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*Submission to consultation on the Tranche 3 Consultation Papers
(Single Project, Landscape Scale, Compensation Options, Other Consequential)*

Introduction

This submission is made to the Environmental Law Reform Taskforce by the National Native Title Council (**NNTC**) in collaboration with the Mabo Centre in relation to the *Tranche 3 Consultation Papers (Single Projects, Landscape Scale, Compensation Options, Other Consequential matters)*.

The NNTC and the Mabo Centre have made several submissions to earlier components of the Commonwealth Environmental Law Reform process. Accordingly, in this submission we will not reiterate our general support for the reform process or highlight, again, the opportunity that the process creates to remedy the virtual exclusion from environmental decision making that has been a feature of Commonwealth environmental law. The background information regarding both the NNTC and the Mabo Centre is contained in an attachment (1) to this submission.

This submission will concentrate on three matters that arise from the four Tranche 3 consultation papers:

1. A general response to the papers.
2. Issues arising from the (absence of) the First Nations Engagement Standard.
3. Specific matters arising from the Compensation Options proposal.

Everyone will benefit if the recognition of Traditional Owner rights, further explored below, is systemically integrated into the environmental reforms.

General Response to the Consultation Papers

A starting point in this regard is to note that the Consultation Papers are, as suggested in their title, only consultation papers. Their purpose is to describe a general approach to (primarily) proposed amendments to the *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) (**EPBC Regulations**). An example of this can be seen in Paper 1 “Streamlining Single Project”, which contains the following comment at p 9 (2.3.1):

A referral under the EPBC Act is a written request to the Minister to ask whether the proposed action (for a single project) is likely to have a significant impact on protected matters and therefore requires assessment and approval under the Act. The EPBC Regulations currently prescribe, in Part 4 and Schedule 2, the information that must be included in a referral under section 72 of the EPBC Act, including requirements relating to the form and content of referrals.

Amendments to Part 4 and Schedule 2 of the EPBC Regulations will refine the referral information requirements, ensuring that documentation submitted with a referral contains the information necessary for the Minister to make a controlled action decision. Noting that the assessment pathway will be determined based on the level of information provided at the referral stage to make an approval decision.

The Paper itself provides no detail or specificity as to what exactly the “refinement” to referral information requirements is. Even when greater specificity is provided, there is no detail to usefully found a submission upon. For example, further down page 9 in Paper 1:

The EPBC Regulation changes will include:

...

- *Clarifying information on any impact reduction measures, including:*
 - *Descriptions of measures to avoid and reduce impacts to the information necessary for a controlled action decision*
 - *Adding repair to the mitigation hierarchy; and*
 - *Shifting the requirement to provide information on the benefits such as offsets to the assessment documentation.*

It is noted that an Exposure Draft of the *Environment Protection and Biodiversity Conservation Amendment (2026 Measures No. 2) Regulations 2026* (Cth) (**Draft Regulations**) was not included in the initial consultation documents for review and that, despite this, the deadline for submissions on the *Draft Regulations* has remained 13 October 2026. In effect this has foreshortened the consultation period on the most technically complicated aspect of the reforms. This approach is to be deplored. Despite this our submission will include reference to the *Draft Regulations* where this is possible and relevant. In relation to the Consultation Papers however there is little value in responding in detail to the generalisations contained within these.

This point noted we do believe there is value in responding to the contained in the consultation papers with the restatement of a number of principles which we believe

should be reflected in the final form of any regulatory amendment. A perusal of the *Draft Regulations* shows they have not been. In our submission it is essential that through any final environmental regulatory amendment, the following systemic changes are enacted.

1. The *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)* is implemented, particularly pertaining to:
 - (a) Free, prior and informed consent (**FPIC**) of Traditional Owners to resources on, use and management of their Country,
 - (b) Self-determined representative institutions to manage collectively held cultural rights, and
 - (c) Intangible and tangible cultural heritage rights.
2. Proponents are required to execute FPIC through a recognised process, statutorily considered by the decision maker, such as a First Nations Engagement Standard.
3. Traditional Owners are the only ones who can identify the significance of the cultural heritage and identify what 'significant impact' would be and assess whether it is acceptable.
4. Any self-assessment processes undertaken regarding projects that may impact Aboriginal and Torres Strait Islander cultural heritage, must include consultation with the affected Traditional Owners.
5. Intangible Cultural Heritage (**ICH**), Indigenous Cultural and Intellectual Property (**ICIP**) and Traditional Environmental Knowledge (**TEK**) must be respected as cultural heritage, with inherent ownership rights and to which permission for use can be granted and withdrawn.
6. Mitigation Hierarchies must include provision for FPIC.
7. In applying methodology for integration of both modern scientific and TEK into environmental assessments and biocultural monitoring, TEK must be approached as being of equal importance.
8. Traditional Owners are the only ones who can determine the significance of their cultural heritage, the acceptable impact on that cultural heritage and manage the compensation for that impact.

The essential elements of the regulatory reform agenda outlined above are informed by the following basic principles:

- Traditional Owners must be treated as rights holders, not general stakeholders.
- Engagement must begin before plans, development zones or project designs are substantially settled.

- Meaningful participation cannot depend on the unpaid or under-resourced capacity of Prescribed Bodies Corporate. Government should provide adequate time, direct participation funding and access to independent legal, cultural and technical expertise so Traditional Owner organisations can properly assess proposals, consult their communities and provide informed advice.
- Faster approvals must not shorten cultural assessment or consultation timeframes.
- Bioregional plans should not remove the need for project-specific engagement where Country or cultural values may be affected.
- Traditional Owners should participate in planning, zoning, monitoring, review and restoration—not only public consultation.
- Cultural values should be considered broadly and not limited to registered heritage places or currently recognised environmental matters.
- Traditional Owners must control culturally sensitive information, including its collection, interpretation, use, storage and publication.
- Avoidance of cultural and environmental harm must remain the priority. Some cultural impacts cannot be repaired or offset.

The First Nations Engagement Standard

We note the proposed new subdivision to Part 5 of the *Draft Regulations*, prescribing the National Environmental Standards that the decisionmaker must consider when making an approval decision under section 136A(1) of the *EPBC Act*. These Standards, are identified in Division 5.2A, section 5.04A of the *Draft Regulations*, as being:

- (a) *National Environmental Standard (Matters of National Environmental Significance) 2026;*
- (b) *National Environmental Standard (Environmental Offsets) 2026;*
- (c) *National Environmental Standard (Community Engagement) 2026;*
- (d) *National Environmental Standard (Data and Information) 2026.*

Striking is the absence from this list of a First Nations Engagement Standard (**FNES**) guiding the requirements for appropriate recognition of Traditional Owners unique rights to engage with projects undertaken or affecting Country. This absence is reflected in both:

- current *EPBC Regulations* 3.07 (in regard to Bilateral Agreements being taken into account in assessment processes), and
- *Draft Regulations* proposed regulation 5.04A, which specifies the national environmental standards to be taken in to account for the purposes of s 136A of the Act (noting that Section 136A is yet to be commenced).

The NNTC and other First Nations organisations have worked over a number of years on the FNES, so it is disappointing that there is still no formal draft for consideration. However, this absence at this stage of the reform process would not prevent the FNES being

prescribed through a proposed Regulation 5.04A(e) and having that sub-regulation commenced at the time when a final FNES is made. A similar amendment to Regulation 3.07, (proposed) regulation 5A.01 and any similar provisions could also be included in the amending regulations.

This approach would allow the expeditious inclusion of the FNES in decision making under the EPBC while still allowing any necessary period to settle the final draft of the Standard. Given the relative ease of inclusion in this manner, it is concerning that such approach to the FNES has not been proposed.

The inclusion of a First Nations Engagement *and Participation in Decision Making* Standard was a key recommendation of the Samuel Review.¹ Implementation of this aspect of the Review through engagement with First Nations was a commitment in the Government's June 2021 response to the Samuel Review. The NNTC through the First Nations Heritage Protection Alliance and in conjunction with the members of the (EPBC) Indigenous Advisory Committee participated in developing a draft standard prior to the passage of the Reform legislation. The final form of Standards that have been made to date (such as the Community Engagement Standard) is drafted in a form that clearly (and appropriately) contemplates First Nations engagement as a discrete requirement.

Against this backdrop the sudden removal of the First Nations Engagement Standard from the narrative contained in the Consultation Papers can only be seen as alarming and ominous. We urgently call on Government to affirm its commitment to developing this Standard and to finalise this process before commencement of the reform package.

Compensation Options

The thrust of our submission under this heading can be simply seen in the fact that this Consultation Paper makes no reference to a role for Traditional Owners and other First Nations people at all. As such it does not even contemplate a role for engagement with traditional owners in the planning, management, or reporting of restorative actions. Given the extent of the Indigenous estate across the Australian continent, this omission is gobsmacking. It suggests an attitude of seeking to remove Traditional Owners from the management of land they are owners of – even under settler law.

Offsets and compensation are a means by which damage done to environmental significance can be managed through an alternative framework. However, in the proposed Restoration Contributions Holder, 'restoration charges will be used to improve environmental outcomes through government delivery of restoration actions that align with long-term strategic objectives for protected matters.' When damage is done on Country to places concerning MNES and identified Traditional Owner management, government delivered and outcome identified processes are inappropriate. It is essential

¹ Contained in Graham Samuel, *Interim Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act* (Report, 2020) and Graham Samuel, *Independent Review of the Environment Protection and Biodiversity Conservation Act* (Final Report, 2020).

that compensation is appropriately managed by the affected Traditional owners themselves.

The Compensation provisions should be redrafted to acknowledge Traditional Owners as fundamental rights holders with unparalleled knowledge of the requirements of care for and restoration of Country. The regulatory amendment framework and its embedded fundamental principles as outlined in section 2 (General Responses) above should form the basis of this redrafting.

In a distinct but related matter, the obligations of the Restorations Contributions Holder should be expanded to require consideration of the views of and benefits to affected Traditional Owners of any actions and expenditure undertaken (see proposed Part 12D generally).

Additional Matter in the Exposure Draft Amending Regulations

Exposure Draft Proposed Regulation 4.03(2)(a) excludes confidential information from a requirement to be included in a referral. While noting the terms of Exposure Draft Proposed Regulation 4.03(3) in our submission this exclusion is too broad, particularly given the absence of any definition of "confidential information". This would allow the public form of a referral to exclude information based on a common law definition of confidential information with a mere statement to the effect that information which is confidential has not been included. An exclusion of this breadth undermines the public comment provisions in relation to referrals under of the principal Act.

Conclusion

The reform of the Commonwealth environmental protection environment provides an opportunity for holistic change to the way Traditional Owner rights, decision making and knowledge, are respected. If the recommendations made in this submission are implemented, the hitherto unregarded rights of Traditional Owners can be exercised to bring the land we all live in back to health. We encourage you to consider these recommendations and extend our invitation to discuss them further.

We invite you to discuss this submission with us at your convenience.

Regards,



Professor Rodney Carter
Director



Jamie Lowe
Chief Executive Officer

ATTACHMENT 1

About Us

National Native Title Council

Established in 2006, the NNTC is the peak body for Australia's Native Title and other Traditional Owner organisations. The NNTC represents Native Title Representative Bodies and Service Providers as well as Prescribed Bodies Corporate recognised under the *Native Title Act 1993* (Cth.) and other equivalent Traditional Owner Representative Institutions (**TORIs**) established under Traditional Owner land rights legislation such as the *Traditional Owner Settlement Act 2010* (Vic) (**TOSA**), the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and the *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA).

The Mabo Centre

Launched in February 2025, the Mabo Centre is a First Nations-led partnership between the NNTC and The University of Melbourne. The Mabo Centre builds on the extensive and ongoing engagement with Traditional Owners undertaken by the NNTC.

Based on the University's Parkville campus, and working closely with Traditional Owners and communities, the Mabo Centre undertakes research to identify best practices, deliver training to strengthen and share knowledge, and develop local leadership skills to maximise economic outcomes through leveraging land and sea rights. Overtime, this will ensure strong principles of self-determination are embedded into native title agreements, better supporting community aspirations and provide greater opportunities for economic development and entrepreneurship on Country.