drafting of the plan.

⁴⁶ *Native Title Act 1993* (Cth), Part 2, Section 24.

- e. The Commission acknowledges that the EPBC Act does provide for the specific involvement of Indigenous peoples in the management of Commonwealth reserves on Indigenous people's lands.⁴⁷ However, the Commission considers that provisions such as these should be expanded so as to also be applied to the management of other areas concerned with the EPBC Act, such as World Heritage and National Heritage listed areas. This may also contribute to a consistent application of the legislation in relation to Indigenous engagement.
81. The Commission also recommends that the EPBC Act provide for the free, prior and informed consent, co-operation and involvement of the Indigenous peoples of a proposed protected area in:
- a. the nomination of the area
 - b. the development and implementation of management plans and other forms of agreement (including bilateral agreements).
82. Secondly, education and accessible information must be provided to the Indigenous peoples whose rights and interests are likely to be affected prior to a declaration being made, to ensure that their consent is properly informed. Clear information must also be provided as to their rights to their lands, waters and natural resources once a listing has been confirmed and finalised as to their role and responsibility in the development and implementation of management plans for those areas.

6 Indigenous Involvement

6.1 Introduction

83. In response to chapter 6 of the Discussion Paper, the Commission will consider:
- a. whether there are opportunities to harmonise legislative provision for the protection of Indigenous heritage values and how
 - b. whether the EPBC Act adequately supports Indigenous involvement in the preparation of management plans for Commonwealth reserves
 - c. whether the processes under the EPBC Act facilitate the involvement and cooperation of Indigenous people as owners of knowledge of biodiversity.
84. In addition to concerns raised above, the Commission notes that the EPBC Act provides for the recognition of Indigenous peoples rights and interests in its objects, particularly:

⁴⁷ *Environment Protection and Biodiversity Conservation Act 1999*, ss 374 – 383.

- a. the role played by Indigenous people in the conservation and sustainable use of resources
- b. the need to promote the use of local and traditional ecological knowledge to inform management and conservation decisions.

6.2 Opportunities to harmonise legislative provision for the protection of Indigenous heritage values

85. The Commission notes that the EPBC Act currently provides for the relationship between State and Territory laws relevant to the Act's scope and operation, including:

- a. *Fisheries Management Act 1991*
- b. *Native Title Act 1993*
- c. *Aboriginal Land Rights (Northern Territory) Act 1976*
- d. *Airports Act 1996*
- e. *Antarctic Treaty (Environment Protection) Act 1980*
- f. *State and Territory laws.*⁴⁸

86. However, the Commission is of the view that the EPBC Act must also require that these laws operate in accordance with the EPBC Act.

87. As discussed above in section 4.1, the Commission notes that while the EPBC Act provides for the protection and conservation of heritage, including cultural heritage, there are no distinct linkages between the EPBC Act and the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*.

88. The Commission also notes that the development of climate change legislative frameworks and policy is developing rapidly in Australia and is a responsibility of the Commonwealth Government. It is in this context, that the Commission promotes the need for climate change policy and legislation to be clearly linked to the EPBC Act.

89. Further, as discussed above, the challenge that water-related issues brings to the successful implementation of the EPBC Act requires formal and direct linkages to the *Water Act 2007* as a matter of urgency.

90. The Commission recommends that ss 5-10 of the EPBC Act be amended to include the relationship between the EPBC Act and legislation concerning climate change as well as the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) and the *Water Act 2007* (Cth).

⁴⁸ *Environment Protection and Biodiversity Conservation Act 1999*, ss 5 – 10.

(a) *The importance of Indigenous involvement*

91. The Australian Government recognise the importance of Indigenous involvement in conservation. In fact they highlight three reasons as to why it is important to involve Indigenous people in understanding and managing biodiversity:
- a. First, there is widespread recognition of the past, present and future custodianship of Australia's biodiversity by Indigenous peoples, and of their rights and responsibilities toward it under both customary and western law.
 - b. Second, traditional and ongoing Indigenous knowledge is increasingly accepted as a valid and necessary information input to biodiversity management, alongside scientific information.
 - c. Third, with some 15% of the continent under Indigenous ownership and/or management in 1996, often in remote environments that represent a management challenge, achieving protection of biodiversity without strong participation by local communities would be impossible.⁴⁹
92. The Commission notes that the joint management of national parks and other conservation reserves (including Indigenous Protected Areas) with Indigenous traditional owners is increasingly being accepted as an appropriate option for the management and protection of these areas.⁵⁰
93. Additionally, Government programs such as the Working on Country program promotes the use of Indigenous knowledge in protecting and managing land and sea country and provides funding for Indigenous people to deliver environmental outcomes such as fire management to the Australian Government. The provision of environmental services by Indigenous peoples will contribute significantly to the maintenance of Australia's biodiversity and assist with the mitigation of climate change impacts.
94. In addition, as discussed above, the international human rights framework clearly identifies Indigenous peoples' rights to be fully engaged in government processes that directly or indirectly impact on their lives. This means that Indigenous people must be directly and substantially engaged in all aspects of the formulation and implementation of policies that affect their rights and interests, particularly in respect of their land and waters. The human rights framework also requires that Indigenous peoples have the right to determine

⁴⁹ Department of Environment, Water, Heritage and the Arts, *Australia State of the Environment Report 2001 (Theme Report)*, published by CSIRO on behalf of the Department of the Environment and Heritage, 2001. At: <http://www.environment.gov.au/soe/2001/publications/theme-reports/biodiversity/biodiversity06-5.html>.

⁵⁰ The Queensland *Cape York Peninsula Heritage Act 2007* which was proclaimed on 2 November 2007, provides for the removal of impediments to the declaration of national parks by establishing joint management arrangements with Indigenous landholders At: http://www.nrw.qld.gov.au/cape_york/index.html. The NSW Government are negotiating Aboriginal co-management of national parks, reserves and other areas through the development of Aboriginal co-management arrangements. At: <http://www.environment.nsw.gov.au/comanagement/index.htm>.

the priorities for their lands, waters and natural resources, and to give - or not give - their free, prior and informed consent over developments on their land. It is also imperative that governments maximise opportunities for Indigenous participation in programs affecting their lands and waters.

95. The Commission also notes that it is the declared position of the Australian Government to encourage Indigenous economic development through leveraging opportunities available to them on the Indigenous estate. Therefore, it will be crucial in the development of the Indigenous Economic Development Strategy that the role of Indigenous peoples, particularly through the use of Indigenous knowledge to assist with conserving Australia's biodiversity, identified in the EPBC Act is accounted for.

6.3 Options for increasing Indigenous involvement

96. For the reasons discussed below, the Commission also considers that this review provides a valuable opportunity to explore potential opportunities for Indigenous peoples in the conservation and sustainable use of resources. Whilst not a conclusive list, options for consideration that are discussed below include:

- a. increased use of Indigenous stewardship models
- b. expanding the composition and role of the Indigenous Advisory Committee
- c. promoting the use of local and traditional ecological knowledge to inform management and conservation decisions

(a) Indigenous stewardship models

97. One option for enhancing the role of Indigenous peoples in the protection and maintenance Australia's biodiversity is to support Indigenous stewardship, particularly over lands where Indigenous peoples reside.
98. The Indigenous stewardship model promotes the inclusion of Indigenous people as an integral part of land and water management, rather than separate to it, with active responsibility for the maintenance and care of land and waters. Under this approach, Indigenous peoples perceive protection of their lands to mean avoiding their destruction through sustainable use, rather than avoiding their use altogether.
99. Therefore, because many Indigenous peoples prefer to remain on their lands, engaging them in land-conservation initiatives creates a win-win opportunity for both conservationists and Indigenous communities.

(b) *Indigenous Advisory Committee*

100. The Commission notes that s 505A of the EPBC Act provides for the establishment of an Indigenous Advisory Committee⁵¹ (IAC). The EPBC Act provides that the functions of the IAC are to:

...advise the Minister on the operation of the Act, taking into account the significance of indigenous peoples' knowledge of the management of land and the conservation and sustainable use of biodiversity.⁵²

101. The composition of the Committee including the qualifications of its members is at the Ministers discretion. Members are appointed on a part-time basis, and the Minister appoints one of the members to chair the Committee.⁵³ The Commission also notes that in accordance with s 505B the Minister may give the Committee written guidelines about its functions.

102. The Commission is concerned that the EPBC Act does not adequately support Indigenous engagement by its failure to clearly state that the membership of the IAC must be constituted only by Indigenous people. If non-Indigenous membership of the Committee is to be approved by the Minister, the Commission considers that the EPBC Act should direct that this decision must be based on the Minister's reasonable satisfaction that:

- a. the member will bring substantial and relevant expertise to the Committee that could not otherwise be obtained from another Committee established under the EPBC Act⁵⁴
- b. the member can fairly represent the interests of Indigenous communities.

103. In addition, the Commission considers that the role of the IAC needs to be strengthened. While the IAC provides representation on issues relevant to Indigenous peoples, their lands and waters, the level of engagement between the Minister and the IAC is often limited to the terms of reference developed by the government. Additionally, the position of the IAC and its capacity to effectively reflect the concerns of Indigenous peoples about their rights and interests is limited by the fact that this platform is to inform the government only, rather than to have a direct role in decisions which affect Indigenous people.

104. The Indigenous Peoples Organisations Network has argued that the IAC is effectively excluded from the workings of the EPBC Act. There is considerable frustration that the IAC is established under the Act to advise the Minister for Environment, Water, Heritage and the Arts on the operation of the Act in relation to activities and matters of national environmental significance.

⁵¹ *Environment Protection and Biodiversity Conservation Act 1999*, s 505a(1).

⁵² *Environment Protection and Biodiversity Conservation Act 1999*, s 505B.

⁵³ *Environment Protection and Biodiversity Conservation Act 1999*, s 505A(2) and (3).

⁵⁴ For example, the Threatened Species Scientific Committee, and the Biological Diversity Advisory Committee, *Environment Protection and Biodiversity Conservation Act 1999*, ss 502 – 505.

However, despite the efforts of the IAC for example, to argue the significance of the Burrup Peninsula on the Dampier Archipelago in Western Australia, their advice has been largely ignored.⁵⁵

105. The Commission is also concerned to ensure that consultation by the Minister with the IAC does not replace the government's requirement to engage directly with Indigenous peoples whose lands and waters will be affected by decisions in accordance with the EPBC Act. That is, whilst engagement with the IAC should be encouraged, it should never be capable of acting as a substitute for direct and comprehensive engagement with the Indigenous peoples of the relevant lands.
106. The Commission recommends that the Review Committee consider strengthening of the IAC to provide a more directive and authoritative capacity rather than limiting this to an advisory role only. For example, the EPBC Act could be amended to provide for delegated decision-making to the IAC on specific matters of significance to Indigenous peoples and their rights and interests. This may include World Heritage listed areas and Commonwealth and National Heritage listed areas over places with significant relevance to Indigenous peoples. Alternatively, the Act could provide greater guidance on the priority of IAC recommendations in informing the decision-making of the Minister to provide greater scope for judicial review where a Minister fails to reasonably follow such recommendations.
107. Additionally, the Commission is concerned about the lack of transparency in relation to the advice provided to the Minister by the Committee's. The Commission is of the view that all of the Committee's established under the EPBC Act, be required to provide formal advice/reports to the Minister and that this information is publically available on the Departments website. This would further contribute to strengthening the role of the IAC.
108. The Commission recommends that the Review Committee consider the inclusion of specific mechanisms that promote transparency in relation to the advice and deliberations of the Committee's established under the EPBC Act. In reviewing the engagement of Indigenous peoples under the EPBC Act and the role of the IAC, the Commission further recommends that the Review Committee have regard to the guidelines for engagement with Indigenous peoples, contained in *Engaging the marginalised: Partnerships between indigenous peoples, government and civil society* (Copy attached at Appendix 1).⁵⁶ These guidelines provide an excellent framework to build upon to formulate an extensive set of principles for Indigenous engagement in the operation of the EPBC Act.

⁵⁵ Indigenous Peoples Organisation Network (IPO), *Environment – Indigenous Peoples Organisation of Australia Response*, Response to Agenda Item 4.2 – Environment of the Seventh Session of the United Nations Permanent Forum, New York, 21 April – 2 May 2008.

⁵⁶ Human Rights and Equal Opportunity Commission and United Nations Permanent Forum on Indigenous Issues, *Engaging the marginalised: Report of the workshop on engaging with Indigenous communities*, (2005) At: http://www.humanrights.gov.au/social_justice.

(c) *Promoting the use of local and traditional ecological knowledge to inform management and conservation decisions*

109. As identified above, the Commission notes that the final object of the EPBC Act promotes the use of Indigenous people's knowledge of biodiversity. While it is positive and crucial that the Australian Government recognises the importance of Indigenous knowledge to the protection of Australia's biodiversity, the Commission is concerned that the object does not also provide for the **protection** of this knowledge.

110. Davis argues that:

Over the millennia, Indigenous peoples have developed a close and unique connection with the lands and environments in which they live. They have established distinct systems of knowledge, innovation and practices relating to the uses and management of biological diversity on these lands and environments.

Much of this knowledge forms an important contribution to research and development, particularly in areas such as pharmaceuticals, and agriculture and cosmetic products. In the context of these uses, Indigenous peoples claim that their rights as traditional holders and custodians of this knowledge are not adequately recognised or protected. They demand not only recognition and protection of this knowledge, but also the right to share equitably in benefits derived from the uses of this knowledge.⁵⁷

111. The EPBC Act does not provide any guidance on how this knowledge is obtained, who has control over the use of this knowledge and under what circumstances (whether it becomes public knowledge or the knowledge of the government department implementing the EPBC Act), and the role of Indigenous people in the appropriation of this knowledge. Are they merely expected to hand over the information in the national interest?

112. A long held concern of Indigenous peoples around the world is the inadequate protection of Indigenous traditional knowledge. This includes protection from misappropriation. For the majority of Indigenous Australians the rights to Indigenous knowledge are generally owned collectively by the Indigenous community (or language group, or tribal group) as distinct from the individual. It may be a section of the community or, in certain circumstances, a particular person sanctioned by the community (in accordance with traditional law and custom) that is able to speak for or make decisions in relation to a particular instance of traditional knowledge. Some of this knowledge is of a highly sacred and secret nature and therefore extremely sensitive and culturally significant and not readily publicly available, even to the members of the particular group who owns that knowledge.

113. The Commission is concerned that the focus of the object of the EPBC Act is *to promote the use of local and traditional ecological knowledge to inform management and conservation decisions*. The reliance on Indigenous

⁵⁷ M Davis, (Science, Technology, Environment and Resources Group), *Biological Diversity and Indigenous Knowledge*, 29 June 1998, Research Paper 17 1997-98, Parliament of Australia, available online at: www.aph.gov.au/library/Pubs/RP/1997-98/98rp17.htm, accessed on 22 September 2008.

knowledge is increasingly becoming common practice. The Commonwealth Government's Green Paper on Climate Change in Australia also identifies the need to investigate 'the feasibility of co-operative research centres to *collect* Indigenous knowledge'.⁵⁸

114. The Commission is of the view that the current framework for the protection of intellectual property in Australia does not provide adequate protection or recognition of the uniqueness of Indigenous knowledge and should not be regarded as an adequate safeguard against the misappropriation of Indigenous knowledge. For example, Australian intellectual property laws typically focus on the right of an individual and are ill-suited to communal or group protection. These laws are also focused on the protection of published 'works' and are therefore also ill-suited to the protection of intergenerational knowledge passed down in the oral tradition:

Opportunities to preserve and value Indigenous Traditional Knowledge are endangered by the range of problems within our environment and communities today. Avenues for the preservation of traditional knowledge are fading and are at risk of being lost altogether. Loss of traditional knowledge will result in a decline of Indigenous identity and a severe reduction in the recognition and understanding of an invaluable sustainable knowledge system.⁵⁹

115. Section 303BA of the EPBC Act states that the objects of the Act include complying with Australia's obligations under the Convention on Biological Diversity's Biodiversity Convention.

116. The Commission refers the Review Committee and the Australian Government to the provisions of this Convention which provides guidance on the issue of protection of Indigenous knowledge. Whilst not specific to Indigenous rights, the Convention on Biological Diversity provides specific opportunities for introducing measures to recognise and protect Indigenous knowledge. For example, Article 8(j) encourages countries to:

...respect, preserve and maintain knowledge, innovations and practices of Indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices.⁶⁰

117. In addition, Article 8(j) specifically gives recognition firstly to the traditional knowledge, innovations and practices of Indigenous people and local

⁵⁸ The Hon Peter Garrett, Minister for the Environment, Water, Heritage and the Arts, Correspondence with the Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for Information in preparation of the Native Title Report 2008, 29 August 2008.

⁵⁹ Traditional Knowledge Revival Pathways. At: http://tkrp.com.au/index.php?option=com_content&task=view&id=17&Itemid=26 (viewed 1 October 2008).

⁶⁰ Convention on Biological Diversity, Article 8(j).

communities while also speaking strongly for its protection, preservation and maintenance. Article 8(j) also provides that the use of Indigenous traditional knowledge, innovations and practices should only occur with the approval and involvement of the Indigenous or local community and that any benefits that arise from its use is to be shared with the people or community from which that knowledge originated.⁶¹

118. Additionally, the Desert Knowledge Cooperative Research Centre (Desert Knowledge CRC) have developed a comprehensive *Protocol for Aboriginal Knowledge and Intellectual Property*.⁶² This protocol has been developed with specific relevance to the Aboriginal communities with which the Desert Knowledge CRC work closely. The protocol acknowledges and respects that those Aboriginal communities and groups will have their own protocols that must also be observed, understood and engaged with as an essential ongoing part of any process with Indigenous people. However, the protocol serves as a very useful guide towards best practice in ethics, confidentiality, equitable benefit sharing and in managing research information.⁶³ The complete protocol is attached at Appendix 2 as an example of what should be considered in the development of a National Indigenous Knowledge Use and Protection Protocol.

119. The Commission recommends that in the absence of an international and national framework that provides for the protection and use of Indigenous knowledge, the Review Committee and the Commonwealth Government should extend the objects of EPBC Act to recognise the importance of protecting, conserving and maintaining Indigenous knowledge.

7 Appendix

120. Appendix 1 - *Engaging the marginalised: Partnerships between indigenous peoples, government and civil society*

121. Appendix 2 - Desert Knowledge Cooperative Research Centre *Protocol for Aboriginal Knowledge and Intellectual Property*

⁶¹ H Fourmile-Marrie & G Kelly, *The Convention on Biological Diversity and Indigenous People: Information concerning the implementation of decisions of the Conference of the Parties under the Convention on Biological Diversity*, Centre for Indigenous History and the Arts, University of Western Sydney, 2000, pages 3-4.

⁶² Desert Knowledge Cooperative Research Centre, *Protocol for Aboriginal Knowledge and Intellectual Property*. At: www.desertknowledgecrc.com.au (viewed 15 December 2008).

⁶³ Desert Knowledge Cooperative Research Centre, *Protocol for Aboriginal Knowledge and Intellectual Property*. At: www.desertknowledgecrc.com.au (viewed 15 December 2008).

Engaging the marginalized: Partnerships between indigenous peoples, governments and civil society



Guidelines for engagement with indigenous peoples

**United Nations Workshop – 2005
International Conference on Engaging
Communities – Brisbane, Australia**

15 August 2005



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Part I – Workshop Overview

Introduction by Workshop Chair, Professor Mick Dodson Member of the United Nations Permanent Forum on Indigenous Issues

On 15 August 2005, in Brisbane Australia, 160 delegates from the International Engaging Communities Conference participated in the UN-sponsored workshop, 'Engaging the marginalized: Partnerships between indigenous peoples, governments and civil society'.

The Secretariat of the United Nations Permanent Forum on indigenous Issues and the Human Rights and Equal Opportunity Commission of Australia organized this workshop which was divided into four sessions. Sessions one and two opened with a number of distinguished panellists who laid out international frameworks, as well as national and local level examples of engaging indigenous communities. The workshop reconvened in the afternoon for small group discussions, where delegates were encouraged to identify specific mechanisms and challenges they have experienced in engaging indigenous peoples as well as identify the important principles to guide engagement with indigenous peoples.

The experiences and comments shared by the delegates have been captured in the *Workshop Report* and the *Guidelines for Engaging Indigenous Communities* which are below.

The workshop aimed to build on the human rights based approach to development which places indigenous peoples at the centre and identify opportunities as well as challenges for engaging indigenous communities in governance processes. This is an important development internationally. The workshop acknowledged that never has the UN system been so primed to receive indigenous views into their frameworks and processes. It is hoped that this document will advance an understanding and awareness of these important issues. The workshop proceedings and guidelines will be discussed at the forthcoming session of the Permanent Forum on Indigenous Issues.

I would like to thank our co-hosts the Human Rights and Equal Opportunity Commission for assisting the United Nations and Secretariat in pulling the workshop together. I would also like to thank and congratulate all the workshop participants from all around the world who contributed to the workshop discussion, shared their experiences and views, which ultimately informed the workshop outcome – *Guidelines for Engaging with Indigenous Communities*.

Part 2 – Workshop Report

International Conference on Engaging Communities, Brisbane 2005 United Nations Workshop 4: Engaging the marginalized – Partnerships between indigenous peoples, governments and civil society

Introduction

This workshop was held on 15 August 2005 and co-sponsored by the Secretariat of the United Nations Permanent Forum on Indigenous Issues and the Human Rights and Equal Opportunity Commission of Australia. Approximately 160 people participated in the workshop.

The workshop noted that indigenous peoples face common experiences of marginalization and exclusion in the states in which they live. This is reflected in significantly lower standards of living and often, feelings of dislocation and disempowerment.

The workshop identified the need to significantly increase efforts to build *effective partnerships* between governments, the private sector, civil society and indigenous peoples. This requires respect for the rights of indigenous peoples.

The workshop noted the key elements of a human rights based approach to engaging with indigenous people and communities. This approach is informed by international law, the normative framework of the international human rights system,¹ the interdependence and inter-relatedness of all human rights, civil, political, economic, social and cultural, and the policies and practices of the United Nations.² It includes the Common Understanding of the Human Rights Based Approach to Development and the principle of free, prior and informed consent.

The workshop centred on the challenges and opportunities of recognizing cultural diversity; developing policies and programs that are non-discriminatory, inclusive, targeted and effective; providing an enabling environment for participation and the empowerment of indigenous peoples at all levels; and adopting approaches that are (indigenous) people centred.

Experiences and challenges in engaging with indigenous communities

The workshop noted some positive experiences but articulated a number of concerns in the interaction of governments, the private sector and civil society with indigenous peoples and communities.

The workshop noted that partnerships with indigenous peoples in some countries variously involve constitutional recognition, are underpinned by formal agreements or protocols for engagement, or involve legislative requirements for governments to consult with indigenous peoples' organizations on matters that directly or indirectly affect indigenous communities. Participants noted that a consistent problem is the failure of governments to comply with the policies and processes that they have established or to act in accordance with their international obligations under international treaties.

The workshop noted that existing relationships between governments and indigenous peoples are often inequitable. This is because the relationship is negotiated with unequal bargaining power. The underlying basis for these relationships are often set by government, are conditional, place limitations on the recognition of indigenous rights and/or pay insufficient attention to the ongoing impact of the history of dispossession and discrimination experienced by indigenous peoples.

The workshop identified the need to build partnerships on an equitable footing, which are flexible and responsive to the diverse needs and circumstances of indigenous peoples. Such partnerships require: the full and effective participation of indigenous peoples; the opportunity for indigenous peoples to identify concerns, prioritize them and propose solutions that are community driven; and respect, and support indigenous peoples' chosen form(s) of representation, including traditional or customary authority structures.

The workshop also identified the need for government, the private sector and civil society to recognize the cultural diversity that exists *within* indigenous peoples and between communities. Accordingly, partnerships must be tailored to the specific characteristics of indigenous communities. Government programs must also be responsive to the specific needs of individual communities, be coordinated and avoid duplication.

The workshop also noted the challenge of developing *sustainable* partnerships with indigenous communities, which are targeted to achieving long term objectives negotiated with the full and effective participation of indigenous peoples. Partnerships should also acknowledge the existing social capital and strengths within indigenous communities, and look to build and support these.

Guidelines for engagement with indigenous peoples

The workshop developed guidelines for governments, the private sector and civil society to engage with indigenous peoples in relation to the following contexts:

- Indigenous systems of governance and law;
- Indigenous lands and territories, including sacred sites;
- Treaties, agreements and other constructive arrangements between states and indigenous peoples, tribes and resources;
- In relation, but not limited to extractive industries, conservation, hydro-development, other developments and tourism activities in indigenous areas leading to possible exploration, development and use of indigenous territories and/or resources;
- Access to natural resources including biological resources, genetic resources and/or traditional knowledge of indigenous peoples, leading to possible exploration, development or use thereof;
- Development projects encompassing the full project cycle, including but not limited to assessment, planning, implementation, monitoring, evaluation and closure – whether the projects be addressed to indigenous communities or, while not addressed to them, may affect or impact upon them;
- UN agencies and other intergovernmental organizations who undertake studies on the impact of projects to be implemented in indigenous peoples territories;
- Policies and legislation dealing with or affecting indigenous peoples;
- Any policies or programs that may lead to the removal of their children, or their removal, displacement or relocation from their traditional territories.

The guidelines for engaging with indigenous communities specifically include:

A Human Rights-Based Approach to Development

- All policies and programs relating to indigenous peoples and communities must be based on the principles of non-discrimination and equality, which recognize the cultural distinctiveness and diversity of indigenous peoples;
- Governments should consider the introduction of constitutional and or legislative provisions recognizing indigenous rights;
- Indigenous peoples have the right to full and effective participation in decisions which directly or indirectly affect their lives;
- Such participation shall be based on the principle of free, prior and informed consent,³ which includes governments and the private sector providing information that is accurate, accessible, and in a language the indigenous peoples can understand;
- Mechanisms should exist for parties to resolve disputes, including access to independent systems of arbitration and conflict resolution.

Mechanisms for representation and engagement

- Governments and the private sector should establish transparent and accountable frameworks for engagement, consultation and negotiation with indigenous peoples and communities;
- Indigenous peoples and communities have the right to choose their representatives and the right to specify the decision making structures through which they engage with other sectors of society.

Design, negotiation, implementation, monitoring, and evaluation

- Frameworks for engagement should allow for the full and effective participation of indigenous peoples in the design, negotiation, implementation, monitoring, evaluation and assessment of outcomes;
- Indigenous peoples and communities should be invited to participate in identifying and prioritizing objectives, as well as in establishing targets and benchmarks (in the short and long term);
- There should be accurate and appropriate reporting by governments on progress in addressing agreed outcomes, with adequate data collection and disaggregation;
- In engaging with indigenous communities, governments and the private sector should adopt a long term approach to planning and funding that focuses on achieving sustainable outcomes and which is responsive to the human rights and changing needs and aspirations of indigenous communities.

Capacity-building

- There is a need for governments, the private sector, civil society and international organizations and aid agencies to support efforts to build the capacity of indigenous communities, including in the area of human rights so that they may participate equally and meaningfully in the planning, design, negotiation, implementation, monitoring and evaluation of policies, programs and projects that affect them;
- Similarly, there is a need to build the capacity of government officials, the private sector and other non-governmental actors, which includes increasing their knowledge of indigenous peoples and awareness of the human rights based approach to development so that they are able to effectively engage with indigenous communities;
- This should include campaigns to recruit and then support indigenous people into government, private and non-government sector employment, as well as involve the training in capacity building and cultural awareness for civil servants; and
- There is a need for human rights education on a systemic basis and at all levels of society.

International agenda for change

The principles recognized in this action-oriented report recognize the agenda for change and should be progressed through the United Nations commitment to the Millennium Declaration, including the Millennium Development Goals process, as well as the Program of Action of the Second International Decade of the World's Indigenous People.

Part 3 – Concluding Remarks

Concluding Remarks by Workshop Rapporteur, Mr Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights & Equal Opportunity Commission (Australia)

We received many valuable contributions from the panellists and delegates during the workshop. While some views differed, and the varying ways of developing partnerships were noted, one common theme re-emerged throughout the workshop. This theme was the need for indigenous peoples to be at the centre of all development, policy-making and planning that affects their lives. This is to be achieved by government and civil society's full support of:

- Full and effective participation of indigenous peoples; and
- Indigenous peoples right to free, prior and informed consent.

Both nationally and internationally much progress is required for an indigenous people-centered approach to be implemented. Workshop panellists Mr Darryl Pearce of the South-West Aboriginal Land and Sea Council in Australia and Mr Mangal Chakma of the Chittagong Hills Tracts in Bangladesh showed that domestically some governments and civil societies are not engaging with indigenous peoples in a way that places them at the centre.

Ms Chandra Roy from the UN Development Programme, offered the Human Rights Based Approach to Development as a model for governments and civil society to engage with indigenous peoples. Ms Elsa Stamatopoulou of the UN Permanent Forum Secretariat affirmed this in her remark that, 'there has been considerable work already on a normative framework of engagement with indigenous peoples; it is time for implementation'.

As the Aboriginal and Torres Strait Islander Social Justice Commissioner I have made a strong commitment to progress the development of the guidelines for engagement by disseminating information about the workshop throughout indigenous communities in Australia. I also understand that my colleagues in the United Nations will disseminate this information internationally.

I also urge governments and civil society to take full consideration of the workshop report as well as adopt the guidelines for engagement.

1 As set out in: *UN Workshop on engaging the marginalized: Background paper prepared by the Secretariat of the UN Permanent Forum on Indigenous Issues*. These include, but are not limited to, the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Rights of the Child; International Labour Organisation Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries; and the Draft Declaration on the Rights of Indigenous Peoples.

2 Including the United Nations Common Country Assessment and Development Assistance Framework (CCA/UNDAF), the Human Rights Based Approach to Development adopted by the United Nations Development Group, the recommendations of the United Nations Permanent Forum on Indigenous Issues and other policies adopted by entities of the United Nations system and other inter-governmental organizations, as well as bilateral donor agencies.

3 The elements of a common understanding of free, prior and informed consent, as identified at the *International Workshop on Methodologies regarding free prior and informed consent and indigenous peoples* (UN Doc: E/C.19/2005/3, 19 January 2005) are set out in the *UN Workshop on engaging the marginalized: Background paper prepared by the Secretariat of the UN Permanent Forum on Indigenous Issues*. The workshop report identifies the main areas where the principle of free, prior and informed consent is relevant; what constitutes consent; the timeframes for seeking such consent; who may provide it on behalf of an indigenous community; how it should be sought; and procedures and mechanisms for oversight and redress.

Further Information

The full report of the workshop, including background papers and presentations, is available at:

- The website of the Human Rights and Equal Opportunity Commission at: www.humanrights.gov.au/social_justice/
- The website of the United Nations at: www.un.org/esa/socdev/unpfii/

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