Submission to the Thematic Report on Human Rights and Biodiversity

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Question 2: Please provide specific examples of good practices in the implementation of human rights obligations in biodiversity-related matters. Focus: practices related to: guaranteeing procedural rights (e.g., rights to information, participation and remedy)

We focus our submissions here on the right to a remedy, that is the ability of environmental groups to obtain ‘standing’ to challenge bio-diversity related decisions via merits review and judicial review.

The courts in Australia take a fairly liberal approach to the standing of environmental groups. Some statutes are also worded quite widely.¹

One example at the regional level is Section 123(1) of the Environmental Planning and Assessment Act 1979 (NSW) which allows ‘[a]ny person’ to seek remedies against a breach of that Act in the NSW Land and Environment Court.²

At the federal level, Section 487 of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (‘EPBC Act’) also deems individuals to have standing to challenge a decision, related conduct or a failure to act under the EPBC Act if they have ‘engaged in a series of activities in Australia or an external Territory for protection or conservation of, or research into, the environment’ at any time in the two years before the decision or action sought to be challenged.³

These liberal standing rules have been vital to litigation – they has allowed environmental groups to challenge the granting of mining licences in areas where there is evidence of impact on endangered species or other bio-diversity issues.

Example – Merits Review Remedy

In Australia, the defining feature of merits review is the power of the review body to substitute its own decision for that of the original decision-maker. This usually happens in the form of a de novo appeal, which is when the review body reconsiders the matter afresh, so all of the evidence (and any new evidence) is re-heard and a new decision is made.

The ability of environmental groups to ask for such review is very important. A case example demonstrating the advantage of this avenue is the Bulga/Warkworth mine case. Here a

A resident’s action group (Bulga Milbrodale Progress Association Inc) made an application in the Land and Environment Court against the approval of a mine extension for the Warkworth mine in the Hunter Valley (operated by a subsidiary of Rio Tinto). The extension of the mine involved the clearing of approximately 766 hectares of four types of endangered ecological communities protected under threatened species legislation.

Importantly, the role of the Land and Environment Court was to hear the application afresh in deciding whether the application should be approved or not. In this case, the Court overturned the approval of the project.

The basis of the decision was that, although the extension would have produced some positive economic and social impacts for the broader community, this was outweighed by environmental factors, including the significant adverse impacts in terms of loss of biodiversity. The judge, Chief Justice Preston, found that at least 25% of the remnant vegetation would be cleared by the project and there was no evidence that this could be regenerated. The Court also considered that the Biodiversity offsets proposed by the mining company were not satisfactory.

Question 3. Please specify, where relevant, specific examples of challenges and obstacles to the integration and protection of human rights in biodiversity-related matters

Although the ability of environmental groups to get standing to challenge is relatively easy, some jurisdictions in Australia have amended environmental legislation to make it difficult for these challenges to succeed.

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4 Section 39(4) of the Land and Environment Court Act 1979 provides that the Court is to have regard to any other Act, the circumstances of the case and the public interest


5 Bulga Milbrodale Progress Association v Minister for Planning and Infrastructure and Warkworth Mining Limited [2013] NSWLEC 48 (Preston CJ).
For instance, following the Bulga/Warkworth case discussed above, the NSW amended the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007*, which governs the assessment of mining projects in NSW. It was amended to elevate economic considerations and resource significance as the primary considerations in assessing projects.\(^6\)

Also, in NSW, merits review is not available to any party if the decision was made after the Planning Assessment Commission (PAC) has held a public hearing. This is a problem because the Minister for Planning has the power to refer large developments to the PAC for a public hearing before a decision about whether to approve a project is made. This is a problem for environmental groups in getting merits review, particularly as the hearing does not lead to any binding outcomes. This is because, after holding a hearing, the PAC is required to make a report with recommendations but that report is not binding. That is, there is no need for the decision-maker to follow its recommendations.\(^7\)

Another problem is the restricted ability of courts undertaking judicial review in Australia. Such courts can only consider the legality (not merits) of a decision. This is illustrated by the approval of a large mining licence in Queensland which raised concerns about impact on vulnerable species. For instance, there was evidence that the mine would result in serious damage to the continued survival of the largest remaining colonies of the endangered Black-throated Finch located in the mining lease area. This was an important, as the finch was in fact declared extinct by the NSW government in February 2016.\(^8\)

![Black-throated Finch](image)

**Black-throated Finch**

There were a number of merits and judicial review challenges to the mine. Firstly, a challenge to the mine under state jurisdiction was enabled by the fact that approval of the mine was publicly advertised pursuant to Queensland legislation. \(^9\) This gave notice to

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7 Environmental Defenders Office NSW, ‘Merits Review in Planning in NSW’, see http://www.edonsw.org.au/the_community_s_right_to_participate_what_happened_to_merits_review
9 Mineral Resources Act 1989 (Qld) and Environmental Protection Act 1994 (Qld) (EPA)
organisations, thereby facilitating their ability to make objections. A number of objections were received, including from a conservation group, Land Services of Coast and Country Inc which objected to the grant of the mining lease due to the impacts of the mine on biodiversity, including impacts on the endangered bird species, Black-throat Finch.

The community group challenged the mine approval in the Queensland Land Court. In a decision in 2015, the Court recommended that the mining lease and environmental authority be granted, but they should be subject to further conditions in relation to monitoring of impacts on the Black-throated Finch.\footnote{http://www.edoqld.org.au/carmichael-l-e/}

Although this was a good outcome, other judicial review challenges to the mine have ultimately not been successful. This is important because apart from adverse impacts on bio-diversity, there are serious concerns about its impact on climate change. This is because the mine will be one of the largest coal mines in the world and the mining and burning of coal from it will generate an estimated 4.7 billion tonnes of greenhouse gas emissions.

In a recent judicial review challenge to this aspect of the mine, brought by the Australian Conservation Foundation (ACF), ACF alleged that the Minister failed to properly consider the impacts of the climate pollution from the mine on the Great Barrier Reef World Heritage Area. However, on 29 August 2016, the Federal Court dismissed that challenge. In doing so, the Court accepted that the Minister concluded that the combustion emissions from the proposed mine would have no relevant impact on the Great Barrier Reef.

This is problematic for environmental litigation in Australia as it underscores the limits of judicial review (limited only to legality, not the merits). It therefore illustrates the need for environmental groups to have access to both merits and judicial review.

Question 4: ‘Please give examples of how the rights of those who may be particularly vulnerable to the loss of biodiversity, including but not limited to indigenous peoples, are (or are not) provided with heightened protection.’

Protection of Indigenous peoples’ rights at the Commonwealth (national) level

This part of the submission focusses on examples of legislative protection of Indigenous rights, and its limitations, at the Commonwealth level.

Under the Australian Constitution, the Australian Parliament can only pass laws in relation to those powers that are enumerated in the Constitution. In that regard, it does not have a specific power to make laws with relation to the environment or biodiversity; this power resides with each of the individual states. However, it has used a number of its other enumerated powers to pass the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (‘EPBC Act’) to protect Australia’s biodiversity.\footnote{The corporations power in s 51(xx) and the external affairs power in s 51(xxix) of the Australian Constitution.}

The \textit{EPBC Act} provides some level of protection for indigenous rights. However, because of the limitations on the power of the Australian Parliament, the scope and capacity of the \textit{EPBC Act}...
Act to protect Indigenous rights is also limited. Nonetheless, some of those provisions are as follows.

The objects of the EPBC Act are contained in s 3(1), of which three refer to Indigenous people. The means by which the EPBC Act achieves these objects include by ‘recognising and promoting indigenous peoples’ role in, and knowledge of, the conservation and ecologically sustainable use of biodiversity.’

Advisory Committees

The recognition and promotion of Indigenous interests can be evidenced by the establishment of an Indigenous Advisory Committee (‘IAC’), the function of which ‘is 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.’ However, the role of the IAC is limited. According to the government, it is ‘an advisory and not a decision making body and it is not a consultative mechanism to seek the views of stakeholders. It does not advocate on behalf of Indigenous communities, stakeholders or funded proponents. It provides strategic advice at the request of the Minister.’

Under the IAC’s terms of reference, its role also includes advising on other matters that affect Aboriginal and Torres Strait Islander people in the environment portfolio and reporting on matters of interest to the Department. However, given that its members are appointed on a part time basis, and that they meet approximately twice a year (although there are regular teleconferences), the IAC is limited in both time and resources in its ability to provide comprehensive advice on the many Indigenous issues arising under both the EPBC Act and within the Department generally.

The Australian Heritage Council (‘AHC’), established pursuant to the Australian Heritage Council Act 2003 (Cth) (‘AHC Act’) also has an advisory role under the EPBC Act in relation to National Heritage Places. The Minister, in appointing members to the AHC ‘must ensure that: … 2 of them are indigenous persons with substantial experience or expertise concerning indigenous heritage, at least one of whom represents the interests of indigenous people.’ However the ultimate responsibility for decision-making rests with the Minister, although it can be (and usually is) delegated.

So there is clearly a role for Indigenous people in the operation of the EPBC Act via the IAC and the AHC. However, the role of these committees is advisory only, the Minister is not obliged to follow their advice or implement their recommendations. These committees also have practical limitations which inhibit them from being an effective mechanism for ensuring that the interests of Indigenous people are appropriately considered and protected.

\[12\] EPBC Act sub-ss 3(1)(d), (f) and (g).
\[13\] Ibid s 3(2)(g)(iii).
\[14\] Ibid s 505B(1).
\[16\] Ibid.
\[17\] EPBC Act s 505A(3).
\[18\] AHC Act s 7(3)(c).
\[19\] EPBC Act s 515.
Conservation Agreements

In addition to the advisory committees noted above, the EPBC Act also allows for conservation agreements to be reached with Indigenous persons or their representatives for the protection and conservation of biodiversity over particular kinds of areas.\(^{20}\) When making these agreements, the Minister must take into account (among other things) articles 8(j), 10(c) and para 4 of article 18 of the Convention on Biodiversity Conservation, all of which acknowledge various rights of indigenous people.\(^{21}\) So there is scope for indigenous peoples to protect their interests via these agreements. To date, however, no conservation agreements have been entered into with Indigenous people.\(^{22}\)

*Water Act 2007* (Cth)

Water is vital to the protection of biodiversity. However, as with the environment and biodiversity, Parliament has limited power under the Australian Constitution to pass laws relating to water. Nonetheless, Parliament was able to enact the *Water Act 2007* (Cth) (‘*Water Act*’) by utilising other enumerated powers, and with the eventual concurrence of the states. The *Water Act*, too, is limited in its scope and sphere of operation, relating only to the Murray-Darling Basin (MDB) and to matters of national interest.

A key management feature established by the *Water Act 2007* is the Murray-Darling Basin Authority (‘MDBA’) which prepares the Murray-Darling Basin Plan (‘Basin Plan’), a catchment-wide planning framework for the sustainable management of water resources. The Basin states\(^{23}\) continue to have a major role in water management through the preparation of water resource plans (‘WRPs’) which are required to give effect to the Basin Plan.

There are a number of mechanisms in the *Water Act* intended to protect indigenous interests. Firstly, in preparing the Basin Plan, the MDBA and the Minister must have regard to ‘social, cultural, Indigenous and other public benefit issues.’\(^{24}\) Indigenous interests are also acknowledged in s 21(4)(c)(v) of the *Water Act*. But it is only one of a number of matters in sub-s (v) to which the MDBA and the Minister must have regard. This is compounded by the fact that sub-s (v) itself is one of ten matters listed in s 21(4)(c). There are also other matters that must be taken into account, promoted or given effect to in the Basin Plan.\(^{25}\) So Indigenous issues are but one of numerous matters to be considered in preparing the Basin Plan.

Further, although the MDBA and the Minister ‘must … have regard to’ Indigenous issues, this is only a procedural requirement that will not necessarily result in a substantive outcome for Indigenous people.

The Basin Plan is specifically required to provide information about Indigenous uses of Basin water resources, including ‘[a] description of the Basin water resources and the context in which they are used’, which ‘must include information about: … (b) the uses to which the Basin water resources are put (including by Indigenous people).’\(^{26}\) However, there are no

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\(^{20}\) Ibid s 305(5)

\(^{21}\) Ibid s 305(6)


\(^{23}\) Queensland, New South Wales, Victoria, South Australia and the Australian Capital Territory.

\(^{24}\) *Water Act 2007* s 21(4)(c)(v).

\(^{25}\) Ibid ss 21(4)(a), (b), s 21(1)-(3).

\(^{26}\) Ibid s 22(1)
obligations set out regarding what is to be done with that information once it has been included in the Basin Plan. The fact that WRPs are required to be consistent with the Basin Plan does not extend to a requirement that WRPs be consistent with ‘the uses to which the Basin water resources are put (including by Indigenous people).’

The current *Basin Plan 2012* contains an acknowledgement of the Traditional Owners of the MDB.\(^{27}\) Chapter 10 of the *Basin Plan 2012* relates to the requirements for WRPs and contains part 14 which requires WRPs to identify the objectives of and the outcomes desired by Indigenous peoples in relation to the management of water resources, and that regard must be had to Indigenous values and uses in determining them.\(^{28}\) Part 14 also requires WRPs to be prepared having regard to the ‘inclusion of Indigenous representation in the preparation and implementation of the plan’;\(^{29}\) ‘Indigenous social, cultural, spiritual and customary objectives, and strategies for achieving these objectives’;\(^{30}\) and ‘native title rights, native title claims and Indigenous Land Use Agreements provided for by the *Native Title Act 1993* in relation to the water resources of the water resource plan area.’\(^{31}\) In addition, a WRP must be prepared having regard to the views of relevant Indigenous organisations with respect to various matters, including native title, Aboriginal heritage, Indigenous social, cultural, spiritual and customary objectives, Indigenous representation, Indigenous participation, and risks to Indigenous values and uses.\(^{32}\) A WRP must also be prepared having regard to the views of Indigenous people with respect to cultural flows.\(^{33}\)

As mentioned earlier, the reference to ‘having regard to’ is a procedural requirement, and does not mandate a particular outcome. And although WRPs must identify the management objectives and outcomes desired by Indigenous people, there is no mandatory requirement that steps be put in place to achieve those outcomes.\(^{34}\)

**Basin Community Committee (BCC)**

Indigenous people are able to voice their concerns and have their rights potentially protected via the BCC, a committee established pursuant to s 202. The main function of the BCC is to advise the MDBA. In addition, the MDBA must consult with the BCC on various matters relating to the Basin Plan.\(^{35}\)

Membership of the BCC must include ‘at least 2 Indigenous persons with expertise in Indigenous matters relevant to the Basin’s water resources.’\(^{36}\) It must also include a member of the MDBA, and eight individuals who are water users.\(^{37}\) The BCC can have up to 17

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27 This acknowledgement is located before the contents and thus does not form part of the Basin Plan itself.
28 *Basin Plan 2012* ss 10.52(1), 10.52(2).
29 Ibid s 10.53(1)(c).
30 Ibid s 10.53(1)(d).
31 Ibid s 10.53(1)(a).
32 Notably, the objectives do not include Indigenous economic or commercial objectives.
33 *Basin Plan 2012* ss 10.54.
34 Note that the *Basin Plan 2012* s 10.52(3) states: ‘A person or body preparing a water resource plan may identify opportunities to strengthen the protection of Indigenous values and Indigenous uses in accordance with the objectives and outcomes identified under subsection (1), in which case the opportunities must be specified in the water resource plan.’
35 *Water Act 2007* ss 43(1)(c), 46(1)(c), 51(2)(c).
36 Ibid s 202(5)(c).
37 Ibid s 204(7).
members, including the Chair.\textsuperscript{38} Thus membership of the BCC is clearly weighted towards non-indigenous interests. To be eligible for appointment to the BCC, a person ‘must have a high level of expertise or interest in: (a) community, indigenous or local government matters relevant to the Basin’s water resources ...’ The BCC must also establish ‘an Indigenous water subcommittee, to guide the consideration of Indigenous matters relevant to the Basin’s water resources.’\textsuperscript{39}

However, the BCC acts only in an advisory capacity; the MDBA must consult with but is not required to follow the advice of the BCC. So the BCC is not at the level of decision-making, that role still resides with the MDBA. However, in that regard, eligibility for membership of the MDBA is based on having a high level of expertise in a field relevant to the MDBA’s functions, which includes expertise in Indigenous matters.\textsuperscript{40}

Thus, as far as the \textit{Water Act 2007} is concerned, Indigenous participation in water management is limited to the BCC whose membership is heavily weighted towards non-Indigenous interests, and whose advice the MDBA is not obliged to follow. Nonetheless, the \textit{Water Act 2007} also requires the consideration of Indigenous interests in the preparation and amendment of the Basin Plan, and for the content of the Plan to include information about Indigenous uses of Basin water resources, which goes some way to protecting indigenous interests in water and therefore biodiversity.

\textsuperscript{38} Ibid s 202(4).
\textsuperscript{39} Ibid s 202(3)(c).
\textsuperscript{40} Ibid s 178.