CENTRAL LAND COUNCIL

Submission to the
Department of Climate Change, Energy, Environment and Water

October and December 2023 consultation materials on new 'Nature Positive' laws

(Reform of the Environment Protection and Biodiversity Conservation Act 1999 (Cth))

April 2024

Contents

About the Central Land Council

Our functions

The Central Land Council **(CLC**) is a Commonwealth corporate entity established under the *Aboriginal Land Rights (Northern Territory) Act 1976* (**ALRA**), with statutory responsibilities for Aboriginal land acquisition and land management in the southern half of the Northern Territory (**NT**). It is one of four Aboriginal land councils established under the ALRA.[1] Our specific consultative and representative functions under ALRA give us a clear interest in the development of new national environmental laws, on behalf of our constituents.

The CLC's area of responsibility spans 780,000 square kilometres – an area almost the same size as New South Wales. Of this, more than half (417,318 km^2) is Aboriginal land under ALRA.[2] ALRA was the first Commonwealth law to recognise Aboriginal systems of land ownership. Land rights asserted under ALRA are unique and the strongest form of land rights in the country, being inalienable Aboriginal freehold title. Aboriginal people have the right not just to negotiate interests in that land, but to refuse certain activities and operations on their land. ALRA land is held by Aboriginal Land Trusts (**ALTs**), the functions of which are to hold title to land and exercise their powers over that land for the benefit of Aboriginal people. An ALT is only permitted to exercise its functions relating to land where the CLC has directed it to do so. The CLC is given powers and functions under the ALRA that make it responsible for the management of Aboriginal land in its region.

In addition, Aboriginal people's rights have been asserted and won under the *Native Title Act 1993* (**NTA**). The CLC is a Native Title Representative Body (**NTRB**) established under the NTA for our region.[3] We provide support to the Prescribed Bodies Corporate (**PBCs**) that are needed to hold native title rights, by assisting with their establishment and fulfilling their obligations under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*.

Additionally, Aboriginal people have succeeded in obtaining rights to small areas of land known as Community Living Areas, which are excised from pastoral leases. CLA land is an estate in fee simple held by a community association formed under the *Associations Act 2003 (NT*) or the *Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth)*.[4] The CLC assists many CLA landholding bodies to grant interests in CLA land and meet their reporting obligations.

The CLC is governed by an elected representative Council of 90 community delegates. Through this Council we represent the interests and aspirations of approximately 20,000 traditional landowners and other Aboriginal people resident in our region. We advocate for our people on a wide range of land-based and socio-political issues to ensure that our families can continue to survive and thrive on their land, and undertake a range of programs reflecting the priorities of and to the benefit of our constituents, including our ranger program[5] and community development program.

---

[1] The others being the Northern Land Council, the Tiwi Land Council and the Anindilyakwa Land Council.

[2] See https://www.clc.org.au/who-we-are/.

[3] See s 203AD.

[4] Pastoral Land Act s 111(1).

[5] Our 14 ranger groups now work on Aboriginal land, including four Indigenous Protected Areas (***IPAs***), 23 jointly managed national parks, and on pastoral stations. Established more than two decades ago, the program enables traditional owners to work on country, doing work that is important to them: caring for country and passing on knowledge and skills to their young people. Rangers work on country to preserve traditional land management practices, maintain culture and language, and gain contemporary skills in land management.

Our region

The land and waters in the CLC region are geographically diverse, spanning sand plans, mountain ranges and river channels from the very dry Simpson Desert in the south-east, to relatively wet savannas in the north. Our region has some of the most intact desert landscapes on earth and is home to unique species of flora and fauna. This geography and these ecosystems have shaped the cultures of Aboriginal people living on different parts of the country over millennia.

In the development of new laws to protect nature, it is essential to recognise that Aboriginal and Torres Strait Islander people are the first land and environmental managers. Aboriginal people in Central Australia have managed country for at least 60,000 years, and their knowledge and practices have and continue to sustain its health.

It is a landscape that must be protected and carefully managed. Following the millennia of sustainable management by Aboriginal people, what was once a thriving managed landscape across the NT is now suffering the effects of around two centuries of non-Indigenous settlement, pastoralism, mining and other land use.

These threats are not abating. The frailty of the NT's regulatory regime, has made our lands and waters highly vulnerable. The granting of a water licence to a company to extract 40,000 megalitres of groundwater each year from Singleton is one such example. It is largest water licence ever granted in the NT and poses a unique and unacceptable threat to environmental and cultural values in the region. The CLC is currently challenging the licence on behalf of native title holders in the NT Court of Appeal.[6]

The lack of strong protections for arid-zone ecosystems is particularly alarming when we consider the evidence of ecosystem collapse and biodiversity decline. The western-central arid zone ecosystem, covering the CLC region, is undergoing ecological collapse.[7] Central Australia is at the forefront of the mammalian extinction globally: of the 34 mammals that have been lost in Australia since colonisation (roughly the same number as the world combined over the last 200 years), 10 of these were from Central Australia.[8] In total, there are 142 species of fauna threatened in the Northern Territory, 46 of which are either endangered or critically endangered – that is, facing very or extremely high risk of extinction in the wild.[9] 84 species of flora are threatened, including 26 that are either endangered or critically endangered.[10] The extent of weeds, particularly buffel grass, is an issue of significant concern. In the words of one traditional owner: *"the weeds are still growing. Not enough being done to fix it."*[11]

[6] See CLC Media Release, 28 February 2024, https://www.clc.org.au/not-going-to-let-it-go-native-title-holders-appeal-singleton-water-licence-ruling/

[7] Bergstrom, D, Wienecke, B, van den Hoff, J, Hughes, L, Lindenmayer, D, Ainsworth, T, Baker, C, Bland, L, Bowman, D, Brooks, S, and Canadell, J. 2021. Combating ecosystem collapse from the tropics to the Antarctic. Global change biology, 27(9), pp.1692-1703, see p.1693-4.

[8] Foley, M. (2020) 'Why is Australia a global leader in wildlife extinctions?', Sydney Morning Herald; Morton, A. (2021) 'Australia confirms extinction of 13 more species, including first reptile since colonisation', The Guardian.

[9] Northern Territory Government 2024, 'Threatened animals' (website)

[10] Northern Territory Government 2024, 'Threatened plants' (website)

[11] Traditional Owner, CLC Central Australian and Barkly Region Joint Management Forum, November 2021.

The impacts of climate change are similarly alarming, and are compounding the threats to our already fragile ecosystems. In Central Australia we are already experiencing – and can expect to increasingly experience – hotter temperatures, more intense heatwaves, harsher and more frequent fire weather, longer periods in drought, more erratic rainfall and aquifer recharge, an increase in the likelihood of major flood events, drier soils, increased evapotranspiration, and increased risk of erosion.[12] Under these conditions, without significant and sustained effort, and adequate resourcing, the ecological decline across Central Australia and the rest of the NT will only accelerate. These impacts are felt deeply by Aboriginal people whose physical, emotional and spiritual health are intimately connected with the health of country.

There is a clear and urgent need for a substantial and sustained increase in protections for ecosystems and biodiversity in Central Australia. This must be done in a way that is inclusive of Aboriginal people, respects their knowledge and expertise, and resources Aboriginal people to lead the work.

[12] CSIRO (2020) Climate Change in the Northern Territory: State of the science and climate change impacts.

Recommendations

Issue 1: Consultation approach

Recommendation 1: That the CLC and other land councils be included in targeted consultations to refine draft mechanisms and exposure draft legislative inserts.

Recommendation 2: That the terms of reference for the Indigenous Advisory Committee (IAC) under a new Act require that committee to be geographically representative, recognising the unique and varied experiences of Aboriginal and Torres Strait Islander people across Australia.

Given the IAC's role in reform of the Act, as an interim measure, its membership should be expanded to include at least one member from the Northern Territory.

Issue 2: Objects of the Act

Recommendation 3: Aboriginal and Torres Strait Islander peoples, their culture and knowledge should be promoted, respected and protected under revised objects to the proposed legislation.

The CLC will provide further feedback on the proposed objects detailed in the February 2024 consultation materials in a future submission.

Issue 3: National Environmental Standard for First Nations engagement and participation in decision-making

Recommendation 4: The Australian Government commence consultation on the draft NES for First Nations engagement and participation in decision-making, including targeted consultation with the NT land councils, allowing sufficient time and resources for the land councils to consult with constituents.

Recommendation 5: The Australian Government ensure land councils and other Aboriginal representative organisations have adequate opportunity to be consulted on all other NES.

Recommendation 6: The NES for *First Nations engagement and participation in decision-making* must be required to be applied to each decision and process under the proposed legislation. This protection should be included in the Act itself, not left vulnerable to subordinate legislation.

Recommendation 7: Any periodic revision of the NES for *First Nations engagement and participation in decision-making* must be done in partnership with Aboriginal and Torres Strait Islander people and be protected by reference in the Act rather than subordinate legislation.

Issue 4: Regional Planning

Recommendation 8: The design and approval of any Regional Plan takes into account the views, feedback and recommendations of local traditional owner groups within the region subject to the proposed Regional Plan.

Recommendation 9: The Australian Government provide the CLC with adequate time and resources to undertake appropriate consultation with our constituents for any Regional Plan in our region.

Recommendation 10: When deciding to make (or not to make) Regional Plans, the Minister must be required to seek and have regard to advice from the Indigenous Advisory Committee and local traditional owner groups, in addition to advice from the Independent Expert Scientific Committee.

Recommendation 11: The minimum timeframe for public consultation on draft Regional Plans (30 days) be extended to 90 days.

Recommendation 12: The Minister's power to exempt an activity that would otherwise be prohibited in a conservation zone should not be exercised without advice from the Indigenous Advisory Committee and the relevant traditional owner groups for the particular region. It should also be subject to clearer and more certain qualifications, including those relating to cultural values and cultural heritage considerations. Alternatively, the pathway should be removed and any 'exemptions' addressed by way of variation to a regional plan.

Recommendation 13: When varying, suspending or revoking a regional plan, adopt a 'use it or lose it' approach to development activities by requiring the commencement of affected actions (rather than the registration) to be the test for any continuation.

Recommendation 14: The new legislative framework should explicitly incentivise the use of Indigenous Protect Areas as conservation zones as part of the regional planning process.

Issue 5: Protecting cultural and heritage values

Recommendation 15: The new legislative framework must include mechanisms to:

a) require decision makes to take into account critical cultural and heritage values when making decision to approve actions or regional plan development zones, and/or

b) vary regional plans to remote critical cultural and heritage values from 'development zones'.

An alternative means to achieve the protection of critical cultural and heritage values would be to expand the scope of 'critical protection area' to include cultural values and heritage considerations.

Recommendation 16: The legislation be updated to ensure consideration of cultural matters, in addition to economic and social matters, throughout.

This includes ensuring that the Minister takes into account cultural matters, alongside social and economic matters, in deciding whether to exercise the discretion to 'call in' an environmental approval decision.

Issue 6: Restoration actions and restoration contributions

Recommendation 17: The approach to restoration actions and restoration contributions should incentivise actions and investments in activities, projects, programs and measures that support or deliver cultural or social benefits, in addition to environmental and biodiversity outcomes.

Recommendation 18: The knowledge and expertise of traditional owners must be considered in determining 'suitable' and appropriate data and information to inform restoration actions.

Recommendation 19: Ensure that the new Act:

a) requires proponents to disclose the type, scale and duration of proposed restoration activities to traditional owners and other stakeholders at the time a proposal to undertake a restoration action is lodged,

b) fund traditional owners to obtain legal advice about proposed restoration actions,

c) provides sufficient time for traditional owners to obtain advice and consider proposals (e.g. 90 days)

d) requires the decision-maker to consider the submissions of traditional owners in deciding proposals for restoration actions, and to be satisfied that a) to c) above have occurred,

e) embeds traditional owner engagement and consent considerations in criteria for spending restoration contribution funds and related payments to achieve restoration actions or similar approved conservation outcomes.

Issue 7: Access to and use of traditional knowledge (data and information)

Recommendation 20: That the IAC membership be geographically representative (see Recommendation 2) and the NES for *First Nations engagement and participation in decision-making* is required to be applied to each decision and process under the proposed legislation (see Recommendation 6).

Recommendation 21: The new legislative framework must place greater emphasis on the role of totemic species and cultural values in threatened species and ecological communities, including with respect to listings, recovery strategies and other administrative mechanisms to help better protect and conserve biodiversity.

Issue 8: EPA functions under other environment-related legislation

Recommendation 22: That the following statutes be included as legislation under which the Environmental Protection Agency may have powers/functions:

- The *Water Act 2007* (Cth)
- The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth)

Introduction

Substantive reform of the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* (**EPBC Act**) is essential and overdue. The Central Land Council (**CLC**) has welcomed the Australian Government's commitment to new 'nature positive' national environmental laws, with legally enforceable National Environmental Standards (**NES**), an independent and well-resourced national Environmental Protection Agency, and strong national protections for First Nations cultural heritage. We are, however, extremely disappointed that so far – as far as we are aware – the Australian Government has made minimal effort to consult directly with representative Aboriginal organisations.

Engagement with land councils and other representative Aboriginal organisations should not be confined to the development of the NES on *First Nations engagement and participation in decision-making*. The 'closed-shop' approach the government has taken to the reform consultations to date ignores the deep working knowledge that land councils have, via our constituents, about Country – knowledge that would add inimitable value to the targeted consultations on the whole suite of reforms, not just the elements perceived to be First Nations-specific. This includes deep working knowledge of threatened species and ecological communities, migratory species, key threatening processes, water resources and heritage.

Not only has the lack of consultation so far by-passed the opportunity for this knowledge to enrich the reforms, it has ignored the degree to which these reforms impact on the rights and interests of Aboriginal and Torres Strait Islander people, and disregarded the land councils' statutory functions.

These functions are to:

a) ascertain and express the wishes and opinion of Aboriginal people living in our region as to the management of Aboriginal land in that area and as to appropriate legislation concerning that land,

b) protect the interests of traditional owners[13] of, and other Aboriginal people interested in, Aboriginal land in our region, and

c) assist Aboriginal people in the taking of measures likely to assist in the protection of sacred sites on land (whether or not on Aboriginal land) in the area of CLC's responsibility.[14]

In carrying out our functions with respect to any Aboriginal land in our region, the CLC is required to have regard to the interests of, and consult with, the traditional owners of the land and any other Aboriginal people interested in the land. The CLC cannot take any action unless it is satisfied that:

a) the traditional owners of that land understand the nature and purpose of the proposed action and, as a group, consent to it, and

b) any Aboriginal community or group that may be affected by the proposed action has been consulted and has had adequate opportunity to express its view to the land council.

The functions have clearly not been facilitated or respected by the consultation approach to date.

[13] See Land Rights Act s 3(1).

[14] Land Rights Act s 23(1).

While we strongly support Federal environmental law reform in principle, the extent to which a new regime protects the rights and interests of and contributes to better outcomes for our people, will depend on the detailed design and the strength of pathways and protections embedded in new legislation.

In making this submission the CLC represents and has considered the interests of a) traditional owners of Aboriginal land in CLC's region, b) CLA associations and residents, c) native title holders in CLC's NTRB area, and d) PBCs in CLC's NTRB area (together, the CLC's constituents).

This submission outlines key issues we have identified based on the first tranches of consultation materials from **October and December 2023**. We intend to provide further input in response to the February 2024 consultation materials and anticipated future documents. We look forward to an invitation to work more closely with the government from this point onwards.

Issue 1: Consultation approach

In order for the CLC to ascertain and express the wishes and the opinion of Aboriginal people in our region in relation to the proposed EPBC Act reforms (and protect their rights and interests, as required by s23 of ALRA), we need to undertake culturally appropriate consultation. The Australian Government's single public submission process undertaken over a relatively short period (particularly when overlapping with summer and ceremony) does not facilitate the informed input of the CLC's constituents into the reforms.

The extent to which these consultations extend beyond the current EPBC Act Indigenous Advisory Committee (IAC) (which does not include a representative from the Northern Territory) is very unclear.

As noted by the Department of Climate Change, Energy, Environment and Water (**DCCEEW**) on the reform website, stakeholder consultations in October and December 2023 and into 2024 will assist the preparation of legislation to be introduced to Parliament. Central Land Council was not invited to attend these stakeholder consultations.

The CLC understands that DCCEEW continues to consult on refined draft mechanisms and exposure draft legislative inserts. The CLC requests greater involvement in these processes.

Recommendation 1: That the CLC and other land councils be included in targeted consultations to refine draft mechanisms and exposure draft legislative inserts.

Recommendation 2: That the terms of reference for the Indigenous Advisory Committee (IAC) under a new Act require that committee to be geographically representative, recognising the unique and varied experiences of Aboriginal and Torres Strait Islander people across Australia.

Given the IAC's role in reform of the Act, as an interim measure, its membership should be expanded to include at least one member from the Northern Territory.

Issue 2: Objects of the Act

Aboriginal and Torres Strait Islander people are the first land managers. Their knowledge and practices have and continue to sustain its health. Harm to the environment and biodiversity uniquely impacts the spiritual and culture life and wellbeing of Aboriginal and Torres Strait Islander people. The objects of the Act must reflect these unique and existing rights and interests.

Recommendation 3: Aboriginal and Torres Strait Islander peoples, their culture and knowledge should be promoted, respected and protected under revised objects to the proposed legislation.

This submission focuses on the information provided in the October and December 2023 consultation materials. The CLC will provide further feedback on the proposed objects detailed in the February 2024 consultation materials in a future submission.

Issue 3: National Environmental Standard for First Nations engagement and participation in decision-making

3.1 Engagement in the development of the NES

The draft NES for *First Nations engagement and participation in decision-making* has not been included in the October or December consultation papers. Further, land councils such as the CLC have not seen or been involved in any discussion regarding its development or drafting. This is very concerning.

This standard must be finalised so that it can operate from the commencement of any new regime. If not, there is a real risk that Aboriginal people will be disadvantaged by the fact that the NES cannot be considered in relevant decisions under the regime, as it is not yet in existence. There is also a risk that Matters of National Environmental Significance (**MNES**) that would only be identified through this yet-to-be-developed NES will not be afforded the protection the EPBC Act is supposed to provide.

The CLC looks forward to further direct engagement with DCCEEW on this standard and offers the following preliminary comments:

i) The NES should support the work of the IAC, but not be limited to it. It must ensure the views and recommendations of local traditional owners are taken into account in making decisions about that country.

ii) It must reflect key considerations of traditional owners across jurisdictions, particularly given aims of the reform process to better integrate and create efficiencies regarding cross-jurisdictional matters.

iii) The CLC has a specific role to play in consultations for this NES in regard to the jointly managed Uluru—Kata Tjuta National Park.

We reiterate that, in order for the CLC to ascertain and express the wishes and the opinion of Aboriginal people living in our region regarding the proposed NES and protect their rights and interests as required by s23 of ALRA, culturally appropriate consultation with the CLC's constituents is required. This primarily means that the Australian Government will need to dedicate sufficient time and resources to consultation with the CLC's constituents.

Recommendation 4: The Australian Government commence consultation on the draft NES for First Nations engagement and participation in decision-making, including targeted consultation with the NT land councils, allowing sufficient time and resources for the land councils to consult with constituents.

Recommendation 5: The Australian Government ensure land councils and other Aboriginal representative organisations have adequate opportunity to be consulted on all other NES.

3.2 Required use of the NES

The consultation materials confirm that decisions will be required to take into account prescribed national environmental standards, meaning the requirement to take into account a NES will be determined by subordinate legislation (rules). Similarly, important processes, such as strategic assessments, need to demonstrate that implementation of instruments (strategic plan) would not be inconsistent with a NES prescribed for the purposes of relevant provisions.

The NES for *First Nations engagement and participation in decision-making* must be required to be applied to each decision and process (strategic assessment, regional planning etc.) under the proposed legislation. Such protection should be included in the Act itself, not left vulnerable to subordinate legislation.

Further, any periodic revision of the NES for *First Nations engagement and participation in decision-making* must be done in partnership with Aboriginal and Torres Strait Islander people. Again, this should be protected by reference in the Act rather than subordinate legislation (rules).

Recommendation 6: The NES for *First Nations engagement and participation in decision-making* must be required to be applied to each decision and process under the proposed legislation. This protection should be included in the Act itself, not left vulnerable to subordinate legislation.

Recommendation 7: Any periodic revision of the NES for *First Nations engagement and participation in decision-making* must be done in partnership with Aboriginal and Torres Strait Islander people and be protected by reference in the Act rather than subordinate legislation.

Issue 4: Regional Planning

4.1 Consultation with traditional owners

Proposed reforms introduce regional planning and the ability for the Minister to make, vary, suspend or revoke regional plans. As proposed, regional plans will allow priority development activities in 'development zones' (subject to conditions) and prohibit certain activities within 'conservation zones' (subject to Ministerial exemptions).

Currently, the proposed NES for Regional Planning does not require localised traditional owner consultation (as distinct from public consultation). Given it is proposed that regional plans will essentially pre-approve compliant actions, it is essential that local traditional owner knowledge, perspectives and impacts relating to proposed priority development activities are taken into account.

This should be done through a specific and culturally appropriate process for engaging with relevant traditional owner groups. This primarily means that the Australian Government will need to dedicate sufficient time and resources to consultation with land council constituents on a regional scale. The CLC's constituents are not a homogenous group – constituents from across the area covered by each regional plan must be engaged in consultations.

Further concerns in relation to the involvement of traditional owners in the proposed regional planning process:

- As proposed in the December 2023 consultation documents, in deciding whether or not to make Regional Plan, the Minister must have regard to advice from an independent scientific committee (Independent Expert Scientific Committee), but not the IAC, let alone local traditional owner groups within the relevant region. This is concerning and again inconsistent with the government's commitment to ensure First Nations perspective inform environment and heritage protection.[15]
- While the draft NES for Regional Planning provides that plans must deliver net positive outcomes for Matters of National Environmental Significance (MNES) at a landscape or seascape level, it is unclear how this assessment will satisfactorily incorporate traditional owners' knowledge, cultural heritage and cultural values associated with those MNES.

We also note that the proposed notice period for public comment on draft regional plans is very short. The proposed 30 day period is insufficient to facilitate meaningful input to such an important process.

Recommendation 8: The design and approval of any Regional Plan takes into account the views, feedback and recommendations of local traditional owner groups within the region subject to the proposed Regional Plan.

Recommendation 9: The Australian Government provide the CLC with adequate time and resources to undertake appropriate consultation with our constituents for any Regional Plan in our region.

Recommendation 10: When deciding to make (or not to make) Regional Plans, the Minister must be required to seek and have regard to advice from the Indigenous Advisory Committee and local traditional owner groups, in addition to advice from the Independent Expert Scientific Committee.

Recommendation 11: The minimum timeframe for public consultation on draft Regional Plans (30 days) be extended to 90 days.

We reiterate Rec. 6 that the NES for *First Nations engagement and participation in decision-making* be required to be applied to each decision and process under the proposed legislation. This protection should be included in the Act itself, not left vulnerable to subordinate legislation.

4.2 Activity exemptions

The consultation documents indicate the new laws will give the Minister the ability to exempt an activity that would otherwise be prohibited in a conservation zone. This power, exercisable in exceptional circumstances, effectively allows the Minister to determine that an activity can proceed, without a variation to the regional plan or review of how the exemption influences the balance achieved with respect to conditions and measures under the regional plan. Further, it creates ambiguity with respect to activities under a regional plan and in what circumstances they need to follow a standard assessment and approval process.

[15] See Department of Climate Change, Energy, Environment and Water (DCCEEW) (2022) *Nature Positive Plan: better for the environment, better for business*, p.13 (weblink)

Such a power should not be exercised without advice from the IAC and the relevant traditional owner groups, and should be subject to clearer and more certain qualifications, including those relating to cultural values and heritage considerations. Alternatively, the pathway should be removed and any 'exemptions' addressed by way of variation to a regional plan.

Recommendation 12: The Minister's power to exempt an activity that would otherwise be prohibited in a conservation zone should not be exercised without advice from the Indigenous Advisory Committee and the relevant traditional owner groups for the particular region. It should also be subject to clearer and more certain qualifications, including those relating to cultural values and cultural heritage considerations. Alternatively, the pathway should be removed and any 'exemptions' addressed by way of variation to a regional plan.

4.3 Varying, suspending and revoking regional plans

It is proposed that the Minister will be able to vary, suspend or revoke a regional plan in various circumstances and provided the Minister is satisfied of various requirements, including threats to protected matters.

The consequences of variations, suspensions and revocations all include provisions relating to whether or not an action in a development zone has been registered with the EPA at the time the variation, suspension or revocation. In most cases, if the proposed action has been registered with the EPA, it may continue to be conducted. This proposal risks inadvertent and perverse outcomes, particularly with respect to revocations of a regional plan for the purposes of protecting threatened species or ecosystems.

This issue can be addressed by requiring the commencement of affected actions to be the test for any continuation, rather than mere registration of the action. This also encourages a more balanced 'use it or lose it' approach to development activities.

Recommendation 13: When varying, suspending or revoking a regional plan, adopt a 'use it or lose it' approach to development activities by requiring the commencement of affected actions (rather than the registration) to be the test for any continuation.

4.4 Incentivising the use of Indigenous Protected Areas

Given Indigenous Protected Areas (IPAs) will assist in achieving 'net positive outcomes' for MNES, they should be financially incentivised as part of the regional planning process – that is land managers should be paid to ensure the ecological and cultural values of IPAs are protected.

Recommendation 14: The new legislative framework should explicitly incentivise the use of Indigenous Protect Areas as conservation zones as part of the regional planning process.

Issue 5: Protecting cultural and heritage values

5.1 Heritage protections and critical protected areas

The consultation documents indicate there will be restrictions on approval decisions under the proposed regime where an action (or regional plan development zone) may include a 'critical protection area'. This is a useful mechanism to help protect critical habitat for matters protected under the proposed legislation. However, there is not an equivalent mechanism to protect cultural and heritage values. This is a significant oversight.

There should be an equivalent mechanism that requires decision makers to take into account critical cultural and heritage values, or to vary regional plans to remove critical cultural and heritage values from 'development zones'. This is particularly important for cultural landscapes and seascapes.

Alternatively, the scope of a 'critical protection area' should be expanded to include matters beyond habitat protection, so that cultural values and heritage considerations can inform an area subject to a critical protection area.

Recommendation 15: The new legislative framework must include mechanisms to:

a) require decision makes to take into account critical cultural and heritage values when making decision to approve actions or regional plan development zones, and/or

b) vary regional plans to remote critical cultural and heritage values from 'development zones'.

An alternative means to achieve the protection of critical cultural and heritage values would be to expand the scope of 'critical protection area' to include cultural values and heritage considerations.

5.2 Embedding statutory consideration of cultural values in decision-making

In several places the consultation documents refer to consideration of economic and social matters, but not cultural. In modernising Australia's national environmental laws it is critical that the reform be updated *throughout* to ensure consideration is given to economic, social and cultural matters. This includes ensuring that the Minister takes into account cultural matters, alongside social and economic matters, in deciding whether to exercise the discretion to 'call in' an environmental approval decision.

Recommendation 16: The legislation be updated to ensure consideration of cultural matters, in addition to economic and social matters, throughout.

This includes ensuring that the Minister takes into account cultural matters, alongside social and economic matters, in deciding whether to exercise the discretion to 'call in' an environmental approval decision.

Issue 6: Restoration actions and restoration contributions

6.1 Incentivising holistic benefits

There is an opportunity for proposed restoration actions and restoration contributions to take a holistic (or multiple-benefit) approach to enhancing outcomes with respect to protected matters under the proposed nature positive legislation. The approach to restoration actions and restoration contributions should incentivise actions and investments in activities, projects, programs and measures that achieve not only the environmental gain required, but also support or deliver cultural or social benefits.

Australia's carbon market has demonstrated the ability and appetite of the community to achieve emissions reductions or avoidance alongside broader benefits to the environment and biodiversity, as well as cultural and social benefits for Aboriginal and Torres Strait Islander people.

In addition, given restoration actions need to be based on suitable and appropriate data (and information or expert assessment that it can contribute to the long-term viability of the impacted protected matter), measures are needed to ensure the knowledge, information and expertise of traditional owners are considered 'suitable' and appropriate to support or incentive for culturally safe and constructive engagement with traditional owner expertise.

Recommendation 17: The approach to restoration actions and restoration contributions should incentivise actions and investments in activities, projects, programs and measures that support or deliver cultural or social benefits, in addition to environmental and biodiversity outcomes.

Recommendation 18: The knowledge and expertise of traditional owners must be considered in determining 'suitable' and appropriate data and information to inform restoration actions.

6.2 Risks and challenges associated with 'securing' restoration actions

The proposed approach to restoration actions and restoration contributions contemplates ensuring actions are 'securely protected' in perpetuity or for a given period. Measures to 'secure' the restoration action (including that achieved by a restoration contribution) may inadvertently overlook risks and opportunities for traditional owners.

With respect to risks, it is important that support be provided to help all stakeholders understand the interactions between property interests (such as agreements and covenants registered on property titles) and native title, land rights and other statutory regimes relating to the Indigenous estate.

With respect to opportunities, it is important that the measures identified to 'secure' environmental gains achieved by restoration actions do not overlook the potential use of Indigenous Protected Areas and other measures familiar to traditional owners.

Recommendation 19: Ensure that the new Act:

a) requires proponents to disclose the type, scale and duration of proposed restoration activities to traditional owners and other stakeholders at the time a proposal to undertake a restoration action is lodged,

b) fund traditional owners to obtain legal advice about proposed restoration actions,

c) provides sufficient time for traditional owners to obtain advice and consider proposals (e.g. 90 days)

d) requires the decision-maker to consider the submissions of traditional owners in deciding proposals for restoration actions, and to be satisfied that a) to c) above have occurred,

e) embeds traditional owner engagement and consent considerations in criteria for spending restoration contribution funds and related payments to achieve restoration actions or similar approved conservation outcomes.

Issue 7: Access to and use of traditional knowledge (data and information)

The October 2023 consultation papers contemplate some engagement with traditional knowledge – referred to in the NES for Data and Information, as well as the practices of Environment Information Australia, and information relevant to protection of biodiversity and decision-making under the nature positive legislation. However more needs to be done to respect, reflect and value traditional owner expertise and knowledge in relation to Australia's lands and waters.

Further, there needs to be greater emphasis on the role of totemic species and cultural values in relation to threatened species and ecological communities, including with respect to listings, recovery strategies and other administrative mechanisms to help better protect and conserve biodiversity.

Recommendation 20: That the IAC membership be geographically representative (see Recommendation 2) and the NES for *First Nations engagement and participation in decision-making* is required to be applied to each decision and process under the proposed legislation (see Recommendation 6).

Recommendation 21: The new legislative framework must place greater emphasis on the role of totemic species and cultural values in threatened species and ecological communities, including with respect to listings, recovery strategies and other administrative mechanisms to help better protect and conserve biodiversity.

Issue 8: EPA functions under other environment-related legislation

The December 2023 consultation papers set out other legislation under which the Environment Protection Agency (EPA) may have powers/functions. The CLC considers that the following statutes should also be included:

- The *Water Act 2007* (Cth)
- The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth)

Recommendation 22: That the following statutes be included as legislation under which the Environmental Protection Agency may have powers/functions:

- The *Water Act 2007* (Cth)
- The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth)