

SUBMISSION TO THE EPBC ACT REVIEW

ANON-K57V-XY7E-T

Organisation

Federation of Victorian Traditional Owner Corporations

State or Territory

Victoria

Attachment provided?

Yes

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SUBMISSION RESPONSES

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**Federation of
Victorian Traditional
Owner Corporations**

17 April 2020

Re: Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act) Review

Introduction

The Federation of Victorian Traditional Owner Corporations is a state-wide body advocating for the rights and interests of Victorian Traditional Owner Corporations. We welcome the opportunity to participate in the 10 yearly review of the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)*.

Traditional Owners have rights, interests, and responsibilities to care for Country that stem from their own systems of governance. The most recent review of the EPBC Act was conducted in 2009. The final report from that review made a number of recommendations aimed at furthering consultation and engagement of Indigenous Australian's in the conservation and protection of biodiversity.

While we welcome the 2009 recommendations in relation to strengthening measures to engage with Traditional Owners, we recommend that the current review shift its Traditional Owner engagement focus from an inform and consult approach to a collaborate and empower one, underpinned by the principles of self-determination.¹ Furthermore, since the 2009 EPBC Act review, there have been significant advances in Policy and Legislation regarding Aboriginal Affairs in Victoria including, for example, the Traditional Owner Settlement Act (2010).²

Biodiversity and conservation are terms that do not connect well with Indigenous concepts around caring for Country.³ Throughout our submission we argue for a shift towards adopting a *biocultural or cultural landscapes* approach that 'encompass both the biological and cultural aspects of a system, address complex relationships and feedbacks within human and ecological well-being, and offer flexible frameworks that facilitate synthesis across different metrics, knowledge systems, and ontologies'.⁴ The *United Nations Educational, Scientific and*

¹ The IAP2 Spectrum of Public Participation provides a clear guide to different levels of participation. The EPBC Act current sits at the inform and consult end of the spectrum and needs to shift to the other end of the spectrum under Collaborate and Empower. https://iap2.org.au/wp-content/uploads/2020/01/2018_IAP2_Spectrum.pdf

² Traditional Owner Settlement Act (2010) http://www8.austlii.edu.au/cgi-bin/viewdb/au/legis/vic/consol_act/tosa2010326/

³ 'Country' is a well-known and widely used Aboriginal term and concept that describes all living, non-living and spiritual parts of the world, as well as the interactions between them. Wherever and whenever these interactions occur according to Aboriginal Law, country is considered to be 'healthy'. People are responsible for maintaining health of country by 'caring for' it according to cultural obligations'. Thomas M. Bach, Christian A Kull and Haripriya Rangan, (2019) 'From Killing Lists to Healthy Country: Aboriginal Approaches to Weed Control in the Kimberley, Western Australia', *Journal of Environmental Management*, 229: p. 12

⁴ Sophie Caillon, Georgina Cullman, Bas Verschuuren and Eleanor J. Sterling, (2017) 'Moving Beyond the Human-Nature Dichotomy Through Biocultural Approaches: Including Ecological Well-being in Resilience Indicators', *Ecology and Society*, 22 (4): pp. 1-27. p. 1. See also: Michael Adams and Anthony English, (2005) "Biodiversity is a Whitefella Word": Changing



Cultural Organization (UNESCO) defines cultural landscapes as ‘combined works of nature and humankind, they express a long and intimate relationship between peoples and their natural environment’.⁵

We note throughout our submission in response to the discussion paper that the language used in regard to Indigenous Australians is inadequately guided by Australia’s obligations under UNDRIP and recommend the Act be strengthened to reflect the rights and interests outlined in UNDRIP.

We also note throughout our concerns about the absence of appropriate mechanisms to ensure the protection of Indigenous Cultural and Intellectual Property (ICIP), the respectful integration of Indigenous Ecological Knowledge (IEK)⁶, or a framework that enables Traditional Owners to fulfil their rights, interests, and responsibilities to care for Country. Strengthening these mechanisms and embedding Traditional Owner rights in the EPBC Act should be a key priority.

Recommendations

1. It is recommended that the Objects and operative provisions of the EPBC Act reflect and implement international standards of Indigenous rights, including those contained in the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP).
2. Inclusion of clear mechanisms to ensure the protection of Indigenous Cultural and Intellectual Property (ICIP) and that any use of ICIP is with the **Free, Prior and Informed** Consent of the owner of that knowledge.
3. Inclusion of clear mechanisms or processes requiring partnerships with Traditional Owners in the management of Country that are underpinned by the principles of self-determination.

Relationships Between Aborigines and the New South Wales Parks and Wildlife Service’, in Luke Taylor, Graeme K. Ward, Graham Henderson, Richard Davis & Lynley A. Wallis (eds) *The Power of Knowledge, The Resonance of Tradition*, Canberra: Aboriginal Studies Press for the Australian Institute of Aboriginal and Torres Strait Islander Studies.

⁵ <https://whc.unesco.org/en/culturallandscape/>

⁶ **Indigenous knowledge:** the understandings, skills and philosophies developed by societies with long histories of interaction with their natural surroundings. For rural and indigenous peoples, local knowledge informs decision making about fundamental aspects of day-to-day life. This knowledge is integral to a cultural complex that also encompasses language, systems of classification, resource use practices, social interactions, ritual and spirituality. These unique ways of knowing are important facets of the world’s cultural diversity, and provide a foundation for locally-appropriate sustainable development (UNESCO) <http://www.unesco.org/new/en/natural-sciences/priority-areas/links/related-information/what-is-local-and-indigenous-knowledge/>

4. Strengthening mechanisms and processes for Traditional Owner involvement is a priority for reform of the Act. Enabling mechanisms and processes should be underpinned by the principles of self-determination and free, prior and informed consent.
5. Identification of risks to Traditional Owners ICIP as a result of future trends in the Native Food & Botanicals (NFB) industry.
6. Embed clear measures within the Act to protect Traditional Owner rights and interests in the developing NFB industry in line with Australia's obligations under UNDRIP, the *Convention on Biological Diversity* (Article 8⁷) and the *Nagoya Protocol on Access and Benefit Sharing*.
7. Strong industry standards that regulates the genetic modification of native species.
8. Development of a Traditional Owner led, co-designed framework/s that guide stakeholders in the respectful integration of IEK and Western Knowledge in land management.
9. Measures within the Act enable Traditional Owners to implement a Cultural Landscapes approach to restoring and maintain healthy Country.

Question 3: Should the objects of the EPBC Act be more specific?

It is recommended that the objects of the EPBC be amended to reflect and implement international standards regarding the rights of Indigenous Peoples as outlined in the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP). One way to bring the EPBC Act in line with UNDRIP would be amend the Act to give effect to articles that specifically refer to conservation and Indigenous knowledge (see Article 29 UNDRIP⁸ and Article 31 UNDRIP⁹)

⁷ Article 8 of the CBD states: '(j) Subject to its national legislation, 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.'

⁸ Article 29 UNDRIP says 'Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for Indigenous peoples for such conservation and protection, without discrimination.'

⁹ Article 31 UNDRIP says '(1) Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional



and those articles that enshrine the principles of self-determination and free, prior and informed consent.

Three of the eight objects of the EPBC Act relate to the rights of Indigenous Australians, yet they currently do not align with international standards regarding Indigenous rights. While the previous review of the EPBC Act made a series of recommendations intended to strengthen these rights, we argue that the Act does not do enough to enable Traditional Owners to exercise their rights to care for Country.

While the current Objects include purposes that are ostensibly beneficial to Traditional Owners,¹⁰ on closer examination the language used is often problematic and is not in line with the articles outlined above. For example, the EPBC Act suggests Indigenous knowledge should only be used ‘with the consent’ of the knowledge holder. This ignores the requirement in UNDRIP for ‘free, prior, and informed’ consent. Further, the use of ICIP not only requires the free, prior and informed consent of the owner of the knowledge, but should be used in ‘cooperation with’ the owner of the knowledge. This language issue is evident throughout the Act.

Finally, the extent to which the operative provisions of the EPBC Act give effect to the objects relating to Indigenous peoples’ rights is not clear.

Recommendation

1. It is recommended that the Objects and operative provisions of the EPBC Act reflect and implement international standards of Indigenous rights, including those contained in the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP).
2. Inclusion of clear mechanisms to ensure the protection of Indigenous Cultural and Intellectual Property (ICIP) and that any use of ICIP is with the **Free, Prior and Informed** Consent of the owner of that knowledge.
3. Inclusion of clear mechanisms or processes requiring partnerships with Traditional Owners in the management of Country that are underpinned by the principles of self-determination.

knowledge, and traditional cultural expressions. (2) In conjunction with Indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.’

¹⁰ See e.g. (ca) to provide for the protection and conservation of heritage; (d) to promote a cooperative approach to the protection and management of the environment involving governments, the community, land-holders and Indigenous peoples; (f) to recognise the role of Indigenous people in the conservation and ecologically sustainable use of Australia’s biodiversity; and (g) to promote the use of Indigenous peoples’ knowledge of biodiversity with the involvement of, and in cooperation with, the owners of the knowledge.

Question 5: Which elements of the EPBC Act be priorities for reform?

The review should prioritise strengthening Indigenous involvement as a key element for reform of the EPBC Act. This could involve, amongst other things:

- a) Embedding mechanisms for the establishment of culturally appropriate governance structures and processes for Indigenous led planning and management, or collaborative management¹¹, of Commonwealth Reserves;
- b) Embedding mechanisms to allow for Indigenous sole management of Commonwealth Reserves;
- c) Statutory requirements for Indigenous consultation to the UNDRIP standard of free, prior and informed consent where Indigenous interests may be affected by a decision under the EPBC Act;
- d) Embedding processes to ensure Indigenous peoples' ownership of their ICIP (including Traditional Knowledge) is respected, protected, and recognised, and that its access and use is controlled by the owner; and
- e) Embedding processes whereby Traditional Owners are enabled to protect areas of national environmental significance and biodiversity (including bio-cultural significance).

Recommendation

4. Strengthening mechanisms and processes for Traditional Owner involvement is a priority for reform of the Act. Enabling mechanisms and processes should be underpinned by the principles of self-determination and free, prior and informed consent.

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

¹¹ Collaborative Management is an approach to managing natural resources that incorporates sustainable use, using Indigenous natural resource management systems. The end goals are the conservation of ecosystems and habitats, together with associated cultural values and the equitable sharing of resource-related benefits. Successful collaborative management approaches are guided by Indigenous management systems that are founded on Traditional Ecological Knowledge (TEK) and practice. See key principles under IUCN Category VI: Protected areas that conserve ecosystems and habitats, together with associated cultural values and traditional natural resource management systems (<https://www.iucn.org/theme/protected-areas/about/protected-areas-categories/category-vi-protected-area-sustainable-use-natural-resources>).

In addition to the future trends identified in the Discussion Paper on page 8, the review should draw on the increasing and irrefutable evidence that Indigenous land management works.¹² And, it supports conservation and ecologically sustainable use of Australia's biodiversity. The general public increasingly accepts this proposition, and over the next decade this acceptance will become mainstream. The language needs to shift from *recognising* to *implementing* or *integrating*.

The discussion paper notes that changing demographics and economic growth, particularly in Asia and the Pacific, will increase pressures on the environment in Australia. It notes there will likely be an 'additional demand for wildlife products and increase the risk of the incursion of pests, diseases and weeds.'¹³ This has particular relevance for the emerging Native Foods and Botanicals (NFB) industry. Increased demand includes not just end products for consumers, but also the exploration, genetic modification and genotyping of Australia's native species.

As demand for Australian native species (including genes and active compounds) increases, there is also greater risk from bioprospecting¹⁴ and biopiracy¹⁵. The EPBC Act should ensure adequate protections to prevent the further exploitation of Indigenous Knowledge and Australian native flora and fauna – genetic and living resources which belong to Indigenous Australians. The Act should be amended to bring these protections in line with the rights and interests of Indigenous Peoples as outlined in the *Convention on Biological Diversity* (Article 8¹⁶) and the *Nagoya Protocol on Access and Benefit Sharing*.

Recommendation

5. Identification of risks to Traditional Owners ICIP as a result of future trends in the NFB industry.

¹² Rosemary Hill, Petina L Pert, Jocelyn Davies, Catherine J Robinson, Fiona Walsh and Fay Falco-Mammone, (2013) *Indigenous Land Management in Australia: Extent, Scope, Diversity, Barriers and Success Factors*, Cairns: CSIRO Ecosystem Sciences.

¹³ Graeme Samuel, AC, *Independent Review of the EPBC Act: Discussion Paper*, November 2019. pp. 13.

¹⁴ From Maiko Sentina, Elizabeth Mason and Terri Janke (2017), *Legal protection of Indigenous Knowledge in Australia*, Terri Janke and Company: Bioprospecting 'involves the search for useful plant related substances that can be developed into marketable commodities such as pharmaceuticals, pesticides and cosmetics.'

¹⁵ From [ETC Group](#): 'Biopiracy refers to the appropriation of the knowledge and genetic resources of farming and indigenous communities by individuals or institutions that seek exclusive monopoly control (patents or intellectual property) over these resources and knowledge.'

¹⁶ Article 8 of the CBD states: '(j) Subject to its national legislation, 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.'

6. Embed clear measures within the Act to protect Traditional Owner rights and interests in the developing NFB industry in line with Australia's obligations under UNDRIP, the *Convention on Biological Diversity* (Article 8¹⁷) and the *Nagoya Protocol on Access and Benefit Sharing*.
7. Strong industry standards that regulates the genetic modification of native species.

Question 11: How can environmental protection and environmental restoration be best achieved together? How should Indigenous land management practices be incorporated?

While we welcome the above question in regard to Indigenous land management practices, it is important to note that there is no one type of Indigenous land management practice. Different Nations are accountable to diverse ecosystems which have different management needs according to law of Country. Currently Traditional Owners are engaged in land management through a range of different mechanisms and with multiple stakeholders.¹⁸ Country and culture differs across the continent, as has been the colonial experience. Empowering and resourcing Traditional Owners to actively manage Country and engage with the stakeholders in a way that is best for them, will enable caring for Country to occur together, as equal partners.

As stated above (see response to Question 5) any integration of Indigenous land management practices should be underpinned by the principles of self-determination, free, prior and informed consent, and the protection of ICIP. This also provides an opportunity to decolonise land management practice and lead to the regeneration of native biodiversity and IEK management systems.

There is an opportunity here to develop a framework that can guide the respectful integration of IEK and Western Knowledge. This is a growing area of interest in biodiversity and conservation¹⁹ and it requires the development of a clear framework and strategy that is led by Traditional Owners.

¹⁷ Article 8 of the CBD states: '(j) Subject to its national legislation, 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.'

¹⁸ Rosemary Hill, Chrissy Grant, Melissa George, Catherine J. Robinson, Sue Jackson and Nick Abel, (2012), 'A typology of Indigenous Engagement in Australian Environmental management: Implications for Knowledge Integration and Social-ecological System Sustainability', *Ecology and Society*, 17 (1): pp. 1-23.

¹⁹ See for example: Fikret Berkes, Johan Colding and Carl Folke, (2000), 'Rediscovery of Traditional Ecological Knowledge as Adaptive Management', *Ecological Society of America*, 10 (5): pp. 1251-1262; Cameron Muir, Deborah Rose and Phillip Sullivan, (2010), 'From the Other Side of the Knowledge frontier: Indigenous Knowledge, Social Ecological Relationships and

Recommendation

8. Development of a Traditional Owner led, co-designed framework/s that guide stakeholders in the respectful integration of IEK and Western Knowledge in land management.

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

While there are opportunities to protect Indigenous culturally important places under various pieces of Commonwealth legislation, including the *Native Title Act 1983* (Cth) and the *Aboriginal and Torres Strait Islander Act 1984* (Cth) (**ATSHIP Act**), the discussion paper rightly notes that these approaches are currently risk based.

There is a significant opportunity here to shift towards a *cultural landscape* approach to management that aligns with the values of Traditional Owners and takes a proactive and strength-based approach to managing culturally important areas. Under a cultural landscape approach to land management, place and values are interlinked. Under such an approach the restoration and maintenance of healthy Country guides practice.

What this requires is an enabling environment in which Traditional Owners are the key decision makers, managing Country according their IEK.

Recommendation

9. Measures within the Act enable Traditional Owners to implement a Cultural Landscapes approach to restoring and maintaining healthy Country.

Question 19: How should the EPBC Act support the engagement of Indigenous Australians in environment and heritage management? How can we best engage with Indigenous

New Perspectives', *The Rangeland Journal*, 32, pp. 259-265; Erin L. Bohensky and Yiheyis Maru, (2011) 'Indigenous Knowledge, Science, and resilience: What Have We Learned from a Decade of International Literature on "Integration"', *Ecology and Society*, 16 (4): pp. 106.



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Australians to best understand their needs and potential contributions? What mechanisms should be added to the act to support the role of Indigenous Australians?

As noted above, the EPBC Act can do much more to support the rights, interests, and responsibilities of Traditional Owners in environment and heritage management. We recommend shifting the language from 'engagement' to participation and collaboration. One way to do this would be to co-design, with Traditional Owners, a high-level Strategy underpinned by the principles of self-determination, to guide stakeholders in this.²⁰

Strengthening the participation of, and collaboration with, Traditional Owners, involves recognising that for Traditional Owners environment and heritage management practices are based on a holistic world view, including practices that respond to the suite of living bio-cultural, cultural heritage, and intangible heritage values.²¹ It has been noted that a key to successful cross-cultural communication and collaboration in natural resource management (NRM) is an explicit acknowledgement and 'understanding of the mental models of both indigenous peoples and scientists'.²²

There are numerous ways to ensure successful cross-cultural communication and collaboration in NRM and these should be co-designed with appropriate Traditional Owner groups and Nations.²³ Insistence, however, on the use of euro centric language and concepts will not enable successful collaboration, as power and control is maintained through the dominance of a knowledge system, thus perpetuating the system of colonisation.²⁴ The opportunity here is to develop a framework that respects and empowers Traditional Owners to exercise IEK that will contribute to the decolonisation of current land management practices.

IEK presents a holistic world view that incorporates the complex interrelationships between human, ecological, spiritual, cultural and economic knowledge and practice.²⁵ We advocate for the shift from a western concept of land management towards one that enables Traditional Owners to implement a Cultural Landscapes approach that restores and maintains healthy Country.

²⁰ See for example Federation of Victorian Traditional Owner Corporations: Cultural Fire Strategy [here](#).

²¹ Deborah Rose, (2005) 'An Indigenous Philosophical Ecology: Situating the Human', *The Australian Journal of Anthropology*, 16 (3): pp. 294-305.

²² Fiona J. Walsh, Perrurle V. Dobson and Josie C. Douglas, (2013), 'Anpernrrentye: A Framework for Enhanced Application of Indigenous Ecological Knowledge in Natural Resource Management', *Ecology and Society*, 18 (3): pp. 1-18.

²³ See for example: Fiona J. Walsh, Perrurle V. Dobson and Josie C. Douglas, (2013), 'Anpernrrentye: A Framework for Enhanced Application of Indigenous Ecological Knowledge in Natural Resource Management', *Ecology and Society*, 18 (3): pp. 1-18; Suzanne M. Prober, Michael H. O'Connor and Fiona J. Walsh, (2011), 'Australian Aboriginal Peoples' Seasonal Knowledge: a Potential Basis for Shared Understanding in Environmental management', *Ecology and Society*, 16 (2): pp. 1-12; Samantha Muller, (), "'Two Ways": Bringing Indigenous and Non-Indigenous Knowledges Together', in Jessica Weir (ed) (2012) *Country, Native Title and Ecology*, Canberra: ANU Press.

²⁴ Samantha Muller, Steve Hemming and Daryl Rigney, (2019) 'Indigenous Sovereignties: Relational Ontologies and Environmental Management', *Geographical Research*, 57 (4): pp. 399-410.

²⁵ Walsh et. al. 'Anpernrrentye'.



This can be done by embedding strong mechanisms within the EPBC Act that enable Traditional Owners to fulfil their rights, interests, and responsibilities to care for Country. Too often ‘engagement’ strategies that seek to include Indigenous Ecological Knowledge in environment and conservation management amount to little more than ‘box ticking’. It is imperative that the EPBC embeds these strong mechanisms to ensure that Traditional Owner participation in planning, decision making and management is respectful and meaningful, and, once again, enables self-determination. This could be achieved through a range of legislative, regulatory and policy reforms co-designed with Traditional Owners.

Yours sincerely



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