Indigenous-Led Conservation: experiences from the Kimberley

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Indigenous people make up just five percent of the global population but hold nearly 22 percent of the world's lands and waters and are stewards for approximately 80 percent of the Earth's biodiversity.[2] In the Kimberley region, these figures increase significantly, with Indigenous people making up close to 50% of the population,[3] holding native title rights over more than 70% of the region,[4] and managing the cultural and conservation values of their native title country through 13 Indigenous ranger groups.

In this context, there is an undeniably central role for Indigenous people to play in conservation management but, conversely, a significant risk that indigenous rights will be negatively impacted or undermined by conservation agendas.[5] The development and use of Indigenous Protected Areas (**IPAs**) in Australia has for 30 years provided a mechanism to balance the interests of conservation with the rights of indigenous people, achieving significant environmental, social and cultural outcomes.[6] In the Kimberley, however, this balance risks being shaken by the Western Australian (**WA**) Government's proposal to establish the 'Kimberley Wilderness Park',[7] moving from a model of sole Indigenous conservation management to a model of joint control with the WA Government.[8] Where indigenous aspirations are to increase conservation protection on country, it is timely to explore alternative models in order to continue building on Australia's leadership in this area, and to avoid conflict between indigenous and conservation agendas.

Indigenous Protected Areas Program

Since the early 1990s, Australia has been at the forefront of international best practice for its work with Indigenous people to establish IPAs.

An IPA is an area of land or sea country that is voluntarily declared to be a protected area and which is managed by Indigenous people in accordance with international guidelines developed by the International Union for the Conservation of Nature. The program was set up in 1997 to facilitate the expansion of Australia's National Reserve through leveraging partnerships between Indigenous people and government.[9] The deliberately unregulated nature of the IPA program aligned with contemporary international thinking,

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[2] Claudia Sobrevila, "The role of indigenous peoples in biodiversity conservation: the natural but often forgotten partners" (Washington, D.C., World Bank, 2008).
[3] Kimberley Development Commission at http://kdc.wa.gov.au/economic-activity/demographics/
[4] See National Native Title Tribunal "Maps" at http://www.nntt.gov.au/assistance/Geospatial/Pages/Maps.aspx.
[5] Tauli-Corpuz V (Special Rapporteur of the Human Rights Council on the rights of indigenous peoples) (2016) "Rights of Indigenous People" in A/71/229.
[6] SVA Consulting, Department of Prime Minister & Cabinet (2016) "Consolidated report on Indigenous Protected Areas following social return on Investment Analyses".
[7] Government of Western Australia (2011) "Kimberley Science and Conservation Strategy".
[8] Kerins, S. (2016) "Kimberley conservation threatens to take a step back on Indigenous rights" *Australian Environment Review,* 186.
[9] See Department of Prime Minister and Cabinet, "Indigenous Protected Areas" at https://www.dpmc.gov.au/indigenous-affairs/environment/indigenous-protected-areas-ipas for a description of the Indigenous Protected Area Program.

shifting away from the 'Yellowstone Model'[10] of government controlled and regulated parks, to recognise that Indigenous or private landholders may have other effective means to manage protected areas.[11]

Today, IPAs cover almost 500,000 square kilometres, making-up over 40% of Australia's National Reserve System,[12] and are pivotal to the Australian Government's ability to deliver on its international targets under the Convention on Biological Diversity.

Within the Kimberley region, there are eight declared IPAs, covering approximately 90,000km^2, an area roughly the same size as Tasmania. These IPAs include some of the most remote and intact ecosystems in Australia, including identified biodiversity hotspots. They are managed by teams of Indigenous rangers who operate, under the guidance of traditional owners, to "conserve ecosystems and habitats together with associated cultural values and traditional natural resource management systems".[13]

A key strength of IPAs is the degree of autonomy exercised by traditional owners in managing these areas. In the Kimberley, the majority of IPAs fall on exclusive possession native title land and Aboriginal Reserve, with traditional owners exercising native title rights to direct conservation and cultural management priorities across their country. This approach has been hugely successful, with an increasing number of Native Title Prescribed Body Corporates (**PBCs**) integrating ranger activities into their core business, allowing them to leverage capacity building, employment and social outcomes as a co-benefit of the support provided under IPA Programs. IPAs also provide an opportunity for PBCs to leverage partnerships, with Government, conservation groups or philanthropic organisations, increasing investment in remote communities and simultaneously enhancing conservation outcomes. These complementary social, economic and cultural benefits flowing from IPAs are well documented, with analysis suggesting that the social return on IPA investment is more than triple the original investment value.[14]

While IPAs were at the forefront of best-practice conservation management when launched 30 years ago, limited evolution of the program in this time has resulted in circumstances where the program may not always match the aspirations of Indigenous people, conservationists or State Governments.

While recognised by the Australian Government, and forming part of Australia's National Reserve, there is no legislative or regulatory framework for IPAs, and their treatment by State or Territory governments, like that of conservation or Indigenous rights more broadly, varies from jurisdiction to jurisdiction. In the Kimberley, the majority of IPAs fall on State (not Commonwealth) lands, with no formal legal framework within WA for recognising IPAs. While native title land, and therefore the majority of IPAs in the Kimberley, is treated as 'Crown land' in WA, therefore receiving some level of protection through the application of state environmental laws,[15] these laws focus on regulating, rather than prohibiting, certain activities, and Indigenous rangers have no power to issue infringement or enforcement notices under these laws.

A further challenge facing IPAs is the limited financial resources available to support conservation outcomes. As currently structured, IPAs receive core funding from the Australian Government under its IPA Program. This program is essential to the existence of Indigenous conservation initiatives, however ongoing funding is uncertain, and even at current funding levels, available resources are generally recognised as requiring

[10] Stevens, S. (1997) "The legacy of Yellowstone", in Conservation Through Cultural Survival, edited by S. Stevens, Island Press, Washington, cited in Adams, M. (2008) "Foundational Myths: Country and Conservation in Australia", 3(1) *Transforming Cultures;* see further Tauli-Corpuz V (Special Rapporteur of the Human Rights Council on the rights of indigenous peoples) (2016) "Rights of Indigenous People" in A/71/229, p8.

[11] Department of the Environment and Heritage, *The Indigenous Protected Area Program Background Information and Advice for Applicants,* date unknown.

[12] Department of Prime Minister and Cabinet, "Indigenous Protected Areas" at https://www.dpmc.gov.au/indigenous-affairs/environment/indigenous-protected-areas-ipas.

[13] International Union for Conservation of Nature, "Protected Area Categories" at https://www.iucn.org/theme/protected-areas/about/protected-areas-categories. Note, the majority of IPAs are IUCN Category V or VI, although some IPAs have been declared with a higher level of protection.

[14] SVA Consulting, Department of Prime Minister & Cabinet (2016) "Consolidated report on Indigenous Protected Areas following social return on Investment Analyses".

[15] For example, the following statutes apply to Crown Land in Western Australia: *Environmental Protection Act 1986* (WA); *Biodiversity Conservation Act 2016* (WA); *Fish Resource Management Act 1994* (WA).

supplementation to support the extensive work taking place.[16] For this reason, Indigenous rangers rely on complementary funding sources, including State, Commonwealth or philanthropic grants and income earnt through the provision of conservation and land management services. Existing levels of IPA funding is not only insufficient to support existing IPAs, but demand for the establishment of new IPAs outstrips available funding and demand for Indigenous ranger jobs frequently outstrips available positions.[17] Amplifying this challenge, the increasing pressure on IPAs to deliver multiple purpose outcomes, either through existing frameworks or through financially beneficial add-ons, such as youth justice programs, creates a situation where existing resources are stretched to capacity, and the core conservation purpose of IPAs risks being undermined.

In addition to limited legal protection and financial resources, a further challenge facing IPAs is the opacity of Indigenous land tenure, particularly native title law, with native title holders uncertain of, and facing extensive obstacles to, exercising native title rights to undertake land management activities.

These challenges indicate that, 30 years on from the commencement of the IPA program, it may be timely to revisit key aspects of the program, including scaling up levels of support commensurate with the significant conservation, cultural and social benefits delivered by IPAs; where requested by indigenous groups, identifying legal or regulatory avenues to enhance conservation protections and powers of indigenous rangers; and identifying policy and legal mechanisms which confirm and strengthen the ability of native title holders to leverage their native title rights to undertake land management activities.

Government conservation models in the Kimberley

In WA, conservation areas are created and regulated under the *Conservation and Land Management Act 1984* (WA) (**CALM Act**) in conjunction with the *Land Administration Act 1997* (WA).[18] The CALM Act is directed at the protection of 'public lands', and establishes a management regime for conservation areas, under the responsibility of Department of Parks and Wildlife. In addition to the protections provided under the CALM Act, conservation reserves may receive additional protection through the declaration of a Class A Reserve,[19] which requires approval of both houses of parliament to undertake certain activities in these areas.

The CALM Act does not provide any specific avenue for the recognition of IPAs, although in practice there can be an overlap of CALM Act and IPA areas.

In recent years, WA Government conservation efforts in the Kimberley have been dominated by the Kimberley Science and Conservation Strategy. This Strategy sets out the process for the WA Government's delivery on its 2011 election commitment to establish the Kimberley Wilderness Park and complementary marine protected areas, which would become Australia's largest conservation park.[20] The Strategy proposes to create new conservation areas under the CALM Act, and with a significant proportion of the proposed new areas falling on exclusive possession native title, to achieve this through joint management arrangements with Traditional Owners.

Joint management has been explored in various forms in Australia for a number of years, with the first jointly managed national park established in 1981 on the Coburg Peninsula north east of Darwin. At its most basic, joint management is a partnership between traditional owners and government which seeks to balance the interests of Indigenous people, conservationists, governments and tourists. [21] It has been described as both an attempt to find common ground, and a trade-off between the rights of interest of

[16] Department of Prime Minister and Cabinet, "Indigenous Protected Areas" at https://www.dpmc.gov.au/indigenous-affairs/environment/indigenous-protected-areas-ipas; Bauman T and Smyth D. (2007) "Indigenous partnerships in protected area management in Australia: three case studies", The Australian Institute for Aboriginal and Torres Strait Islander Studies, 65.
[17] See generally Country Needs People at http://www.countryneedspeople.org.au/.
[18] See s41 *Land Administration Act 1997 (WA)* and ss5,6 *Conservation and Land Management Act 1984* (WA).
[19] Section 42 *Land Administration Act 1997* (WA).
[20] Government of Western Australia (2011) "Kimberley Science and Conservation Strategy".
[21] Kerins, S. (2016) "Kimberley conservation threatens to take a step back on Indigenous rights" *Australian Environment Review,* 186.

Indigenous people, and the right and interests of government conservation agencies and the wider Australian community.[22] While there are examples of successful joint management arrangements, one of the strongest criticisms is that it inevitably involves government-led coercive partnerships, with asymmetrical power relations.[23] A broadly publicised example of this is the tension between Traditional Owners' desire to close Uluru to climbers and the Northern Territory Government's desire to use it as a tourism opportunity.[24]

The benefits and compromises which flow from joint management are inevitably fact specific, and will depend on the underlying rights and tenure of the traditional owners, the governance and power relations of the joint management arrangements, the aspirations of traditional owners and the extent to which joint management helps to further these. Recent developments in Queensland, where traditional owners have agreed to the development of jointly managed National Parks in exchange for the creation of equivalent areas of freehold title[25] suggest the extent to which joint management can be viewed or used as a trade-off or bargaining tool.

Under the WA Government's approach to joint management, the proposed areas would be brought under the CALM Act as either jointly vested or jointly managed lands,[26] with the regulatory protections of the CALM Act applying. Lands would be managed jointly by the Department of Parks and Wildlife and Traditional Owners in accordance with a negotiated Joint Management Agreement.

One major concern in relation to the WA Government's proposed model of joint management for the Kimberley is that it moves from the existing approach of Indigenous-led sole management under IPAs, to a government-centric approach, with a significant lessening of indigenous rights.[27] These concerns are amplified by the positioning of the WA Government in relation to indigenous rights more broadly, with the government actively pursuing a policy to erode native title rights and interests.[28] WA Premier Mr Colin Barnett recently said:

> "What I don't want to see, and what you don't want to see, is increasing areas of the State, particularly say in the Kimberley, being tied up in conservation of a sort …The conservation issue, particularly in the Kimberley, is important, but the State has taken on that responsibility… The conservation of the Kimberley has been done by the government and it is government that should do that."[29]

His statement suggests the WA Government remains caught in the historical paradigm of traditional government-controlled National Parks, which will make any attempts at genuine and equal partnership through joint management difficult to realise.

An alternative approach

The different models of Indigenous conservation can be described as a spectrum, with Indigenous sole management at one end, co-management in the middle, and government management, with an Indigenous advisory role, at the other end.[30] In the Kimberley, where traditional owners hold exclusive possession native title rights and are actively managing areas for conservation through IPAs, the WA Government's proposal

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[22] Smyth D and Jaireth H. (2012) "Shared governance of protected areas: recent developments", 2012(2) *National Environmental Law Review,* 57.
[23] Smyth D, "Joint management of national parks in Australia" in Baker R, Davies J and Young E (eds), *Working on Country – Contemporary Indigenous Management of Australia's Lands and Coastal Regions*, Oxford University Press, Oxford 2001, cited in Kerins, S. (2016) "Kimberley conservation threatens to take a step back on Indigenous rights" *Australian Environment Review,* 187.
[24] Discussed in Kerins, S. (2016) "Kimberley conservation threatens to take a step back on Indigenous rights" *Australian Environment Review,* 187.
[25] Picone, A. (2016) "Rethinking National Parks: How to make everyone a winner" in New Matilda at https://newmatilda.com/2016/10/28/rethinking-national-parks/.
[26] See sections 7, 8A and 8AA *Conservation and Land Management Act 1984* (WA).
[27] Kerins, S. (2016) "Kimberley conservation threatens to take a step back on Indigenous rights" *Australian Environment Review,* 186.
[28] Oxfam International (2016) "Kimberley case study" in *Custodians of our land defenders of our future* available at https://www.oxfam.org.au/wp-content/uploads/2016/09/bn-australia-kimberley-land-rights-260916-en.pdf.
[29] Premier Colin Barnett speaking at the Pastoralists and Graziers Association Convention, Perth, 2016.
[30] Bauman T and Smyth D. (2007) "Indigenous partnerships in protected area management in Australia: three case studies", The Australian Institute for Aboriginal and Torres Strait Islander Studies, 10.

for joint management, which could involve surrendering control of traditional lands and removing independent decision-making,[31] suggests a perplexing move down this spectrum, and demonstrates the need for an alternative pathway which supports Indigenous aspirations of sole management of country. In the Kimberley, this could be achieved through amendments to the CALM Act and *Land Administration Act 1997* (WA) to allow for the recognition of IPAs, or through new legislation providing for the creation of 'Aboriginal National Parks'.

Amendments to existing WA laws to recognise IPAs may go some way to addressing the dual challenges of limited environmental protections and limited resources for IPAs. In the Northern Territory, the *Territory and Parks Wildlife Conservation Act* (NT) has been used to provide Territory Government recognition the Dhimurru IPA, allowing rangers to leverage increased resources and protections.[32] Under the *Territory and Parks Wildlife Conservation Act* (NT), Aboriginal corporations can enter into a legal agreement with the Territory government for the protection and provision of resources for a conservation area.[33] This approach can be distinguished from existing CALM Act provisions relating to joint management or joint vesting which, while allowing for joint management agreements, shift management responsibility away from traditional owners into a joint management body, as well as potentially impacting the underlying tenure and native title rights and interests. To complement these changes, changes would also be required to the *Land Administration Act 1997* (WA) to allow for the declaration of Class A Reserves over these areas in a way that would not impact on the underlying rights of native title holders.

Given the extent of changes that would be required to the CALM Act and *Land Administration Act 1997* (WA) to achieve this outcome, a more straight forward approach could be the development of new legislation to allow for the creation of Aboriginal National Parks. Key features of this legislation should include the ability to limit certain activities without Parliamentary approval (similar to a Class A Reserve); the ability to regulate certain activities and manage visitors – with approval coming back to the native title holders as opposed to the Minister; the ability of rangers to enforce plans of management; and an avenue for the WA Government to invest resources – recognising that the Aboriginal National Park delivers valuable conservation outcomes. There is precedent in WA for the creation of conservation areas through specific legislation, although this has generally been site-specific.[34]

Conclusion

Developments in conservation and land management, including the development of IPAs, the growth of private conservation areas and recent announcements by the Queensland Government of an intention to enable the creation of private national parks,[35] demonstrate the strong potential for indigenous people to be controlling and managing conservation outcomes on Indigenous lands.

IPAs have provided a vehicle for indigenous people to pursue the goal of sole-Indigenous management of conservation areas for over 30 years. However, where indigenous people have aspirations to strengthen conservation outcomes in IPAs, including through leveraging additional funding or enforcing IPA plans of management, the voluntary structure of IPAs may no longer be adequate.

In the Kimberley, the alternative proposed to IPAs by the WA Government is a model of joint management. This represents a swing away from indigenous-led management, towards more traditional models of State controlled conservation.

[31] Kerins, S. (2016) "Kimberley conservation threatens to take a step back on Indigenous rights" *Australian Environment Review,* 186.
[32] Ibid, 187.
[33] Section 73 Territory and Parks Wildlife Conservation Act (NT).
[34] See for example *Rottnest Island Authority Act 1987* (WA).
[35] Roberts G (2016) "Queensland could offer national parks to private landholders" in ABC News available at http://www.abc.net.au/news/2016-10-29/qld-government-to-give-national-park-protections-to-private-lan/7977730.

Non-conducive political and legal settings are amongst the greatest challenges to indigenous-led conservation management.[36] In order to build on the last 30 years of international progress in conservation management, an alternative approach is needed which strengthens indigenous rights to sole management through providing pathways to funding and enforcement. Models for such an approach already exist in the Northern Territory and in site-specific national park legislation in WA. The WA Government should work with the Commonwealth Government and traditional owners to build on international progress and domestic experience in indigenous conservation management and pioneer a new model for indigenous-led conservation management.

[36] Tauli-Corpuz V (Special Rapporteur of the Human Rights Council on the rights of indigenous peoples) (2016) "Rights of Indigenous People" in A/71/229, para 47.