

6 October 2016

Mr John Knox
United Nations Special Rapporteur on Human Rights and the Environment
Thematic Engagement, Special Procedures and Right to Development Division
UNOG-OHCHR
CH-1211 Geneva 10, Switzerland

By email: srenvironment@ohchr.org

Dear Special Rapporteur Knox,

Submission to Thematic Report on Biodiversity and Human Rights

The Law Council of Australia appreciates the opportunity to provide a submission to your upcoming thematic report on biodiversity and human rights, to be presented at the 34th session of the Human Rights Council.

The Law Council of Australia is the peak national representative body of the Australian legal profession. It represents the Australian legal profession on national and international issues, on federal law and the operation of federal courts and tribunals. The Law Council represents 60,000 Australian lawyers through state and territory bar associations and law societies, as well as Law Firms Australia.

In preparing this submission the Law Council appreciates the input from the Law Society of South Australia (LSSA), as well as members of the Australian Environment and Planning Law Group from the Law Council's Legal Practice Section and the Law Council's National Human Rights Committee.

Overview of Submission

The Law Council endorses an approach to human rights, consistent with international law and practice, which confirms that all human rights are universal, indivisible and interdependent and interrelated. The Law Council also recognises and endorses increasing international attention to human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment.

In considering the Special Rapporteur's questionnaire the Law Council has decided to focus on the following two questions with reference to Australia:

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

Challenges and obstacles in biodiversity related matters

Federal integration of human rights

The Australian Government has signed and ratified seven 'core' international human rights treaties to which it is a party.¹ None of the international human rights instruments to which Australia is a party specifically protect environmental rights. However some environmental rights may be indirectly or implicitly protected through other rights. For example, the right to life, right to health, right to water and right to culture, among others.

There are also other international instruments that, while not binding, are relevant in recognising the interplay of human rights and the environment in the Australian context. For example, in 2009 the Australian Government formerly endorsed the *Declaration on the Rights of Indigenous Peoples* (DRIP). Through articles 29 to 32, the role of Indigenous peoples in the conservation and protection of the environment is protected.²

The operation of the Commonwealth human rights framework is limited with respect to biodiversity related matters. With no federal human rights act or sufficient human rights protections in environmental legislation, there are gaps with biodiversity related matters. For example, federal laws do not protect specific environmental rights, such as human rights to a clean and healthy environment.³

The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) is the Australian Government's central piece of environmental legislation. It provides a legal framework to protect and manage nationally and internationally important flora, fauna, ecological communities and heritage places defined in the Act as matters of national environmental significance.

The EPBC Act incorporates human rights in some aspects of its operation, for example non-interference with Indigenous rights. Section 8 of the EPBC Act provides that the Act does not affect the operation of the *Native Title Act 1993* (Cth) and the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). Both these Acts include provisions that preserve customary rights to use of lands and waters.⁴ However, there are some shortfalls with federal legislative protection of biodiversity and human rights under the EPBC Act. This point is best illustrated in the case studies below.

¹ *Convention on the Elimination of All Forms of Racial Discrimination, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, Convention on the Elimination of All Forms of Discrimination against Women, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities.*

² For example, article 29(1) provides that "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". Other examples include the *Rio Declaration on the Environment and Development* and the *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* (the Aarhus Convention).

³ These rights have been expressed through non-binding international agreements, such as the *Rio Declaration on the Environment and Development* and the *Convention on Access to Information*. Many nations have also sought to implement these rights in their domestic laws. For example, Section 24(a) of the *Constitution of the Republic of South Africa 1996* (South Africa).

⁴ Section 211, *Native Title Act 1993* and section 71, *Land Rights Act (Northern Territory) 1976*. For more background see Dr Allan Hawke AC, Independent review of the *Environment Protection and Biodiversity Conservation Act 1999*, 21 December 2009. Available at: <https://www.environment.gov.au/legislation/environment-protection-and-biodiversity-conservation-act/epbc-review-2008>.

Threats to standing under the EPBC Act

The Law Council regards section 487 of the EPBC Act as an important provision, in that it extends standing to organisations with an active interest in the conservation of the environment who wish to challenge decisions made under the Act.⁵ There is no need for an applicant to prove that they have been adversely affected by an approval decision or that they have a special interest in an approval decision. This is particularly relevant in the biodiversity context where the impacts of, for example, a new mine, may have national or international implications, or relate to Australia's international treaty obligations.

The Law Council was concerned by attempts in 2015 by the Federal Government to make amendments to the EPBC Act, through the Environment Protection and Biodiversity Conservation (Standing) Bill 2015 (the Bill), which would have provided that only aggrieved persons (as defined by section 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth)) could make an application for judicial review of decisions made under the EPBC Act. The Bill was referred to the Senate Environment and Communications Legislation Committee for review whereupon the Law Council made a submission.⁶ The Law Council argued that the Bill was undesirable on the grounds that:

- it was inconsistent with the rule of law in that it was to apply retrospectively;
- section 487 has positively contributed to improving statutory compliance, increasing Executive accountability; and
- section 487 has positively contributed to Australia's compliance with international human rights law.

The Bill lapsed at prorogation of the Parliament on 17 April 2016 and has yet to be reintroduced.

State and territory integration of human rights

At the state and territory level only the Australian Capital Territory⁷ and Victoria⁸ have human rights acts. Neither acts specifically protect environmental rights, however, they may be indirectly protected through other human rights, for example through the right to life.⁹

Recent legislative amendments, introduced in 2015, to the *Human Rights Act 2004* (ACT) have aimed to better incorporate cultural and other rights of Aboriginal and Torres Strait Islander peoples as they relate to biodiversity. Paragraph 27(2)(b) of that Act states that:

Aboriginal and Torres Strait Islander peoples...must not be denied the right to have their material and economic relationships with the land and waters and other resources with which they have a connection under traditional laws and customs recognised and valued.

In introducing the amendment, the ACT Government aimed to implement the aspirations of Articles 25 and 31 of UNDRIP.¹⁰ A similar provision is contained in section 19 of the *Charter of Rights and Responsibilities 2006* (Vic).

⁵ *Lawyers for Forests Inc v Minister for Environment, Heritage and the Arts (No 2)* [2009] FCA 466.

⁶ Law Council of Australia, Submission to the Senate Environment and Communications Legislation Committee, Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015, 10 September 2015. Available at: http://www.lawcouncil.asn.au/lawcouncil/images/3050-LCA_Submission_EPBC_Act_standing.pdf.

⁷ *Human Rights Act 2004* (ACT).

⁸ *Charter of Rights and Responsibilities 2006* (Vic).

⁹ Section 9(1) of the *Human Rights Act 2004* (ACT) and section 9 of the *Charter of Rights and Responsibilities 2006* (Vic).

Case study - climate change

The LSSA has provided advice on the recent case of *Australian Conservation Foundation Incorporate v Minister for the Environment* [2016] FCA 1042. The case referred to an application for judicial review of the Minister for the Environment's decision to approve, subject to conditions, the proposed Carmichael coal mine project in in Central Queensland under the EPBC Act. The mine was proposed by Adani Mining, a wholly owned subsidiary of Adani Group.

The Court held it was not possible for the Minister to draw conclusions as to the likely contribution of Adani's action to a specific increase in global temperature. Accordingly, the Court was not able to accept that there was a demonstration of the necessary relationship between Adani's action and impacts on relevant biodiversity in the near region, including the Great Barrier Reef.

The case highlights the challenges in utilising the EPBC Act to deal with climate change, in particular green house gas emissions as the EPBC Act was enacted prior to green house gas emissions being recognised and used as a measure of climate change. The EPBC Act recognises the guiding principles of sustainable development but does not contain an express green house gas emissions trigger to capture carbon intensive projects. Accordingly they are often able to be approved without triggering the protections of the EPBC Act.

The LSSA has suggested that EPBC Act should be amended to the effect that it expressly recognises climate change as one of the major factors endangering biodiversity. Furthermore, the LSSA has recommended that the Act should put in place measures to address direct and indirect green house gas emissions and protect any environment in threat of these emissions.

Rights of those particularly vulnerable to the loss of biodiversity

As noted above, there are a number of gaps in the federal, state and territory human rights protection, particularly with regards to biodiversity. The Law Council has a special interest in how this impacts upon the rights of Aboriginal and Torres Strait Islander peoples in Australia in engaging with the legal system.¹¹ This includes promoting effective measures to ensure continuing improvement of their economic and social conditions and to ensure they are able to maintain and strengthen their institutions, cultures and traditions.¹²

Case study - Indigenous heritage values

The LSSA has provided advice on the recent case of *Tasmanian Aboriginal Centre Incorporated v Secretary, Department of Primary Industries, Parks, Water and Environment* (No 2) [2016] FCA 168. In that case, Mortimer J found that the opening to recreation vehicles of three tracks in the Western Tasmania Aboriginal Cultural Landscape by the respondents was likely to have a significant impact on national heritage values, being Indigenous heritage values, of the Western Tasmania Aboriginal Cultural Landscape contrary to section 15B(4) of the EPBC Act.¹³

¹⁰ Revised Explanatory Statement, Human Rights Amendment Bill 2015 (ACT), 11 February 2016. Available at: http://www.legislation.act.gov.au/es/db_51446/20160211-63120/pdf/db_51446.pdf.

¹¹ Law Council of Australia, Policy Statement: Indigenous Australians and the Legal Profession, February 2010. Available at: <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/PolicyStatementIndigenousAustralians.pdf>.

¹² Ibid.

¹³ Section 15B(4) relates to the requirement for approval of activities with a significant impact on a National Heritage place.

In considering what the protected subject matter was in this case, it was held that although a national heritage "place" appears, at first impression, to be the subject matter of the EPBC's protection, taking into account the text of other provisions and reading section 15B of the EPBC Act as a whole, it was apparent that what is being protected is not simply a "place" but the "values" of that place which warranted.

Part of the "heritage" of a place may relate to historical events, to activities undertaken by people in a place but it can also involve ideas, aspirations, beliefs and practices. Indigenous heritage value is defined under section 528 of the EPBC Act as a place that "is of significance to Indigenous persons in accordance with their practices, observances, customs, traditions, beliefs or history".

Mortimer J held that protected matter was much larger and less tangible than the approach both parties had suggested, in that protection is given to values, Indigenous values in this case, which attached to a place.¹⁴ The "place" would not just cover specific sites within the area covered by a Ministerial decision.¹⁵ In determining the question of impact, Mortimer J highlighted that it was important to recognise the "value" of an entire landscape in which Aboriginal people lived, hunted, fished and cared for their land.¹⁶

On appeal to the Full Court of the Federal Court of Australia,¹⁷ Allsop CJ, Griffiths and Moshinsky JJ held that the national heritage values are the values included in the National Heritage List.¹⁸ Their honours held that it was not permissible to identify the relevant national heritage value and the Indigenous heritage value by evidence in a particular case.¹⁹ This is prescribed by the terms of section 324D of the EPBC Act, which outlines the meaning of national heritage values.

The LSSA notes that the case illustrates how the courts interpret the EPBC Act with respect to national heritage values, arguing that greater consideration could be given to a broader interpretation of Indigenous heritage values so as to include intangible values of significance, beyond those specified on the National Heritage List.

I trust this information is of assistance for your report on biodiversity and human rights to be presented at the 34th session of the Human Rights Council.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Jonathan Smithers', written over a horizontal line.

Jonathan Smithers
Chief Executive Officer

¹⁴ *Tasmanian Aboriginal Centre Incorporated v Secretary, Department of Primary Industries, Parks, Water and Environment* (No 2) [2016] FCA 168 at 214.

¹⁵ *Ibid.*

¹⁶ *Ibid* at 220.

¹⁷ *Secretary, Department of Primary Industries, Parks, Water and Environment v Tasmanian Aboriginal Centre Incorporated* [2016] FCAFC 129.

¹⁸ The National Heritage List is Australia's list of natural, historic and Indigenous places of outstanding significance to the nation. More information can be found at:

<https://www.environment.gov.au/heritage/places/national-heritage-list>.

¹⁹ *Ibid* n17 at 90.