



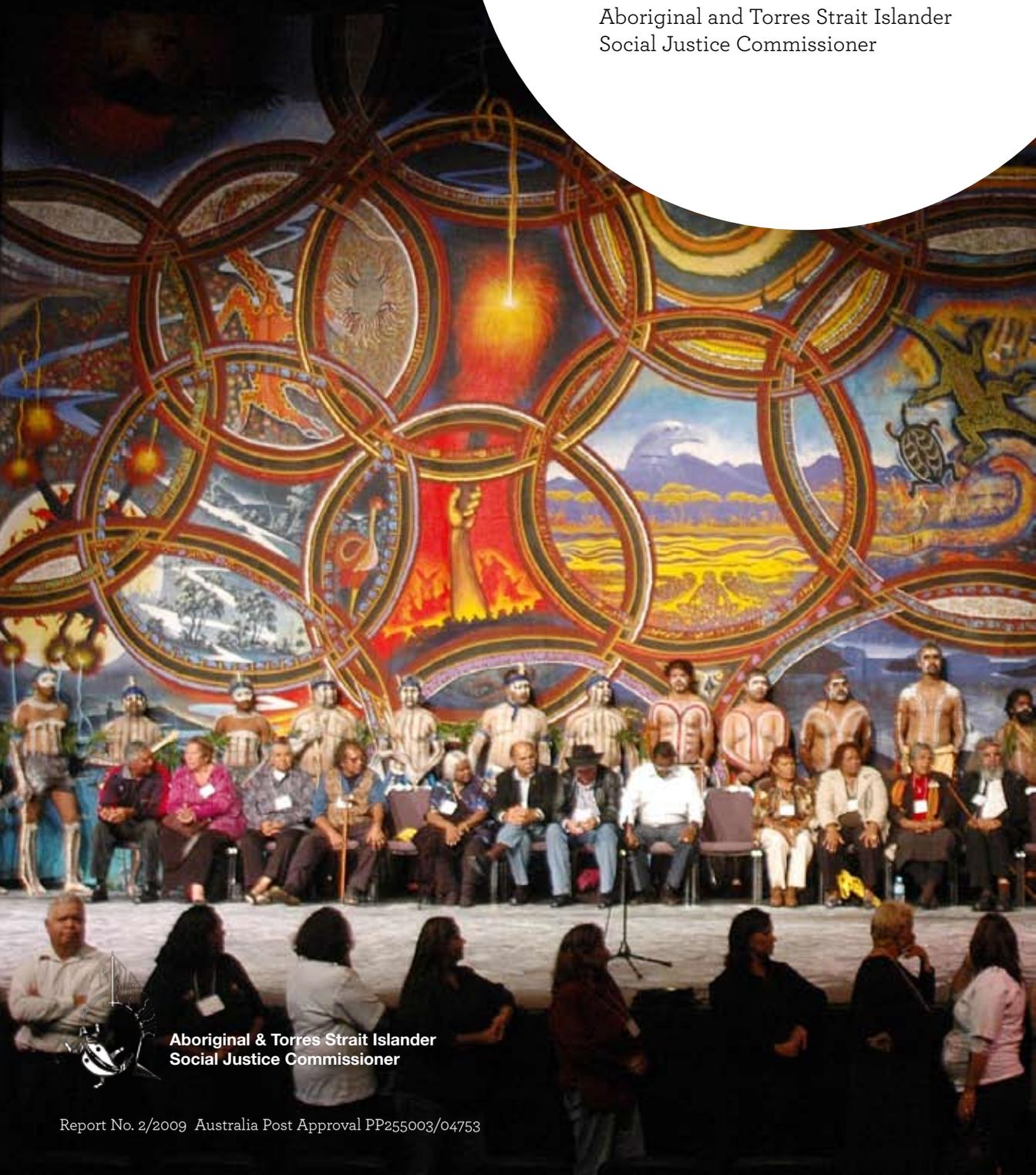
**Australian
Human Rights
Commission**

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2008

Native Title Report

Aboriginal and Torres Strait Islander
Social Justice Commissioner



**Aboriginal & Torres Strait Islander
Social Justice Commissioner**

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The cover photograph taken by Toni Wilkinson is courtesy of the Australian Institute of Aboriginal and Torres Strait Islander Studies with permission from the South West Aboriginal Land and Sea Council. The canvas in the photograph was used as the backdrop for the 2008 Annual Native Title Conference held in Perth on Noongar country. Six Noongar artists worked together to produce the master piece. They were, Shane Pickett, Lance Chadd, Troy Bennell, Sharyn Egan, Alice Warrell and Yvonne Kickett.

The material in this publication includes views and recommendations of individual contributing authors, which do not necessarily reflect the views of the Australian Human Rights Commission or indicate its commitment to a particular course of action.

Please be aware that this publication may contain the names or images of Aboriginal and Torres Strait Islander people who may now be deceased.



Native Title Report 2008



Aboriginal & Torres Strait Islander Social Justice Commissioner

Report of the Aboriginal & Torres Strait Islander Social
Justice Commissioner to the Attorney-General as
required by section 46C (1) (a) Human Rights and Equal
Opportunity Commission Act 1986 (Cth).



**Australian
Human Rights
Commission**

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**Aboriginal & Torres Strait
Islander Social Justice
Commissioner**

Aboriginal and Torres Strait Islander Social Justice Commissioner

The position of the Aboriginal and Torres Strait Islander Social Justice Commissioner was established within the Australian Human Rights Commission in 1993 to carry out the following functions:

- (1) Report annually on the enjoyment and exercise of human rights by Aboriginal peoples and Torres Strait Islanders, and recommend where necessary on the action that should be taken to ensure these rights are observed.
- (2) Promote awareness and discussion of human rights in relation to Aboriginal peoples and Torres Strait Islanders.
- (3) Undertake research and educational programs for the purposes of promoting respect for, and enjoyment and exercise of, human rights by Aboriginal peoples and Torres Strait Islanders.
- (4) Examine and report on enactments and proposed enactments to ascertain whether or not they recognise and protect the human rights of Aboriginal peoples and Torres Strait Islanders

The Commissioner is also required, under Section 209 of the Native Title Act 1993 (Cth), to report annually on the operation of the Native Title Act and its effect on the exercise and enjoyment of human rights by Aboriginal peoples and Torres Strait Islanders.



About the Social Justice Commissioner's logo

The right section of the design is a contemporary view of traditional Dari or head-dress, a symbol of the Torres Strait Island people and culture. The head-dress suggests the visionary aspect of the Aboriginal and Torres Strait Islander Social Justice Commissioner. The dots placed in the Dari represent a brighter outlook for the future provided by the Commissioner's visions, black representing people, green representing islands and blue representing the seas surrounding the islands. The Goanna is a general symbol of the Aboriginal people.

The combination of these two symbols represents the coming together of two distinct cultures through the Aboriginal and Torres Strait Islander Commissioner and the support, strength and unity which it can provide through the pursuit of social justice and human rights. It also represents an outlook for the future of Aboriginal and Torres Strait Islander social justice, expressing the hope and expectation that one day we will be treated with full respect and understanding.

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**Australian
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18 February 2009

The Hon Robert McClelland MP
Attorney-General
Parliament House
CANBERRA ACT 2600

Dear Attorney

I am pleased to present to you the *Native Title Report 2008* in accordance with section 209 of the *Native Title Act 1993*.

The report is focused on two main topics. First I give an overview of changes to native title law and policy, and summarise native title cases that were heard during the reporting period.

The second half of the report focuses on climate change and water policy, and makes a number of recommendations aimed at heightening Indigenous participation and engagement in these policy areas. While this includes consideration of the native title implications of these issues, I have also used this opportunity to examine the enjoyment and exercise of human rights by Aboriginal and Torres Strait Islander peoples in light of other changes to policy and legislation made between 1 July 2007 and 30 June 2008 in accordance with section 46C(1) (a) of the *Human Rights and Equal Opportunity Commission Act 1986*.

The report also includes two case studies which demonstrate the potential impacts of climate change on the human rights of Torres Strait Islanders and the Indigenous nations of the Murray-Darling Basin.

I look forward to discussing the report with you.

Yours sincerely

Tom Calma
Aboriginal and Torres Strait Islander
Social Justice Commissioner

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Note – Use of the terms ‘Aboriginal and Torres Strait Islander peoples’ and ‘Indigenous peoples’

The Aboriginal and Torres Strait Islander Social Justice Commissioner recognises the diversity of the cultures, languages, kinship structures and ways of life of Aboriginal and Torres Strait Islander peoples. There is not one cultural model that fits all Aboriginal and Torres Strait Islander peoples.

Aboriginal and Torres Strait Islander peoples retain distinct cultural identities whether they live in urban, regional or remote areas of Australia.

Throughout this report, Aborigines and Torres Strait Islanders are referred to as **‘peoples’**. This recognises that Aborigines and Torres Strait Islanders have a collective, rather than purely individual, dimension to their livelihoods. Throughout this report, Aboriginal and Torres Strait Islander peoples are also referred to as **‘Indigenous peoples’**.

The use of the term ‘Indigenous’ has evolved through international law. It acknowledges a particular relationship of Aboriginal people to the territory from which they originate. The United Nations High Commissioner for Human Rights has explained the basis for recognising this relationship as follows:

Indigenous or aboriginal peoples are so-called because they were living on their lands before settlers came from elsewhere; they are the descendants – according to one definition – of those who inhabited a country or a geographical region at the time when people of different cultures or ethnic origins arrived, the new arrivals later becoming dominant through conquest, occupation, settlement or other means... (I)ndigenous peoples have retained social, cultural, economic and political characteristics which are clearly distinct from those of the other segments of the national populations.

Throughout human history, whenever dominant neighbouring peoples have expanded their territories or settlers from far away have acquired new lands by force, the cultures and livelihoods – even the existence – of indigenous peoples have been endangered. The threats to indigenous peoples’ cultures and lands, to their status and other legal rights as distinct groups and as citizens, do not always take the same forms as in previous times. Although some groups have been relatively successful, in most part of the world indigenous peoples are actively seeking recognition of their identities and ways of life.¹

The Social Justice Commissioner acknowledges that there are differing usages of the terms ‘Aboriginal and Torres Strait Islander’, ‘Aboriginal’ and ‘indigenous’ within government policies and documents. When referring to a government document or policy, we have maintained the government’s language to ensure consistency.

¹ United Nations High Commissioner for Human Rights, *Fact sheet No.9 (Rev.1), The Rights of Indigenous Peoples* (1997). At: <http://www.unhcr.ch/html/menu6/2/fs9.htm> (viewed 8 December 2008).



Ngallak Koort Boodja (Our Heart Land) Noongar representatives at the 2008 Native Title Conference, Proud and Strong...

The Ngallak Koort Boodja (Our Heart Land) Canvas

The project was developed over three years for the Noongar Focus of the Perth International Arts Festival in 2006. The concept of a major artwork uniting all 14 Noongar clan groups including Wajuk, Amangu, Yued, Balladong, Binjareb, Wilmen, Wardandi Geneang, Bibbulmen, Minang, Goreng, Wujari, Nyaki-Nyaki, and Kalaamaya was guided by the Noongar Elders and representatives. These representatives were elected to ensure that the project reflected in an art piece a symbol of the living culture and strong identity of the Noongar Nation. Six artists worked together to produce the master piece. The six Noongar artists were Shane Pickett, Lance Chadd, Troy Bennell, Sharyn Egan, Alice Warrell and Yvonne Kickett.

The Canvas Explained

The half and full circles represent the 14 clans of the Noongar people, inner full circles represent the six seasons.

- Eagles and crows – representing the summer season and the heat of the summer when there are many carcasses.
- Fire Tree – a symbol of all Noongar Country, as balga trees are found all through Noongar Country. The arm coming out from the land represents how Noongar people come from the land.
- Perth – Kings Park.
- Full Moon – an important time of each month. The landscape on this part of the canvas reflects the Carrolup style art.
- Dolphins – Noongar people ‘sing up’ dolphins to herd fish up to the shore so they can be caught.
- Christmas Tree – Moodja – when people die, their spirits go back to the tree. The tree is sacred and cannot be cut down. It is also important for the shade it gives.
- One river represents all rivers.
- One waterhole represents all waterholes.
- Yellow and orange goannas and turtles – for medicine.
- Stirling Ranges – place of the Golden Eagle.
- King George Sound – Albany.

Contents

The report overview: It's time to talk	1
1. The Native Title Report 2008	2
1.1 The Native Title Report 2008 – Summary	3
2. Recommendations	5
<hr/>	
Chapter 1 The year in review	11
1. The Declaration on the Rights of Indigenous Peoples	12
2. The National Apology	13
3. A new approach to native title?	14
3.1 Trickle down of the new policy approach	18
4. The next 12 months?	21
<hr/>	
Chapter 2 Changes to the native title system – one year on	23
1. General observations about the 2007 changes	24
2. Changes to the claims resolution process	25
2.1 Relationship between the NNTT and the Federal Court	26
2.2 Registration test amendments	29
3. Changes to native title representative bodies	31
3.1 Recognition periods	32
3.2 Operation areas	33
4. Changes to respondent funding	35
5. Changes to prescribed bodies corporate	36
5.1 Financial support	37
5.2 Fee for service	39
5.3 PBC Regulations	39
6. The CATSI Act 2006	40
7. Improving native title – as simple as an attitude change?	42
7.1 Further suggestions for improvement	44

.....		
Chapter 3	Selected native title cases: 2007-08	51
1.	Other Court decisions	52
2.	Bodney v Bennell – the Noongar appeal	53
	2.1 The case	53
	2.2 Successful appeal ground 1 – Continuity	54
	2.3 Successful appeal ground 2 – Connection	56
	2.4 The future of the Noongar peoples' claim	57
3.	Western Australia v Sebastian – the Rubibi appeal	58
	3.1 The case	59
	3.2 Content of native title rights and interests	60
	3.3 Extinguishment of native title rights and interests	62
	3.4 The future of the Yawuru peoples' claim	62
4.	Griffiths v Minister for Lands, Planning and Environment (Northern Territory)	63
	4.1 The case	63
	4.2 Ground 1: Acquiring native title only, where no other interests in the land exist	65
	4.3 Ground 2: Acquiring land for the benefit of a third party	65
	4.4 Justice Kirby's dissenting judgment	66
	4.5 The outcome of the case – disposable native title	68
5.	Blue Mud Bay – Northern Territory v Arnhem Land Aboriginal Land Trust	76
	5.1 The case	77
	5.2 The impact of the National Apology	78
	5.3 The future of fishing in the NT	79
	5.4 Implications of the case on native title and other land rights regimes	81
6.	Conclusion	82
	6.1 Section 223	83
	6.2 Presumption of continuity	84
	6.3 Capacity of the court to take into account reasons for change	85
	6.4 Revitalisation of culture	87
	6.5 Recognition and healing	88
.....		
Chapter 4	Climate change context – International and Domestic	91
1.	An historical overview	92
2.	The International Framework	94
	2.2 The Millennium Development Goals	97
	2.3 United Nations Permanent Forum on Indigenous Issues	98
	2.4 Declaration on the Rights of Indigenous Peoples	99
	2.5 The Second International Decade on the World's Indigenous People	100
3.	The Domestic Framework	103
	3.1 Australian Government Reviews	104
4.	Complimentary Legislation	107
	4.1 Environmental Protection and Biodiversity Conservation Act 1999	108
5.	The need for a human rights-based approach to climate change policy	109

6.	Indigenous peoples', human rights, and climate change	110
6.1	Indigenous participation in climate change policy	111
7.	Conclusion	112

Chapter 5 Indigenous peoples and climate change 115

1.	Overview of key climate change issues for Australia's Indigenous peoples'	116
2.	The Indigenous Estate – 'our' greatest asset?	118
2.1	Native Title	120
2.2	Land Rights	124
2.3	The National Reserve System	125
2.4	Cultural Heritage	127
2.5	Diverse Climatic Regions	129
3.	The climate change challenge	130
3.1	Access to information	130
3.2	Pressures on Indigenous lands and waters	132
3.3	Health and well-being of Indigenous people	140
3.4	Protection of Indigenous knowledge's	143
4.	Opportunities from climate change	143
4.1	The Indigenous Economic Development Strategy	143
4.2	Indigenous contributions to mitigate and adapt to climate change	146
4.3	The provision of environmental services – 'culture based economies'	151
4.4	Sustainable Indigenous communities	155
4.5	Inclusion of climate change outcomes in agreement making	159
5.	Indigenous Engagement with Policy Formulation	161
5.1	Climate Change Litigation	163
6.	Close the Gap – Join the Dots	164
	Recommendations	167

Chapter 6 Indigenous Peoples and Water 169

1.	Introduction	169
2.	Key Issues for Indigenous peoples	170
3.	The Cultural Value of Water	171
3.1	Cultural vs economic vs environmental rights	173
4.	Protection of Indigenous Peoples Rights to Water	173
4.1	The International Framework	174
4.2	The Domestic Framework	179
5.	Indigenous Water Management	198
6.	Pressures on Indigenous Waters	205
7.	Opportunities for Indigenous peoples to access their right to water	207
8.	Conclusion	208

.....		
Chapter 7	The protection of Indigenous knowledge's	211
	1. Overview	211
	2. Classes of threat to Indigenous traditional knowledge	214
	3. The existing framework	215
	3.1 International	215
	3.2 Domestic	219
	4. Protection of Indigenous Knowledge's	221
	5. Principles of Protection	225
	5.1 A framework for protection	226
.....		
Case study 1	Climate change and the human rights of Torres Strait Islanders	229
	1. Potential effects of climate change on the Torres Strait Islands	232
	2. Climate change and the human rights of Torres Strait Islanders	235
	2.1 The right to life	236
	2.2 The right to water	237
	2.3 The right to food	238
	2.4 The right to health	239
	2.5 The right to a healthy environment	240
	2.6 The right to culture	242
	3. What is already being done?	247
	3.1 The Torres Strait Coastal Management Committee	248
	3.2 A federal study: climate change for northern Indigenous communities	250
	4. What next?	251
	4.1 Information, knowledge, data	251
	4.2 Governance, planning and strategies	252
	4.3 Evaluation and monitoring	253
	4.4 Awareness and capacity building	253
	5. If things continue as they are? Torres Strait Islanders rights of action	255
	5.1 <i>Environmental Protection Act 1994</i> (Qld)	256
	5.2 Negligence	256
	5.3 Public nuisance	257
	5.4 Human Rights Remedies	257
	6. Conclusion	259
.....		
Case Study 2	The Murray-Darling Basin – an ecological and human tragedy	265
	1. Overview	265
	2. Indigenous peoples of the Murray-Darling Basin	269
	3. Potential effects of climate change on the Murray-Darling River Basin and it's Indigenous Peoples	271
	3.1 Mismanagement, long-term drought, and climate change	272
	3.2 Wetlands, Water Rights and the Cultural Economy	275
	4. Climate change and the human rights of the Indigenous Peoples living in the Murray-Darling River Basin	289
	4.1 International obligations	289
	4.2 Domestic Protection	291
	5. What is being done?	291
	6. What could be done?	298

Appendix 1	Native Title Determinations	301
Appendix 2	Native Title Statistics 2007-08	307
Appendix 3	Social Justice Package – recommendations made in 1995	315
Appendix 4	The international framework for engagement of indigenous peoples in climate change policy	321
Appendix 5	Government initiatives to address the impacts of climate change on Indigenous peoples	343
Appendix 6	Projected Climate Change Impacts and Potential Impacts on Indigenous Communities	371
Appendix 7	Overview of Australian water sector legislation and policies	381
Appendix 8	Desert Knowledge CRC: Aboriginal Intellectual Property Protocol	395
Appendix 9	Acronyms/Abbreviations List	405

List of case studies, maps, text boxes and tables

Chapter 1	Text Box 1: Victoria's new approach to land justice	17
	Text Box 2: The Australian Capital Territory – establishing the bases for good relationships and agreements	18
Chapter 2	Map 1: Representative Aboriginal/Torres Strait Islander Body Areas 1 July 2008	35
	Map 1: Selected cases from 2007-2008	52
Chapter 3	Text Box 1: Full Federal Court decision in Griffiths v Northern Territory (2007) 243 ALR 72	75
Chapter 4	Text Box 1: What is climate change?	92
	Text Box 2: Responding to climate change	93
	Text Box 3: Examples of how human rights will be negatively affected by climate change	96
	Text Box 4: The Millennium Development Goals	97
	Text Box 5: The Second International Decade on the World's Indigenous People – Programme of Action – Recommendations regarding the Environment	102
	Text Box 6: What is an emissions trading scheme?	105
Chapter 5	Text Box 1: The Indigenous Estate	118
	Map 1: Australian National Reserve System accounts for 11.5% of Australia's land area (88,436,811 ha) and has 8667 protected areas	125
	Text Box 2: The National Reserve System has its origins in the Rio Earth Summit of 1992	126
	Map 2: Australian climate zones – major classification groups	130
	Text Box 3: Western Arnhem Land Fire Abatement (WALFA)	134
	Text Box 4: Indigenous Economic Development Strategy (IEDS)	144
	Text Box 5: The National Indigenous Climate Change (NICC) Research Project	149
	Text Box 6: Australian Dialogue and National Framework	150
	Text Box 7: The Bushlight Project – Centre for Appropriate Technology	156
	Text Box 8: NSW BioBanking Scheme	160
	Text Box 9: Attitudinal change requires:	165
Chapter 6	Text Box 1: What are water rights?	170
	Table 1: International Instruments	174
	Text Box 2: The Ramsar Convention	177
	Text Box 3: Paruku IPA – Western Australia	185
	Text Box 4: Community Water Grants Program – The Nyirripi Community Council	186

	Text Box 5: Indigenous Economic Development Strategy (IEDS)	187
	Text Box 6: Aboriginal Cultural Licence – Nari Nari Tribal Council	189
	Text Box 7: The Return of Lake Condah to the Gunditjmarra	193
	Text Box 8: <i>Cape York Peninsula Heritage Act 2007</i>	198
	Text Box 9: International Water Experts Forum, Garma Festival, 2008	199
	Text Box 10: The Indigenous Water Policy Group	200
	Text Box 11: The two main objectives of the IWPG	201
	Text Box 12: Murray Lower Darling Rivers Indigenous Nations (MLDRIN)	203
	Text Box 13: The primary objectives of the Australian Indigenous Water Focus Group	204
Chapter 7	Text Box 1: What is Indigenous traditional knowledge?	212
	Table 1: Summary of major international instruments that recognise Indigenous peoples' right to protect their traditional knowledge	216
	Text Box 2: The United Nations University (UNU) Centre on Traditional Knowledge	218
	Text Box 3: Traditional Knowledge Revival Pathways	221
	Text Box 4: Use and Occupancy Mapping: Murray-Darling River Basin	223
Case Study 1	Map 1: The Torres Strait region	230
	Text Box 1: Impacts of climate change on small islands	234
	Text Box 2: TSRA recommendations	254
Case Study 2	Text Box 1: The Murray-Darling Basin	265
	Map 1: The Murray-Darling Basin	266
	Text Box 2: Modern perceptions of the Murray-Darling Basin	267
	Table 1: Proportion of the State in Murray-Darling Basin	268
	Map 2: The Indigenous Nations who have formed the alliance the Murray Lower Darling Rivers Indigenous Nations	269
	Text Box 3: The Importance of the Rivers to the Indigenous Nations	270
	Text Box 4: Projected climate change impacts in the MDB – The Murray-Darling Basin Sustainable Yields Project	274
	Text Box 5: Cultural Living – Agnes Rigney of the Ngarrindjeri peoples	276
	Text Box 6: What is a wetland?	277
	Text Box 7: What are sulfidic sediments?	279
	Text Box 8: The high biodiversity value of river red gum forests	280
	Text Box 9: Declaration on the Rights of Indigenous Peoples	283
	Text Box 10: What is cultural water?	284
	Text Box 11: The cultural economy – Jeanette Crew of the Mutti Mutti peoples	285
	Text Box 12: Declaration on the Rights of Indigenous Peoples	287
	Text Box 13: International Covenant on Economic, Social, and Cultural Rights	287
	Text Box 15: The purpose of the Memorandum of Understanding between Murray Lower Darling Rivers Indigenous Nations and Murray-Darling Basin Commission	294
	Text Box 16: The purpose of the Cooperation Agreement between Murray Lower Darling Rivers Indigenous Nations and Environmental Non-Government Organisations	295
	Text Box 17: Use and Occupancy Map – Yorta Yorta	296
	Text Box 18: Lesson to be Learned	299

The report overview:

It's time to talk

.....

Today we honour the Indigenous peoples of this land, the oldest continuing cultures in human history.¹

2008 was a significant year for Aboriginal and Torres Strait Islander peoples with far reaching effects, although not limited to, native title.

After 11 years of conservative rule under the Howard Government, that saw Indigenous peoples' native title rights and interests severely degraded under the Wik 10 Point Plan, the election of the Labor Government raised an opportunity to renew the relationship between the State and Australia's Indigenous peoples.

The National Apology in February was a significant and historic event that recognised the devastating impact of Stolen Generation policies. These policies facilitated the dispossession and removal of Indigenous peoples from their traditional lands, resulting in the disruption of connection to their country and their culture. This has in turn impacted greatly upon the ability or success of Aboriginal and Torres Strait Islander peoples claiming native title, with the cruel twist that the more an Aboriginal or Torres Strait Islander has been hurt by government policy, the less likely they are to have their native title recognised. I was honoured to represent the Stolen Generations and their families in giving the formal Indigenous response to the Apology.

This new opportunity has also resulted in an early announcement from the Attorney-General to reconsider the current adversarial approach of the native title system and encouraged States and native title stakeholders to engage in native title negotiations in a more flexible manner.² This approach was complemented with the introduction of policies aimed at improving the social and economic situation of Aboriginal and Torres Strait Islander peoples. Some of the policies are inextricably linked to native title and the rights of Indigenous peoples to their lands, waters and natural resources. For example, in the new government's National Platform and Constitution, the Australian Labor Party stated that it:

- understands that land and water are the basis of Indigenous spirituality, law, culture, economy and well-being
- acknowledges that native title and land rights are both symbols of social justice and valuable economic resources to Indigenous Australians

1 Prime Minister of Australia, Apology to Australia's Indigenous Peoples, House of Representatives, Parliament House, Canberra, 13 February 2008. At: http://www.pm.gov.au/media/speech/2008/speech_0073.cfm.

2 Attorney-General, *Speech*, (Speech delivered at the Negotiating Native Title Forum Brisbane, 29 February 2008). At: http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/Speeches_2008_29February2008-NegotiatingNativeTitleForum (viewed March 2008).

- recognises that a commitment was made to implement a package of social justice measures in response to the High Court's Mabo decision, and will honour this commitment
- fully supports native title as a property right under Australian law.³

1. The Native Title Report 2008

As with previous reports submitted by the Aboriginal and Torres Strait Islander Social Commissioner, this year's report will examine the operation of the native title system and its affect on the exercise and enjoyment of human rights by Aboriginal and Torres Strait Islander peoples during the 2007-2008 reporting period. It will also discuss the effect of changes that were made to the native title system during 2007 under the previous Government's native title reform process.

The report also considers three important native title cases before the courts during the 2007- 2008 reporting period; Noongar, Rubibi and Griffiths. This discussion is followed by a discussion of the Blue Mud Bay case which related to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). These cases highlight particular human rights implications for Aboriginal and Torres Strait Islander peoples, including:

- the compulsory acquisition of lands where no other interests in the land exist
- the ever present issues of connection and continuity
- the extinguishment of native title rights and interests
- the legitimacy of elements of traditional law and custom such as descent and succession.

In addition to examining the progress the government has made in achieving rights and equality for Indigenous peoples, and how the government can complement its symbolic Apology with practical, beneficial changes to the native title system, the theme of the Native Title Report 2008 includes the topical issues of climate change and water. It is in this context that I also consider the protection of Indigenous knowledge in policies and processes developed in response to these issues.

In examining these issues, and more particularly the effect they have on Indigenous peoples in Australia, I make a number of recommendations aimed at heightening the participation and engagement of Indigenous peoples in addressing these issues.

In order to invoke the imagination, I have also included two case studies which explore first hand the potential impacts of climate change on a number of human rights of the Indigenous peoples, particularly those living on the Torres Strait Islands and the Indigenous nations of the Murray-Darling Basin.

As I have endeavoured to do in previous reports, the Native Title Report 2008 considers issues relevant to Aboriginal and Torres Strait Islander peoples now and for the future.

I welcome the early actions of this Government and hope that they make every effort to work with Indigenous peoples across Australia to build on the positive energy that was felt on the 13 February 2008, the day of the Apology to the Stolen Generations, to ensure that we as a nation can finally move towards building sustainable Indigenous communities.

3 Australian Labor Party, Australian Labor Party National Platform and Constitution (2007). At: <http://www.alp.org.au/platform/>, chapter 13, paras 91-104 (viewed July 2008).

1.1 The Native Title Report 2008 – Summary

(a) Chapter 1

Chapter one, 'The Year in Review', is precisely that.

I also take the opportunity to revise significant events concerning Aboriginal and Torres Strait Islander peoples, and the effect of these upon native title. The ensuing time since the federal election has seen the historic National Apology, an indication of support for the *Declaration of the Rights of Indigenous Peoples*, and the active attempts of the Attorney-General and federal, state and territory Ministers to develop a new relationship between Indigenous and non-Indigenous Australians, coupled with a new attitude to native title. I welcome the reinvigorated approach being afforded to native title, and am hopeful of tangible, reportable changes occurring in the coming year.

(b) Chapter 2

In my *Native Title Report 2007*, I voiced my concerns over the impacts on the human rights of Indigenous peoples under the amendments to the native title system as enacted in 2007. This year I examine the practical effects the changes have had. The overwhelming response I received from stakeholders regarding the amendments was that they have had little to no impact thus far. However, this was coupled with ongoing concern that they do not go far enough in meeting the desired outcomes of the preamble of the Native Title Act, or assuring Indigenous peoples' rights.

Chapter 2 examines the various amendments such as the relationship between the Tribunal and the Federal Court, and amendments to the Registration Test, Native Title Representative Bodies (NTRBs), respondent funding and Prescribed Bodies Corporate (PBCs). I then consider the impact of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth), and the concurrent changes that are required to enable NTRBs and PBCs to comply with the regulatory requirements. I conclude the chapter by proffering some suggestions, based upon observations and feedback I have received from stakeholders, as to how the system can be improved.

(c) Chapter 3

Chapter 3 considers three important native title cases before the courts in 2007-2008; Noongar, Rubibi and Griffiths, followed by a discussion of the Blue Mud Bay case which related to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALRA). These cases highlight how the *Native Title Act* and other legislation impacts on the human rights of Aboriginal and Torres Strait Islander peoples. Ten determinations were made throughout the year, and eight claims were struck out.

The Noongar people met with disappointment when the Full Federal Court determined that Justice Wilcox had erred in making a determination of native title, particularly with regards to continuity requirements, the effects of white settlement and connection.

However, the Rubibi appeal, was successful, widening further the original native title determination in overturning some of the findings on extinguishment. Despite this positive outcome, the length and technical nature of the case demonstrates a litigious trend on the part of governments, contrary to the conciliatory approach they have committed to.

The High Court in Griffiths, the third case, found that native title rights and interests can be compulsorily acquired for the benefit of private business, thus providing confirmation that the Northern Territory Government can acquire native title rights and interests for any purposes whatsoever, including for the private benefit of a third party. Ultimately, due to a change of government, the native title was not acquired, but the case raises serious questions regarding acquisition.

And finally, the Blue Mud Bay decision gave cause for celebration to the Northern Territory's coastal Aboriginal population. The High Court recognised that the ALRA provides exclusive possession rights to the intertidal zone, extending to 80% of the Territory's coast line. I conclude the chapter by discussing possible reform to prevent the slow, technical and litigious progress of native title claims as seen all too often. Even where a determination is made, it is subject to appeal, or comes at the end of a long and frustrating journey.

(d) Chapter 4

In keeping with the theme of the Seventh Session of the United Nations Permanent Forum on Indigenous Issues, being 'Climate Change and its impacts on Indigenous peoples', I have considered this issue in the context of concerns raised by Indigenous Australians.

Chapter 4 provides an analysis of the international and domestic climate change policy and legislative framework with an aim to highlighting the existing mechanisms that may be drawn upon to ensure the development of climate change policy is extensive and adequately addresses the relationship to Indigenous peoples rights and interests in this regard.

(e) Chapter 5

Chapter 5 provides a discussion on the first topical issue covered by this report, the impacts of climate change on Australia's Indigenous peoples. A number of suggestions are offered in relation to the development of strategies to prepare in advance for these impacts. In addition, I discuss the opportunities arising from climate change, the potential for Indigenous peoples to take full advantage of such opportunities, and the level of assistance that will be required in order for people to secure benefits. This discussion is central to the Government's position that Indigenous peoples leverage their assets, the Indigenous estate, to achieve economic development.

I also discuss the work that Indigenous communities around the country are already doing to respond to climate change and to start preparing to engage in emerging carbon markets. However, I stress the need for Government to ensure that Indigenous people are fully engaged in this debate at all levels to guarantee the greatest possible outcomes.

(f) Chapter 6

The second topical issue considered in chapter 6 of this year's report is water. This topic is particularly important in light of the expected impacts from climate change as well as ongoing drought. While it is understood that water is a global concern, the discussion contained in this chapter highlights the specific concerns for Indigenous Australians including addressing the pressures but also being able to access the opportunities through working with Government on water management. Issues such as access to cultural water rights to fulfil cultural responsibilities, including environmental conservation, as well as the lack of protection of these rights to water under the current legislative framework that governs water resources is considered throughout this chapter.

(g) Chapter 7

In the context of both climate change and water, the protection of Indigenous peoples' knowledge's is an issue that is relevant to both. Particularly, where the use of Indigenous knowledge's has been identified as a vital component to responding to issues such as climate change and biodiversity conservation. Chapter 7 considers the lack of protection afforded under current intellectual property laws such as copyright and patenting and considers the need for the development of a mechanism which provides protocols around the use, access, and ownership of Indigenous knowledge's that includes a protection regime. Such a regime may include provisions similar to copyright and patenting. However these provisions would be in accordance with the traditional law and customs that govern this use and appropriation, and provide for the unique communal nature of this knowledge.

2. Recommendations

The following recommendations address the concerns raised in Native Title Report 2008.

Recommendations: Chapter 2

- 2.1 That any further review or amendment that the Australian Government undertakes to the native title system be done with a view to how the changes could impact on the realisation of human rights of Aboriginal and Torres Strait Islander peoples.
- 2.2 That the Australian Government respond to the recommendations made in the *Native Title Report 2007* on the 2007 changes to the native title system.
- 2.3 That the Australian Government and the National Native Title Tribunal draft a comprehensive and clear guide to the registration test. The Australian Government should consider whether further guidance on the registration test should be included in the law, through regulation or through amendment to the Native Title Act.
- 2.4 That the Australian Government monitor the impact of the Queensland NTRB amalgamations on the bodies' operation, and provide direction, assistance and resources to those bodies which require it.
- 2.5 That the Australian Government create a separate funding stream specifically for Prescribed Bodies Corporate and corporations which are utilising the procedural rights afforded under the Native Title Act.
- 2.6 That once the CATSI Act has been implemented, the Registrar of Indigenous Corporations and the Minister for Families, Housing, Community Services and Indigenous Affairs, together review the impact the law has on Indigenous corporations. In particular, the review should examine the impact of the CATSI Act on PBC's' ability to protect and utilise their native title rights and interests.
- 2.7 That the Registrar of Indigenous Corporations and the Minister for Families, Housing, Community Services and Indigenous Affairs, work closely to ensure that funding provided to registered PBCs is consistent with the aim of building PBC's' capacity to operate.

Recommendations: Chapter 3

- 3.1 That the Australian Government pursues consistent legislative protection of the rights of Indigenous peoples to give consent and permission for access to or use of their lands and waters. A best practice model would legislatively protect the right of native title holders to give their consent to any proposed acquisition. A second best option would be to amend s 26 of the Native Title Act to reinstate the right to negotiate for all compulsory acquisitions of native title, including those that take place in a town or city.
- 3.2 That the Australian Government amend the Native Title Act to provide a presumption of continuity. This presumption could be rebutted if the non-claimant could prove that there was 'substantial interruption' to the observance of traditional law and custom by the claimants.
- 3.3 That the Australian Government amend the Native Title Act to address the court's inability to consider the reasons for interruption in continuity. Such an amendment could state:

In determining a native title determination made under section 61, the Court shall treat as relevant to the question whether the applicant has satisfied the requirements of section 223:

 - whether the primary reason for any demonstrated interruption to the acknowledgment of traditional laws and the observance of traditional customs is the action of a State or Territory or a person who is not an Aboriginal person or Torres Strait Islander
 - whether the primary reason for any demonstrated significant change to the traditional laws acknowledged and the traditional customs observed by the Aboriginal peoples or the Torres Strait Islanders is the action of a State or Territory or a person who is not an Aboriginal person or Torres Strait Islander.
- 3.4 That the Australian Government amend the Native Title Act to define 'traditional' for the purposes of s 223 as being satisfied when the culture remains identifiable through time.

Recommendations: Chapter 4

- 4.1 That the Australian Government formally support and develop an implementation strategy on the Declaration on the Rights of Indigenous Peoples as a matter of priority.
- 4.2 That particular attention be paid to the impacts of climate change on Indigenous peoples in the formulation of Australia's climate change strategies. The recommendations of the United Nations Permanent Forum on Indigenous Issues (on the special theme of climate change and Indigenous peoples) and the provisions of the Program of Action for the Second International Decade of the World's Indigenous People provide important guidance in this regard.
- 4.3 That the Australian Government review the existing domestic mechanisms that are relevant to Indigenous peoples and climate change, and identify any inconsistencies or impediments and where further policy development or amendment is required.
- 4.4 That the Australian Government actively engage Indigenous Australians in post Kyoto negotiations, particularly in relation to the utilisation of the Kyoto mechanisms, international investment in carbon abatement, and issues around the urban migration of both internally displaced peoples and those that will require relocation in the region.
- 4.5 That the Australian Government actively engage Indigenous Australians in the development of the Carbon Pollution Reduction Scheme, particularly in relation to:
 - a. the protection and maintenance of Indigenous lands, waters, natural resources, and cultural heritage
 - b. to identify and facilitate access to economic opportunities arising from carbon abatement and mitigation.
- 4.6 That the regulatory framework for Australia's climate change policy guarantees and protects Indigenous peoples' engagement and participation. This should include Indigenous involvement in all aspects of climate change law and policy such as development, implementation, monitoring, assessment and review.

Recommendations: Chapter 5

- 5.1 That the Australian Government's focus on the economic aspects of Indigenous inclusion in climate change policy is extended to include social, cultural and environmental policy considerations.
- 5.2 That the Australian Government consider the particular impact of climate change on Indigenous peoples' human rights and ensure these are addressed when developing responses.
- 5.3 That in developing and implementing climate change policy, the Australian Government ensure that Indigenous communities are not further disadvantaged. The Australian Government should ensure that:
- Indigenous peoples do not bear an inequitable proportion of the cost of climate change
 - Indigenous peoples existing rights and interests are not jeopardised
 - Indigenous peoples' rights to lands and water, access to carbon resources, and other rights and interests are enhanced and fully protected.
- 5.4 That government departments which have specific responsibilities for Indigenous affairs (for example, FaHCSIA and Attorney-General's Department), work closely with departments responsible for climate change policy to ensure that the social, cultural, environmental and economic impacts of climate change on Indigenous peoples are identified and addressed. For example, how native title and land rights can help facilitate opportunities arising from climate change and carbon markets.
- 5.5 That the Australian Government fulfil its commitment to develop a legislative framework that provides for Indigenous participation in carbon markets that includes national principles for engagement with Indigenous peoples, including:
- the full participation and engagement of Indigenous peoples in negotiations and agreements between parties
 - the adoption of, and compliance with, the principle of free, prior and informed consent
 - the protection of Indigenous interests, specifically access to our lands, waters and natural resources and ecological knowledge
 - the protection of Indigenous areas of significance, biodiversity, and cultural heritage
 - the protection of Indigenous knowledge relevant to climate change adaptation and mitigation strategies
 - access and benefit-sharing through partnerships between the private sector and Indigenous communities
 - non-discrimination and substantive equality
 - access to information and support for localised engagement and consultation.
- 5.6 That the Australian Government ensure an ongoing commitment to these recommendations by seeking bipartisan support for Indigenous participation and engagement in climate change policy.

Recommendations: Chapter 6

- 6.1 That in accordance with international law and Australia's international obligations, the Australian Government:
- i) protects and promotes Indigenous peoples right to the equal exercise and enjoyment of their human right to water, by ensuring their full and effective participation and engagement in the development and implementation of water policy
 - ii) recognises and respects the importance of Indigenous traditional ecological knowledge and management of biodiversity and conservation, including water
 - iii) give greater consideration to the relevance of international mechanisms such as the Ramsar Convention and the Convention on Biological Diversity in the development of water policy.
- 6.2 That governments fully recognise the significance of water to Indigenous peoples and incorporate their distinct rights, including as water users, to water, the environment, economic development, participation and engagement into the *Water Act 2007*. In particular, the *Water Act* should be amended to include a distinct category that provides for "Indigenous cultural water use" and access entitlements.
- 6.3 That the Government amend the Native Title Act to extend the right to negotiate to apply to water resources, including development and extraction applications, and water management planning.
- 6.4 That governments develop and include in the National Water Initiative, specific guidelines on how to implement Indigenous water rights:
- i) that the National Water Commission give higher priority to ensuring that the values and interests of Indigenous peoples are considered, including:
 - the explicit inclusion of Indigenous interests in Water Plans
 - recognition and protection of existing rights and interests held by Indigenous peoples, including native title and cultural heritage rights
 - consistency across jurisdictions in providing for the recognition and protection of Indigenous rights and interests
 - consistency across jurisdiction in implementing Water Plans and National Water Policy.
 - ii) that National Water Policy includes explicit links to climate change policy.
- 6.5 That government departments that have specific responsibilities for Indigenous affairs (for example, the Department of Families, Housing, Community Services and Indigenous Affairs and the Attorney-General's Department) work closely with the Department of Environment, Water, Heritage and the Arts, and the Department of Climate Change, to ensure that the social, cultural, environmental and economic impacts and opportunities for Indigenous peoples arising from water and climate change are identified and addressed.

- 6.6 That Australian governments commit to a framework that provides for Indigenous participation in water policy that includes national principles for engagement with Indigenous peoples, including:
- the adoption of, and compliance with, the principle of free, prior and informed consent
 - the protection of Indigenous interests, specifically access to our lands, waters and natural resources and ecological knowledge
 - the protection of Indigenous areas of significance, biodiversity, and cultural heritage
 - the protection of Indigenous knowledge relevant to climate change adaptation and mitigation strategies
 - access and benefit-sharing through partnerships between the private sector and Indigenous communities
 - non-discrimination and substantive equality
 - access to information and support for localised engagement and consultation.

Recommendations: Chapter 7

- 7.1 That the Australian Government engage Indigenous peoples around the country to develop a legislative framework that provides for protection of Indigenous knowledge's and a protocol for the use of this knowledge.
- 7.2 That all governments amend relevant legislation and policy, such as the Native Title Act, Cultural Heritage legislations and various land rights regimes, to ensure consistency with the proffered national legislative regime framework. This should extend to all legislation that relates to Indigenous peoples and their rights and interests such as education, health, tourism, the arts and so on.
- 7.3 The proffered national legislative regime framework should be applied to all climate change and water policy and processes, including domestic and international negotiations relating to carbon, water and environmental markets.

Chapter 1

The year in review

.....

In November 2007, Australia elected a new federal government. With the new government came new policies aimed at improving Aboriginal's and Torres Strait Islander's social and economic situation. In the new government's National Platform and Constitution,¹ the Australian Labor Party stated that it:

- understands that land and water are the basis of Indigenous spirituality, law, culture, economy and well-being
- acknowledges that native title and land rights are both symbols of social justice and valuable economic resources to Indigenous Australians
- recognises that a commitment was made to implement a package of social justice measures in response to the High Court's Mabo decision, and will honour this commitment
- fully supports native title as a property right under Australian law
- fully supports the statutory recognition of inalienable freehold title under the *Aboriginal Land Rights (Northern Territory) Act 1976* and the right of property owners to provide free, prior and informed consent to any major changes affecting their interests
- believes that negotiation produces better outcomes than litigation and that land use and ownership issues should be resolved by negotiation where possible
- will facilitate the negotiation of more Indigenous Land Use Agreements and ensure that traditional owners and their representatives are adequately resourced for this task
- believes that the independence of native title representative bodies should be supported to enable them to freely advocate on behalf of the people they represent. It will evaluate the performance of these bodies against transparent indicators, including how satisfied traditional owners are with the service they have received
- will address the chronic staffing retention issues of native title representative bodies by supporting professional development and mentoring opportunities
- will ensure adequate resourcing for the core responsibilities of Prescribed Bodies Corporate.

1 Australian Labor Party, *Australian Labor Party National Platform and Constitution* (2007). At: <http://www.alp.org.au/platform/>, chapter 13, paras 91-104 (viewed July 2008).

These are welcome commitments which, if fulfilled, could greatly improve the human rights of Aboriginal and Torres Strait Islander peoples. This chapter outlines the progress that has been made over the past 12 months to improve the native title system. However, there is still a long way to go before these commitments can be said to have been realised.

1. The Declaration on the Rights of Indigenous Peoples

The *Declaration on the Rights of Indigenous Peoples* (the Declaration) was adopted by the General Assembly of the United Nations on 13 September 2007. It was adopted with 143 countries voting in favour, 11 abstaining and 4 voting against. Regrettably, Australia was one of the four countries which voted against the Declaration.

However, this does not detract from the significance of the Declaration, which was the culmination of over two decades of negotiations at the United Nations and fierce advocacy by indigenous peoples from all over the world since the 1970s. It reaffirms that indigenous people are entitled to all human rights recognised in international law without discrimination. But it also acknowledges that without recognising the unique collective rights of indigenous peoples and ensuring protection of our cultures, indigenous people can never truly be free and equal.

Significantly for indigenous peoples' rights relating to their lands and waters, Articles 25-32 provide for:

- rights to maintain traditional connections to land and territories
- ownership of such lands and protection of lands by the government
- establishment of systems to recognise indigenous lands
- rights to redress, and compensation for lands that have been taken
- conservation and protection of the environment
- measures relating to storage of hazardous waste and military activities on indigenous land
- protection of traditional knowledge, cultural heritage and expressions and intellectual property
- processes for development on indigenous land.²

With the change of Australia's federal government in November 2007, there was a change in position on the Declaration; the new government indicated it will support the Declaration, but that support is yet to be formally indicated.

Once this occurs, the challenge will be for the government and Indigenous peoples to together develop partnerships based on the principles set forth in the Declaration and on the basis of mutual respect.

2 *Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (2007) A/RES/61/295. At: <http://www.un.org/esa/socdev/unpfii/en/drip.html> (viewed July 2008).

2. The National Apology

The first significant event of the new government occurred on 13 February 2008 when the Prime Minister, Kevin Rudd made the National Apology to the Stolen Generations of Australia's Indigenous peoples in the House of Representatives:

We apologise for the laws and policies of successive Parliaments and governments that have inflicted profound grief, suffering and loss on these our fellow Australians... Until we fully confront that truth, there will always be a shadow hanging over us and our future as a fully united and fully reconciled people. It is time to reconcile. It is time to recognise the injustices of the past. It is time to say sorry...We apologise for the hurt, the pain and suffering that we, the parliament, have caused you by the laws that previous parliaments have enacted. We apologise for the indignity, the degradation and the humiliation these laws embodied.

...

Our challenge for the future is to embrace a new partnership between Indigenous and non-Indigenous Australians...The truth is: a business as usual approach towards Indigenous Australians is not working. Most old approaches are not working. We need a new beginning. A new beginning which contains real measures of policy success or policy failure. A new beginning, a new partnership, on closing the gap with sufficient flexibility not to insist on a one-size-fits-all approach for each of the hundreds of remote and regional Indigenous communities across the country but instead allows flexible, tailored, local approaches to achieve commonly-agreed national objectives that lie at the core of our proposed new partnership.³

It was a historic day for the country, and I was honoured to represent the Stolen Generations and their families and give a response to the government. In my response I acknowledged the significance of the event for the future:

It's the day our leaders – across the political spectrum – have chosen dignity, hope and respect as the guiding principles for the relationship with our first nations' peoples. Through one direct act, Parliament has acknowledged the existence and the impacts of the past policies and practices of forcibly removing Indigenous children from their families. And by doing so, has paid respect to the Stolen Generations. For their suffering and their loss. For their resilience. And ultimately, for their dignity.

...

This is not about black armbands and guilt. It never was. It is about belonging. The introductory words of the 1997 *Bringing them home* report remind us of this. It reads:

...the past is very much with us today, in the continuing devastation of the lives of Indigenous Australians. That devastation cannot be addressed unless the whole community listens with an open heart and mind to the stories of what has happened in the past and, having listened and understood, commits itself to reconciliation.

By acknowledging and paying respect, Parliament has now laid the foundations for healing to take place and for a reconciled Australia in which everyone belongs.

...

Let your healing, and the healing of the nation, begin.⁴

3 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, p 167 (The Hon Kevin Rudd MP, Prime Minister).

4 T Calma, *Let the healing begin* (Speech delivered in response to government to the national apology to the Stolen Generations, Canberra, 13 February 2008). At: http://www.humanrights.gov.au/about/media/speeches/social_justice/2008/20080213response_to_gov_to_the_national_apology_to_the_stolen_generations.html (viewed February 2008).

The National Apology came 10 years after an Australian Human Rights Commission [then the Human Rights and Equal Opportunity Commission] report *Bringing them home*,⁵ an inquiry into the tragic policies of successive Australian governments to forcibly remove Aboriginal and Torres Strait Islander children from their families and homes. Nationally, between one in three and one in ten Indigenous children were forcibly removed from their families and communities between 1910 and 1970. These policies continue to impact considerably on the lives of Indigenous Australians across the country.⁶

The policies for which the Prime Minister gave the National Apology can not be separated from the native title system today. When the governments' policies forcibly removed children, they broke their integral connection to their lands, families and culture. This break in connection has meant that in the eyes of the Australian legal system, many Aboriginal and Torres Strait Islanders have lost their native title rights and interests. It is a cruel aspect of native title law that the more an Aboriginal or Torres Strait Islander has been hurt by government policy, the less likely they are to have their native title realised.

3. A new approach to native title?

Only time will tell how the government complements its symbolic National Apology with practical changes that are beneficial to Indigenous Australians. In the context of native title and land rights, one member of the High Court has already said:

Honeyed words, empty of any practical consequences, reflect neither the language, the purpose nor the spirit of the National Apology.⁷

Not long after the National Apology the new Attorney-General reflected that in the past, native title, which is '[a]n opportunity for reconciliation has all too often become an instrument of division'. He recognised that native title has a crucial role to play in forging a new relationship between Indigenous and non-Indigenous Australians, and is an opportunity to develop new attitudes and new ways of thinking and doing things, because through native title, 'we acknowledge Indigenous peoples ongoing relationship to land'.⁸

In the spirit of building a new relationship, the Attorney-General outlined that the government's attitude to native title will be a flexible approach that produces both symbolic and practical outcomes. This will be achieved through negotiating agreements and avoiding litigation. The government will:

[Avoid] unduly narrow and legalistic approaches to native title processes that can result in the further dispossession of Aboriginal and Torres Strait Islander people.⁹

5 Australian Human Rights Commission, *Bringing them home: National inquiry into the separation of Aboriginal and Torres Strait Islander children from their families* (2007). At: http://www.humanrights.gov.au/social_justice/bth_report/index.html (viewed June 2008).

6 For more information see Australian Human Rights Commission, *Bringing them home: National inquiry into the separation of Aboriginal and Torres Strait Islander children from their families* (2007). At: http://www.humanrights.gov.au/social_justice/bth_report/index.html (viewed June 2008).

7 *Northern Territory v Arnhem Land Aboriginal Land Trust* [2008] HCA 29, 71 (Kirby J).

8 Attorney-General, Speech, (Speech delivered at the Negotiating Native Title Forum Brisbane, 29 February 2008). At: http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/Speeches_2008_29February2008-NegotiatingNativeTitleForum (viewed March 2008).

9 Attorney-General, Speech, (Speech delivered at the Negotiating Native Title Forum Brisbane, 29 February 2008). At: http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/Speeches_2008_29February2008-NegotiatingNativeTitleForum (viewed March 2008).

This new attitude to native title is welcome. I hope that it will lead to tangible results and will go some way to addressing the continuing native title gridlock that I reported on in my *Native Title Report 2007*. However, this in itself is not enough.

Since then, the Attorney-General has met with states' and territories' Ministers for Native Title under the theme 'making native title work better'. The only public outcome of this meeting to date was a communiqué which outlined actions that the Ministers will pursue in order to improve native title. These include:¹⁰

- Resolution of claims – the Ministers will establish a Joint Working Group on Indigenous Land Settlements to develop policy options for developing broader native title settlements.
- Commonwealth financial assistance – the Ministers will develop an agreement about how the federal government can finance the states and territories in such a way to facilitate settlement of native title.
- Ministerial meetings – the Ministers will meet once a year.

Beside these general commitments, the communiqué stated that all the Ministers had agreed to a flexible and less technical approach to native title and committed their governments to taking a more flexible view, considering also how the process might be able to achieve real outcomes for Indigenous people.¹¹ At the time of writing this Report, none of the actions outlined in the communiqué had been commented on any further.

Throughout the year Jenny Macklin, the Minister for Families, Housing, Community Services and Indigenous Affairs, has also made various references to the government's new approach to native title and what that might include.

Minister Macklin concentrated her comments on how the native title system could be improved so that it has greater benefits for Indigenous Australians. Encouragingly, Minister Macklin has recognised that native title is one aspect of a National Indigenous Economic Development Strategy. However, comments in her 2008 Mabo Lecture raised a number of issues concerning the Government's approach to native title that the Attorney-General has not yet provided a public response to. Two of these are worth mentioning here.

Firstly, Minister Macklin talked about a review of native title, which was reported in the media as a government commitment to 'overhaul' the whole native title system.¹² Consequently, many stakeholders expressed hope and support for such a review which would be an important opportunity to fix many significant problems with the system. Much of the annual national Native Title Conference 2008 centred on discussions about what a review could achieve. However, to date the Attorney-General has not voiced his support nor made any other announcements about a comprehensive review. As a result, there was unnecessary confusion and effort spent by Indigenous people and other stakeholders about what the government plans to do, which Minister will be responsible for it, and what changes the government will consider.

10 Attorney-General, 'Native Title Ministers' Meeting Communiqué' (media release, 18 July 2008). At: http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/MediaReleases_2008_ThirdQuarter_18July-Communique-NativeTitleMinistersMeeting (viewed 21 July 2008).

11 Attorney-General, 'Native Title Ministers' Meeting Communiqué' (media release, 18 July 2008). At: http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/MediaReleases_2008_ThirdQuarter_18July-Communique-NativeTitleMinistersMeeting (viewed 21 July 2008).

12 P Karvelas & P Murphy, 'Labor to overhaul native title law', *The Australian*, 22 May 2008. At: <http://www.theaustralian.news.com.au/story/0,,23738718-2702,00.html> (viewed May 2008), and K Parker, 'Native Title to get overhaul', *Koori Mail*, 4 June 2008.

Minister Macklin also announced through the year that the government will explore ways of ensuring that money flowing to communities from mining agreements¹³ lasts for generations and is used to 'make a difference to their lives and the lives of their children and grandchildren'.¹⁴ She reflected that it would be a shame if the huge proceeds from the mining boom were not used to close the gap between Indigenous and non-Indigenous Australians; that the benefits from the mining boom should be harnessed for the benefit of the community. To further this, Minister Macklin established a small informal working group to discuss how this could be achieved. There has been no public outcome from these discussions to date.

While I acknowledge and commend the government's record spending and commitment to closing the gap between Indigenous and non-Indigenous Australians, many Indigenous communities who are engaged in mining agreement negotiations are forced to use this process to access funds to provide essential services to their communities, for example dialysis machines and other health and education services. Many of these essential services are provided by the government to Australians living in urban and rural centres. However, the government's provision of infrastructure and resources is minimal in remote communities, of which Indigenous people constitute a large proportion of the residents. The government should provide these services consistently across Australia, ensuring all people's international human rights, for example their rights to food, water, health and education, are realised.

If essential services and infrastructure are provided by government, communities can complement them with outcomes achieved through the private agreements made with mining and resource companies to provide for future activities that they themselves prioritise. In order for communities to make the most from these negotiations, government should assist to build their capacity to undertake negotiations on a fair and equitable basis, with an equal seat at the table.

While the new government is finding its feet with Indigenous rights relating to land and water, around the country states and territory governments are progressing. Some examples include Victoria and the Australian Capital Territory.

13 In this context, the Minister is referring to agreements made between communities and mining companies under the Right to Negotiate provisions of the Native Title Act. The Act provides for negotiations and agreements to be made between native title holders or registered native title claimants; and the miner, explorer or prospector who will benefit from the 'future act', that is, the granting of a mining or exploration tenement. As the agreements, and any ancillary agreements, that are made under the Native Title Act are not public, there is no publicly available figure of how much money is flowing to Indigenous communities through these agreements, nor how those funds are being spent.

14 Minister for Families, Housing, Community Services and Indigenous Affairs, *Beyond Mabo: Native title and closing the gap*, (2008 Mabo Lecture, Townsville, 21 May 2008). At: http://www.facs.gov.au/internet/jennymacklin.nsf/print/beyond_mabo_21may08.htm (viewed May 2008).

Text Box 1: Victoria's new approach to land justice

Even before the new Federal Government made the National Apology, the human rights landscape for Aboriginal people in Victoria was improving.

On 1 January 2008, Victoria's *Charter of Human Rights and Responsibilities Act 2006* came into effect. Its preamble recognises Aboriginal Victorians' special importance 'as descendents of Australia's first people, with their diverse spiritual, social, cultural and economic relationship with their traditional lands and waters.' It commits to recognising specific human rights of Victorian Aboriginal people to maintain their relationship with the land and waters.¹⁵

Alongside the new human rights charter, the Victorian government started working on finding a new way of approaching native title which will be more flexible, non-technical and cover a broad range of issues, not just native title.

In March 2008, the Victorian government established a Steering Committee to oversee the development of a Victorian Native Title Settlement Framework. The Steering Committee is chaired by Professor Michael Dodson and made up of representatives from the Victorian Traditional Owner Land Justice Group and government department representatives who are working together to develop a way for Traditional Owners groups to negotiate agreements with the state, either as an alternative or along side a native title determination.¹⁶ The goal of the Steering Committee is to create a better way of negotiating native title that delivers faster outcomes and a fair goal for all.¹⁷ The Government recognised that:

Such a broad approach is particularly pertinent in Victoria, where the onerous bar set by the courts in *Yorta Yorta* of proof of the continuous existence and vitality of a pre-sovereignty normative society through to the current day is so difficult to reach, given the history of dispossession and dispersal in this state.¹⁸

The Steering Committee is to report to the Victorian Government by the end of 2008.¹⁹

15 *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 19(2).

16 R Hulls, Attorney-General of Victoria, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 16 September 2008.

17 Attorney-General of Victoria, 'Mick Dodson to head Government's alternative framework for negotiating native title', (Media release, 13 March 2008).

18 R Hulls, Attorney-General of Victoria, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 16 September 2008.

19 Attorney-General of Victoria, 'Mick Dodson to head Government's alternative framework for negotiating native title', (Media release, 13 March 2008).

Text Box 2: The Australian Capital Territory – establishing the bases for good relationships and agreements²⁰

Despite the fact the ACT has only two native title determinations being actively pursued, and no Native Title Representative Body, there are recent developments in the ACT which should provide the basis for good relationships and agreements between the government and the ACT's Indigenous population. Firstly, the preamble of the *Human Rights Act 2004* (ACT) recognises Indigenous peoples as the first people of Australia:

Although human rights belong to all individuals, they have special significance for Indigenous people – the first owners of this land, members of its most enduring cultures, and individuals for whom the issue of rights protection has great and continuing importance.

Recently, the ACT government established an elected Indigenous representative body, recognising that '[t]he abolition of the Aboriginal and Torres Strait Islander Commission removed the opportunity for the Indigenous community to consult and negotiate with governments. The ACT government recognised the need for the local Indigenous community to have a voice and established an Indigenous representative body'. The Elected Body provides advice to the ACT government relating to 'connection to land' issues in the ACT.

The ACT further cements these positive developments with a commitment to dealings 'with the native title system being based on the principle of free, prior and informed consent of Indigenous participation in order to be effective and sustainable.'

3.1 Trickle down of the new policy approach

The new government's approach to native title has started to trickle down through the system via policy announcements and minor legislative change, and it has been commented on by the High Court.²¹ However, no significant progress has been made to address the many major problems with the native title system.

Throughout the year no amendments were made to the *Native Title Act 1993* (Cth) (the Native Title Act). The regulations for Prescribed Bodies Corporate (PBCs), that are a necessary part of the changes made to the system in 2007, are still being drafted.²²

20 J Stanhope, ACT Minister for Indigenous Affairs, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 9 September 2008.

21 See the discussion in Chapter 3 of *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20 (Kirby J).

22 For more information on the 2007 changes, see chapter 2 of this Report and T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Australian Human Rights Commission (2008) At: http://www.humanrights.gov.au/social_justice/nt_report/ntreport07/index.html.

One notable policy change was announced. In July 2008, the Attorney-General stated that the Commonwealth will now recognise that non-exclusive native title rights can exist in territorial waters up to 12 nautical miles from the Australian shoreline.²³ This is a welcome change that means the Commonwealth Government's approach is consistent with the states' approach and may help negotiating settlements in a number of claims.

Throughout the year, the Federal Court continued to determine native title. Over the reporting period, ten native title determinations were made, all of which determined that native title exists over some or all of the determination area. Of these, one determination was litigated and nine were consent determinations.²⁴ Four court decisions relating to native title and land rights are discussed in detail in chapter 3 of this Report.²⁵

(a) The Evidence Act Amendment Bill 2008

In May 2008, the Evidence Act Amendment Bill was introduced in the House of Representatives. If it is passed,²⁶ evidence of the existence or content of traditional law and custom in courts will be able to be presented without breaching the hearsay rule or the opinion evidence rule.²⁷ The amendments apply to any Commonwealth law where traditional law and custom can be considered.

I welcome this amendment, which addresses some of the limitations of the western legal system in taking into account the oral nature of Aboriginal and Torres Strait Islander traditional law and custom.

However, the amendments will not resolve the problems of significant language and cultural barriers to Aboriginal and Torres Strait Islander witnesses who are giving oral evidence in court. This is a problem that is perpetuated by the nature of native title law and what the witnesses are being asked to prove:

[native title and land claim cases require] Aboriginal witnesses to demonstrate their traditional connections to Aboriginal land. Some witnesses appear reticent or even inarticulate, despite their actual, considerable knowledge of Aboriginal traditions. However, there are also highly acculturated Aboriginal witnesses; ironically, such witnesses may be criticized by opposing counsel essentially for their Anglo-Australian cultural literacy, so that such witnesses will be depicted as not, or less, "traditional" than their less acculturated counterparts and, therefore, have their status as Aboriginal traditional owners of land discounted—or at least questioned. For these vulnerable

23 12 nautical miles is the distance of the Australian territory under international maritime law. States and Territories have jurisdiction out to the 3 nautical mile mark and over vessels on intrastate voyages. The federal government has jurisdiction from the 3 nautical mile mark outwards. The previous federal government only recognised native title to Australia's territorial waters at the time of sovereignty, which was approximately 3 nautical miles from the shoreline. Attorney-General, 'A More flexible Approach to Native Title', (Media release, 17 July 2008). At: http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/MediaReleases_2008_ThirdQuarter_17July2008-AMoreFlexibleApproachtoNativeTitle (viewed 21 July 2008).

24 See Appendix 1 for more information on the determinations that were made during the year, including how long each determination took.

25 See Appendix 2 for the key statistics on the native title system throughout the year.

26 The Evidence Act Amendment Bill was referred to the Senate Legal and Constitutional Affairs Committee on 18 June 2008. The Committee reported on the Bill on 25 September 2008, giving its support.

27 Section 59 of the *Evidence Act 1995* (Cth) provides a rule that excludes what is known as 'hearsay' evidence from being submitted in a court as evidence. The rule states that 'evidence of a previous representation made by a person is not admissible to prove the existence of a fact that the person intended to assert by the representation'. The purpose of the rule is to exclude statements made out of court because the reliability of those representations cannot be tested. Section 76 of the *Evidence Act 1995* (Cth) provides a rule that generally excludes evidence of an opinion from being submitted in a court as evidence (known as the 'opinion evidence rule'). The rule states that 'evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed'.

Native Title Report 2008

witnesses, there is a Catch-22 cleavage: if you are articulate, you appear less traditional; if you are inarticulate, you may appear traditional, but it is difficult for the tribunal to assess your claim to traditional ownership of land.²⁸

Neither will the amendments comprehensively address the evidence issues that Aboriginal and Torres Strait Islanders face in native title proceedings. Many significant issues which I have identified in previous native title reports will remain.²⁹

For example the amendments only apply to evidence of traditional law and custom, not to every element of native title, to which the strict rules of evidence will continue to apply. For example, 'one of the problems about native title is that it requires proof of who you are, a genealogy which is just simply impossible for people who did not have written records'.³⁰

In preparing this Report, I spoke to Justice Wilcox about his observations as a Federal Court judge who sat on native title cases. He stressed that oral traditions in themselves will only 'get you back so far', whereas native title claimants still have to prove traditional law and customs were observed by every generation back to the date of sovereignty which is nearly 200 years. The cruel result is that:

[the white legal system] force [Aboriginals and Torres Strait Islanders] to prove things knowing that they just don't have the records. And of course the whitefellas didn't help, they didn't keep records of the Aboriginal people either. They didn't do it until long after they were doing it for white people.³¹

These compounding factors contribute to the near impossible evidence burden for proving native title, which were seen again in cases before the Federal Court this year (see chapter 3). I strongly recommend the Attorney-General consider further reform.

(b) Native title funding

The spending allocated for native title in the May 2008 Federal Budget was disappointing.

In February 2008, the Attorney-General stated that the government would ensure that Traditional Owners and their representatives were adequately resourced so that they are in a position to pursue beneficial outcomes.³² This sentiment was supported by the Minister for Indigenous Affairs.³³ The National Native Title Tribunal,³⁴ other

28 M Walsh, 'Which Way?' Difficult options for vulnerable witnesses in Australian Aboriginal Land Claim and Native Title cases' (2008) 36(3) *Journal of English Linguistics* 239.

29 See T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Australian Human Rights Commission (2008), pp 172-178; T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2005*, Australian Human Rights Commission (2005); W Jonas, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2002*, Australian Human Rights Commission (2003).

30 M Wilcox, former Justice of the Federal Court of Australia, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 23 July 2008.

31 M Wilcox, former Justice of the Federal Court of Australia, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 23 July 2008.

32 Attorney-General, *Speech*, (Speech delivered at the Negotiating Native Title Forum Brisbane, 29 February 2008). At: http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/Speeches_2008_29February2008-NegotiatingNativeTitleForum (viewed March 2008).

33 Minister for Families, Housing, Community Services and Indigenous Affairs, *Beyond Mabo: Native title and closing the gap*, (2008 Mabo Lecture, Townsville, 21 May 2008). At: http://www.facs.gov.au/internet/jennymacklin.nsf/print/beyond_mabo_21may08.htm (viewed May 2008).

34 National Native Title Tribunal, *National Report: Native Title*, June 2008 (2008), p 3. At: <http://www.nntt.gov.au/Applications-And-Determinations/Procedures-and-Guidelines/Documents/National%20Report%20Card%20-%20June%202008.pdf> (viewed July 2008).

governments,³⁵ the National Native Title Council,³⁶ the Minerals Council of Australia³⁷ and myself, among others, have continued to call for additional funding so that the system can operate effectively.³⁸ Despite widespread recognition of the severe resource constraints under which Native Title Representative Bodies (NTRBs) operate, the 2008-09 Federal Budget, the first Budget of the new government, decreased the funding available to them.³⁹

In total less than \$59million was allocated to resource all 15 NTRBs across the country. This includes the funding allocated for Prescribed Bodies Corporate (PBCs) whose job it is to protect, promote and preserve native title rights and interests.⁴⁰ This amount is abysmal when compared to the over \$7billion the government receives in taxes from the resource industry who use the lands, and is token when compared to the \$21.7 billion budget surplus.

During the reporting period, the Attorney-General's department chaired the Native Title Coordination Committee which has made recommendations to government on funding the native title system. Those recommendations and the outcomes in the 2009-2010 Budget are not public but I look forward to seeing the government respond by addressing this serious failure in its next Budget.

4. The next 12 months?

While the new relationship between the Government and Indigenous Australians started with the landmark National Apology in February, the goodwill has not yet transpired into significant decisions or actions to improve the native title system.

In order for the Government to see 'more, and better, outcomes delivered through native title processes'⁴¹ a lot more work will need to be done. The Attorney-General has recognised that 'tinkering at the edges is not enough',⁴² but in this reporting period, the first year of the new government's term, that is all we have seen.

In my next native title report, I hope to report that the governments' new approach to native title has resulted in tangible, reportable changes that have had a real impact on native title agreements, and that these agreements are clearly beneficial to Aboriginals and Torres Strait Islanders, contributing to reconciliation between all people in this country, and self-determination and sustainable development for Indigenous communities.

35 See chapter 2 of this Report for more information.

36 National Native Title Council, 'Four-point plan for making native title system work better' (media statement, 16 July 2008). At: http://www.glc.com.au/me_xx/20080716.htm (viewed July 2008).

37 Minerals Council of Australia, 2008-09 Pre-Budget Submission (2008), p vi. At: http://www.minerals.org.au/_data/assets/pdf_file/0015/26025/FINAL_08_Pre-Budget_Sub_rev.pdf (viewed October 2008).

38 See chapter 3 and recommendation 3.1 in T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Australian Human Rights Commission (2008) and T Calma, 'A system starved of funds', *The Australian*, 23 May 2008. At: <http://www.theaustralian.news.com.au/story/0,25197,23743271-7583,00.html> (viewed May 2008).

39 R Markwell, adviser, Office of Jenny Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, Correspondence to the National Native Title Council, 19 August 2008.

40 T Wooley, public officer, De Rose Hill – Ilpalka Aboriginal Corporation and Yankunytjatjara Native Title Aboriginal Corporation, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 8 September 2008.

41 Attorney-General, Speech, (Speech delivered at the Negotiating Native Title Forum Brisbane, 29 February 2008). At: http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/Speeches_2008_29_February2008-NegotiatingNativeTitleForum (viewed March 2008).

42 Attorney-General, Speech, (Speech delivered at the Negotiating Native Title Forum Brisbane, 29 February 2008). At: http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/Speeches_2008_29_February2008-NegotiatingNativeTitleForum (viewed March 2008).

Chapter 2

Changes to the native title system – one year on

.....

In my *Native Title Report 2007*, I reported on the changes that were made to the native title system during that year. The changes, which were made through two pieces of legislation which amended the Native Title Act, primarily affected:

- the claims resolution process, including the powers of the National Native Title Tribunal (the NNTT or the Tribunal), the Federal Court of Australia, and the relationship between the two
- native title representative bodies
- prescribed bodies corporate (through the introduction of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*)
- respondent funding.

A range of other changes were also made under the heading ‘technical amendments’.

In the *Native Title Report 2007*, I expressed concern about how these changes will impact on the realisation of human rights of Aboriginal and Torres Strait Islander peoples.¹ In particular I was, and I remain, concerned that recognition and protection of native title was not placed at the centre of the government’s ‘reform’ agenda. Instead, the changes were directed at achieving a more efficient and effective native title system.

Indigenous people also want a native title system that functions well, but the version of ‘efficiency’ promoted in the amendments may not promote the realisation of Indigenous peoples’ rights and legitimate aspirations. These rights should be at the centre of any dialogue around the operation of the native title system.

Unfortunately, the Attorney-General has indicated that he does not plan to review the implementation of the changes.² It is disappointing that, once again, the impact that the government’s system has on Indigenous peoples will not be comprehensively or formally evaluated and considered.

In preparing this report, I asked a number of stakeholders for their opinions on how the changes have impacted on the system. One year on, the changes have not had a notable impact. A number of stakeholders

1 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Australian Human Rights Commission (2008), pp 24-27. At: http://www.humanrights.gov.au/social_justice/nt_report/ntreport07/index.html.

2 R McClelland, Attorney-General, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 11 September 2008.

consider it too early to tell, and that it may take a while for the changes to ‘filter through the system’.³

In addition, many stakeholders are still not fully aware of the breadth or detail of the changes. In the beginning of 2008, the NNTT undertook its client satisfaction research. This survey found that very few respondents were ‘spontaneously aware’ of the changes.⁴ Once prompted, a total of 72 percent of the survey respondents were aware of the reforms. The majority of the respondents considered that the changes would result in varying degrees of improved efficiency. Overall however, many ‘were unsure of the real impact or of the specific nature of these changes’.⁵

Nevertheless, some observations about the changes can be made. From the input I have received, it is clear that many stakeholders consider that the changes do not go far enough to ensure the realisation of Indigenous peoples’ rights, and if the Native Title Act is going to have the outcomes envisaged in its preamble, the Australian Government will need to do much more than tinker with the edges of the system.

1. General observations about the 2007 changes

State and territory governments were generally lukewarm about the impact of the changes to date.⁶ Many governments voiced uncertainty about whether the changes will result in any marked improvement. One government stated that the changes ‘had no discernible impact’ and that so far they ‘do not appear to have resulted in improvements to the efficiency or effectiveness of the system’.⁷ Others considered it too early to comment in detail, but reported that it was difficult to say whether there will be any impact as the new powers of the NNTT have not yet been exercised, and some other changes have not been implemented.⁸

Some governments were slightly more positive that the changes will result in improvements in the future. Victoria’s Attorney-General stated that some of the changes with regard to the powers of the NNTT will contribute to ‘more efficient

3 G Roche, Manager, Department of Families, Housing, Community Services and Indigenous Affairs, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 11 September 2008; G Neate, President, National Native Title Tribunal, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 27 August 2008.

4 The survey was completed by 213 individuals and organisations that have had contact with the Tribunal since its inception: see G Neate, President, National Native Title Tribunal, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 5 August 2008, p 10. Based on spontaneous awareness, changes to mediation (15%) and the registration test (14%) were the best known, no other was mentioned by over 10% of the total: see G Neate, President, National Native Title Tribunal, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 5 August 2008, p 2.

5 G Neate, President, National Native Title Tribunal, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 5 August 2008, pp 1-2.

6 The government of Western Australia was the only government that I did not receive input for the Report from. The Western Australian Government was in caretaker mode when I was collecting information for this Report.

7 M Scrymgour, Northern Territory Minister for Indigenous Policy, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 September 2008.

8 J McNamara, Executive Director, Indigenous Services, QLD Department of Natural Resources and Water, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 September 2008; R Hulls, Attorney-General of Victoria, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 16 September 2008.

and effective mediation of matters'.⁹ Similarly, South Australia's Attorney-General commented that 'to some degree the amendments have improved the efficiency and effectiveness of the system.'¹⁰

Native Title Representative Bodies' (NTRBs)¹¹ views are consistent with those of the state and territory governments. While one NTRB reported that the amendments 'have not to date had very much practical effect on [their] operations'¹², they did state that they have 'generally been positive'¹³. Another expressed uncertainty about whether the legislative reforms had achieved their purpose.¹⁴

The Prescribed Bodies Corporate (PBC) representatives that I spoke to found it difficult to comment on the impact of the changes, as some of the changes have not yet been implemented. One PBC commented that 'there's been no discernible difference'.¹⁵ The most common PBC comment was that funding and support is their most pressing concern, which continues to threaten their future operation and their ability to comply with the changes. One PBC employee from the Torres Strait commented that:

The 2007 changes...it's very slow coming up in the Torres Strait. We just got the [Office of the Registrar of Indigenous Corporations] people starting to do the governance training ... but we're still finding it difficult to get funding from the [Torres Strait Regional Authority] for the individual PBCs.¹⁶

Observations and feedback I received about specific changes are detailed in this chapter. In addition, many stakeholders offered their views about what other areas of the system could be improved and amended in order to better protect the human rights of Aboriginal and Torres Strait Islanders. I have outlined some of these suggestions at the end of this chapter.

2. Changes to the claims resolution process

A major aspect of the 2007 changes dealt with the relationship between the Federal Court of Australia and the NNTT, and the mediation of native title. The changes were made in response to a review of the native title claims resolution process which focused on the more efficient management of native title claims. The government accepted most of the review's recommendations and adopted the option for

9 R Hulls, Attorney-General of Victoria, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 16 September 2008.

10 M Atkinson, Attorney-General of South Australia, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 September 2008.

11 For ease of reference I will use the term NTRB to include both Native Title Representative Bodies and Native Title Service Delivery Agencies where applicable. NTRBs are bodies recognised by the minister to perform all the functions listed in the Native Title Act in Div 3 of Part 11. Native Title Service Delivery Agencies are bodies that are funded by government to perform some or all of the functions of a representative body: see s 203FE of the *Native Title Act 1993* (Cth).

12 B Wyatt, CEO, Goldfields Land and Sea Council Aboriginal Corporation, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 4 September 2008.

13 South Australia Native Title Services, *Email to the Native Title Unit at the Australian Human Rights Commission for the Native Title Report 2008*, 18 July 2008.

14 K Smith, CEO, Qld South Native Title Services Ltd, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 19 September 2008.

15 T Wooley, public officer, De Rose Hill – Ilpalka Aboriginal Corporation and Yankunytjatjara Native Title Aboriginal Corporation, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 8 September 2008.

16 J Akee, Mer Gedkem Le (Torres Strait Islanders) Corporation, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 29 September 2008.

institutional reform which provides the NNTT with an exclusive mediation role, in which the Federal Court can intervene at any time.¹⁷

Overall, many stakeholders were not inclined to provide positive feedback on the changes that were made. There is a continuing lack of faith in the NNTT's capacity to mediate claims effectively and in the Tribunal's and the Court's ability to work together for the benefit of the system. I raised concerns about increasing the NNTT's mediation powers in the *Native Title Report 2007*.

2.1 Relationship between the NNTT and the Federal Court

(a) Administrative changes aimed at improving communication between the NNTT and the Federal Court

The NNTT and the Federal Court have continued and expanded on initiatives that were started in order to improve the communication between the two bodies. The President of the NNTT stated that:

Around the country the Tribunal has been more consistent and comprehensive in [its] regional planning... We are reporting the progress, or lack of progress, and the reasons why to the Court. Some of the Tribunal members and employees are appearing before the Court on behalf of the Tribunal to improve communications between the institutions. There has been some resistance to some of these initiatives in parts of the country, but I am convinced that such rigour is needed and that transparency and accountability is important...¹⁸

The Court has amended the Federal Court Rules to provide for the procedures necessary to implement a number of the changes. In addition, the Federal Court Native Title Registrar noted that:

The Court has worked closely with the Tribunal to ensure that its relationship with the Tribunal is effective in assisting the timely resolution of native title claims and that practices in the resolution of native title claims are transparent.¹⁹

This has included regular liaison meetings between the Court and the NNTT, *ad hoc* discussions and briefings, joint information sessions on the legislative reforms, and regular regional review hearings.²⁰

However, most other stakeholders did not comment on whether they have witnessed any improvement in the relationship between the Court and the NNTT. One NTRB did state that they have 'seen very little evidence to the fact that those legislative reforms have delivered [enhanced communication between the NNTT and the Court]'.²¹

17 See chapter 2 of T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Australian Human Rights Commission (2008) for a detailed description of the amendments and my concerns.

18 G Neate, President, National Native Title Tribunal, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 27 August 2008.

19 J Eaton, Native Title Registrar, Federal Court of Australia, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 21 August 2008.

20 J Eaton, Native Title Registrar, Federal Court of Australia, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 21 August 2008.

21 K Smith, CEO, Qld South Native Title Services Ltd, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 19 September 2008.

(b) Mediation of native title proceedings – the NNTT’s new powers and functions

As I mentioned above, the changes made in 2007 gave the NNTT exclusive mediation powers.²² However, the Federal Court Native Title Registrar emphasised that:

The reforms to the native title system ... have not changed the underlying principle that native title determination applications are proceedings in the Court and that mediation in the [NNTT] is an adjunct to those proceedings and directed to their prompt resolution.²³

In any case, it is difficult to ascertain what the impacts of these changes will be, as it appears that many of the Tribunal’s new powers are yet to be used:²⁴

... it’s interesting to see that after the Tribunal got the powers, how many of those powers have they in fact used? That’s going to be the burning question... whether much transpired from it I think is the question that needs to be asked.²⁵

The Federal Court has confirmed this, indicating to me that it ‘has not heard any matters in which it has considered the NNTT’s use of its new mediation powers, for example directing parties to attend or produce documents.’²⁶ The powers of the Tribunal to refer issues of fact and law or the question of whether a party should cease to be a party to the Court have not been used.²⁷

Additionally, the Court hasn’t heard any matters in which the NNTT has reported to the Federal Court that a party or its representative did not act in good faith during mediation.²⁸ However, the President of the Tribunal stated that ‘[r]eports from some Tribunal members suggest that the good faith conduct obligation has had a positive effect on the conduct of some parties’.²⁹

22 See T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Australian Human Rights Commission (2008), pp 39-46.

23 J Eaton, Native Title Registrar, Federal Court of Australia, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 21 August 2008.

24 J McNamara, Executive Director, Indigenous Services, QLD Department of Natural Resources and Water, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 September 2008; T Kelly, NSW Minister for Lands, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 1 September 2008. Although the NNTT has issued a number of Procedural Directions to ensure that when the powers are used, they are implemented consistently.

25 K Smith, CEO, Qld South Native Title Services Ltd, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 19 September 2008.

26 J Eaton, Native Title Registrar, Federal Court of Australia, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 21 August 2008.

27 J Eaton, Native Title Registrar, Federal Court of Australia, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 21 August 2008.

28 See T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Australian Human Rights Commission (2008), p 45. The amendments introduced a requirement that each party and each person representing a party in native title proceedings, must act in good faith in relation to the mediation (s136B(4) *Native Title Act 1993*): see J Eaton, Native Title Registrar, Federal Court of Australia, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 21 August 2008. However, the NNTT has issued a Procedural Direction which sets out ‘a range of matters that the presiding Member should take into account in deciding whether he or she considers that a person did not act or is not acting in good faith in the conduct of a mediation’: see G Neate, President, National Native Title Tribunal, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 27 August 2008, citing National Native Title Tribunal, Procedural Direction No.2 of 2007.

29 G Neate, President, National Native Title Tribunal, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 27 August 2008.

Native Title Report 2008

The one new power that the NNTT does appear to be using regularly is its right to appear before the Federal Court when the Court is considering a matter currently being mediated by the NNTT,³⁰ but there is little feedback on the impact this has had.

Nonetheless, even though the Tribunal hasn't used many of its new powers, it considers:

...early indications are that in some areas parties are engaging in a more productive fashion in mediation...³¹

There were mixed responses from stakeholders about the usefulness of the Tribunal's new mediation functions. One NTRB relayed to me that it is not supportive of the NNTT having additional powers and questioned the Tribunal's level of mediation expertise.³² Similarly, South Australia's Attorney-General considers that '[i]f the NNTT, especially, tries to use its new powers to take more control of our state-wide negotiations, it will become a serious hindrance.'³³ He views the impact of the changes to the Tribunal's mediation powers with some scepticism:

The changes assume that close management of claims by the Federal Court and NNTT is desirable and helpful. Under [South Australia's] approach, and any approach that tries to reach broader settlements that incorporate non-native title benefits, this is questionable. The court and NNTT tend to be impatient with long periods taken to negotiate settlements, as their statutory role is resolving applications for determination of native title.³⁴

This view is consistent with the Federal Court's observations that:

There have, however, been a number of instances ... where parties have requested that matters not be referred to the NNTT for mediation as other strategies are being pursued...³⁵

The integral role of mediation and the relationship between the two key administrative bodies in the system in resolving native title issues was acknowledged by the Claims Resolution Review and the consequent changes that were made to the native title system in 2007. Nonetheless, the Tribunal's new powers haven't been used to make any significant change to the system, and one year later, very little improvement can be seen. The concerns I raised in the *Native Title Report 2007* remain, and I am not optimistic that without further change, any significant improvement in native title claims resolution will be forthcoming.

30 J Eaton, Native Title Registrar, Federal Court of Australia, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 21 August 2008.

31 G Neate, President, National Native Title Tribunal, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 27 August 2008.

32 B Wyatt, CEO, Goldfields Land and Sea Council Aboriginal Corporation, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 4 September 2008.

33 M Atkinson, Attorney-General of South Australia, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 September 2008.

34 M Atkinson, Attorney-General of South Australia, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 September 2008.

35 J Eaton, Native Title Registrar, Federal Court of Australia, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 21 August 2008.

2.2 Registration test amendments

In my *Native Title Report 2007*, I noted that new provisions had been inserted into the Native Title Act, enabling the Federal Court to dismiss applications that do not meet the merit conditions of the registration test (which are set out in s 190B of the Native Title Act).³⁶ I also noted other changes to the application of the registration test, including that it must now be applied to applications that had not previously been subject to the test, it must be reapplied to those applications that had previously failed the test, and it does not have to be reapplied in limited situations where a registered claim is amended.³⁷

Between 1 July 2007 and 30 June 2008, the Native Title Registrar made 104 registration decisions. A total of 23 applications were registered³⁸, 81 were not accepted:

The high failure rate reflects the large number of claims that had to be re-tested under the [2007] amendments... The majority of the claims had previously failed the registration test, were not on the Register of Native Title Claims and were not amended following the commencement of the transitional provisions. The registration test status quo was maintained for many claims (ie they were not on the Register when the decision was made, and so the native title claim group did not lose procedural rights).³⁹

Generally the amendments to registration testing have been seen as quite positive. Victoria's Attorney-General stated that '[i]t may be that the new powers of the Federal Court to dismiss... applications that have not been able to pass the registration test, may have some benefits in efficiencies of the State's resource commitments'.⁴⁰

NTRBs have also supported this change as it will allow them to concentrate their resources better:

...in our area, a number of the early claims...were deficient...by putting some of the claims through that process again actually did bring to light how deficient they were and as a result are in the process of being struck out. So even though, superficially it might sound like a hard provision, it was necessary... it was a trigger to open up claims and show they were properly constituted, and properly authorised...⁴¹

Other NTRBs have commented that the ability to make minor changes to the claim and not go through the registration test again is an improvement to the system that resulted from the 2007 changes.⁴²

However, very real concerns have been raised with me about the possibility that the amendments could limit the rights of Indigenous claimants if the powers aren't used with caution:

36 *Native Title Act 1993* (Cth) ss 190F(5)-(6); T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Australian Human Rights Commission (2008), p 52.

37 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Australian Human Rights Commission (2008), p 53.

38 17 just accepted, and 6 amended claims were accepted for registration without the registration test being applied under s 190A(6A) of the Native Title Act.

39 National Native Title Tribunal, *National Report: Native Title*, June 2008 (2008). At: <http://www.nntt.gov.au/Applications-And-Determinations/Procedures-and-Guidelines/Documents/National%20Report%20Card%20-%20June%202008.pdf> (viewed July 2008).

40 R Hulls, Attorney-General of Victoria, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 16 September 2008.

41 K Smith, CEO, Qld South Native Title Services Ltd, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 19 September 2008.

42 South Australia Native Title Services, *Email to the Native Title Unit at the Australian Human Rights Commission for the Native Title Report 2008*, 18 July 2008.

[The court's power to dismiss unregistered claims] may be helpful in dealing with unsustainable claims and paving the way for viable new claims, although this will depend to a large extent on how the court applies the new provisions... Dismissals need to be dealt with on a case by case basis with NTRBs being afforded sufficient time and due process to ensure a claim group has exhausted all avenues to satisfy the registration test or to demonstrate other reasons why a particular unregistered claim should not be dismissed.⁴³

Given the serious consequences that can eventuate if a claim is dismissed, I recommend that the Attorney-General work with NTRBs to monitor the use of the Court's powers in order to determine whether the provisions need to be amended to better protect the important procedural rights for claimants that come with registration of their claim.

(a) Merit conditions of the registration test

In the *Native Title Report 2007*, I outlined my concern that the interpretation given to section 190B (the merit conditions of the registration test) by delegates of the Native Title Registrar has varied over time.⁴⁴ Given that the 2007 changes allow the Court to dismiss claims if they fail the registration test under s 190B, its application by the Registrar is considerably more important – failure to pass the registration test has even more significant implications than before.

Last year there was an opportunity for the Federal Court to provide more clarity on the application of s 190B. Instead, what applicants need to do to pass the test is more ambiguous and less settled than before.

In August 2007, the Federal Court handed down its decision in *Gudjala People 2 v Native Title Registrar*⁴⁵ (the *Gudjala* decision), which concerned an application for review of a decision not to accept an application for registration.⁴⁶ The case was dismissed, but in handing down the decision Justice Dowsett set out detailed requirements for what was necessary to pass the registration test. Many of these requirements appear to be significantly more stringent than the requirements were previously thought to be.

For example, Justice Dowsett held that in order to meet the requirement in section 190B(5)(a) of the Native Title Act⁴⁷, it is not sufficient to show that all members of the claim group are descended from people who had an association with the claim area at the time of European settlement, and that some members of the claim group are presently associated with the claim area. He considered that the application must address the history of the association since European settlement, and must provide evidence that the claim group as a whole, not just some of its members, are presently associated with the area.⁴⁸

43 B Wyatt, CEO, Goldfields Land and Sea Council Aboriginal Corporation, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 4 September 2008.

44 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Australian Human Rights Commission (2008), p 53.

45 *Gudjala People 2 v Native Title Registrar* [2007] FCA 1167.

46 See s190D(2) of the *Native Title Act 1993*.

47 Section 190B(5)(a) requires that claimants assert that the claim group 'have, and the predecessors of those persons had, an association with the area'.

48 *Gudjala People 2 v Native Title Registrar* [2007] FCA 1167, 51-52.

In April 2008, the National Native Title Tribunal released a guide to understanding the registration test.⁴⁹ It was designed ‘to assist in preparing a new application for a determination of native title (a claimant application), or amending an existing application’.⁵⁰ It appears to follow the more stringent requirements outlined in the Gudjala decision.

However, in August 2008 the Full Federal Court allowed an appeal from the Gudjala first instance decision, and the matter was remitted to the primary judge.⁵¹ One of the reasons for allowing the appeal was that Justice Dowsett ‘applied to his consideration of the application a more onerous standard than the [Native Title Act] requires’.⁵²

The Full Federal Court explained:

...it is only necessary for an applicant to give a general description of the factual basis of the claim and to provide evidence in the affidavit that the applicant believes the statements in that general description are true. Of course the general description must be in sufficient detail to enable a genuine assessment of the application by the Registrar under s 190A and related sections, and be something more than assertions at a high level of generality. But what the applicant is not required to do is to provide anything more than a general description of the factual basis on which the application is based. In particular, the applicant is not required to provide evidence of the type which, if furnished in subsequent proceedings, would be required to prove all matters needed to make out the claim. The applicant is not required to provide evidence that proves directly or by inference the facts necessary to establish the claim.

Turning to the specifics of this case, we think there are observations of the primary judge in his reasons which suggest that his Honour approached the material before the Registrar on the basis that it should be evaluated as if it was evidence furnished in support of the claim. If, in truth, this was the approach his Honour adopted, then it involved error...⁵³

In response to this decision, the NNTT is currently preparing a new guide to understanding the registration test.

However in the meantime, there is still – if not more – uncertainty about what is required for an application to pass the registration test, and yet the consequences of not passing the test are now even more significant. It is imperative that greater clarity and consistency in registration testing is achieved as soon as possible.

3. Changes to native title representative bodies

The 2007 changes also affected the bodies that represent Aboriginal and Torres Strait Islander groups to enable them to gain protection and recognition of their native title rights. The changes affected NTRBs’ recognition, their areas, the bodies eligible to be NTRBs, their governance, reporting, and funding.⁵⁴

49 National Native Title Tribunal, *Native title claimant applications: A guide to understanding the requirements of the registration test*, p 5. At: <http://www.nntt.gov.au/Publications-And-Research/Publications/Documents/Publications%20particular%20to%20business%20streams/Native%20title%20claimant%20applications%20April%202008.pdf> (viewed 17 September 2008).

50 National Native Title Tribunal, *Native title claimant applications: A guide to understanding the requirements of the registration test*, p 5. At: <http://www.nntt.gov.au/Publications-And-Research/Publications/Documents/Publications%20particular%20to%20business%20streams/Native%20title%20claimant%20applications%20April%202008.pdf> (viewed 17 September 2008).

51 *Gudjala People 2 v Native Title Registrar* [2008] FCAFC 157.

52 *Gudjala People 2 v Native Title Registrar* [2008] FCAFC 157, 7 (French, Moore, Lindgren JJ).

53 *Gudjala People 2 v Native Title Registrar* [2008] FCAFC 157, 92-93 (French, Moore, Lindgren JJ).

54 See chapter 3 of T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Australian Human Rights Commission (2008),

3.1 Recognition periods

The 2007 changes introduced fixed term recognition periods for NTRBs of between one and six years. In the *Native Title Report 2007*, I expressed a number of concerns about the changes including the amount of ministerial discretion in recognising these bodies, the additional administrative burdens placed on them, the uncertain position that bodies with short recognition periods are put in, and the preclusion of judicial review for the decision.⁵⁵

The Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) considers that this change:

has already had a positive impact on service delivery by NTRBs. NTRBs are much more conscious of the need to perform efficiently and effectively as a result of this change, and are very much aware that their performance will be subject to detailed assessment as they approach the end of their recognition period.⁵⁶

Unfortunately, FaHCSIA did not elaborate on exactly how there has been a positive impact on service delivery, and how this might have affected the Aboriginal and Torres Strait Islander people that the bodies are established to represent.

The changes also allow the Minister to withdraw recognition of an NTRB if he or she is satisfied that the body is not satisfactorily performing its functions or if there are serious or repeated irregularities in the financial affairs of the body.⁵⁷ FaHCSIA reported that the Minister has not used this power since the changes were implemented.⁵⁸

The views of NTRBs on the impact the changes to recognition periods have had on them differs. The Goldfields Land and Sea Council (GLSC) in Western Australia, which received recognition for three years, said that this time frame didn't allow for significant forward and strategic planning in the management of their claims.⁵⁹ Similarly, Queensland South Native Title Services considers:

The whole idea of one year funding or two year funding is ridiculous ... with our amalgamation, we have a larger area to look at, if one of the arguments is to attract and retain professional staff, it's very very difficult to do that when you are tied to a one year funding cycle, sure there can be comfort letters to creditors and comments made to employees, but at the end of the day, we have a very large program to role out with the surety of only one year funding.⁶⁰

55 Note, the recognition periods were announced in June 2007, see T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Australian Human Rights Commission (2008), pp 70-78.

56 G Roche, Manager, Department of Families, Housing, Community Services and Indigenous Affairs, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 11 September 2008.

57 See T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Australian Human Rights Commission (2008), p 75.

58 G Roche, Manager, Department of Families, Housing, Community Services and Indigenous Affairs, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 11 September 2008.

59 B Wyatt, CEO, Goldfields Land and Sea Council Aboriginal Corporation, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 4 September 2008.

60 K Smith, CEO, Qld South Native Title Services Ltd, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 19 September 2008.

On the other hand, the North Queensland Land Council (NQLC), which received a six year recognition period, said that the changes to the recognition periods have had a 'positive impact on the NQLC'. They consider that the triennial funding allocation allows for better forward planning, and is an improvement over annual funding submissions, giving them greater certainty than the previous system.⁶¹

3.2 Operation areas

The 2007 changes also included amendments that allow the Minister to extend or vary the area covered by a representative body. Significant changes to representative body areas were made in Queensland over the year, and came into effect on 1 July 2008.⁶²

Specifically, the Gurang Land Council and the Mount Isa region of the Carpentaria Land Council have amalgamated with the Queensland South Native Title Services. The Central Queensland Land Council has amalgamated with the NQLC.

These considerable changes have consumed many of the Queensland representative bodies' resources and capacity throughout the year. It has diverted the bodies' efforts away from progressing native title claims, and undermined their ability to represent their Indigenous constituents while they deal with significant change in an under resourced environment.

The NQLC outlined the process undertaken in its amalgamation with Central Queensland Land Council. In the process, a number of problems were encountered. NQLC considers that there was a:

...lack of a coherent forward strategy by FaHCSIA in their rolling out of the Minister's decisions in this regard. They have been reactive about responding to challenges that have occurred during the realignment of boundary process rather than anticipating potential blockages and having strategies in place to deal with them.⁶³

61 I Kuch, Transition Manager, North Queensland Land Council, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 25 August 2008. On the 7 September 2005, the former Attorney-General issued a media release outlining the 2007 changes (see Attorney-General, 'Practical reforms to deliver better outcomes in native title', (Media Release, 7 September 2005)). However, the changes to provide NTRBs with multi-year funding were not formally announced until the 23 November 2005 when a joint media release was issued by the former Attorney-General and former Minister for Indigenous Affairs (see Attorney-General and the Minister for Immigration, Multicultural and Indigenous Affairs, 'Delivering better outcomes in native title – update on the government's plan for practical reform', (Media Release, 23 November 2005)); E McDermott, Department of Families, Housing, Community Services and Indigenous Affairs, *Email to Native Title Unit at the Australian Human Rights Commission for the Native Title Report 2008*, 23 December 2008.

62 On 7 June 2007, the former Minister for Families, Community Services and Indigenous Affairs announced changes to NTRBs in Queensland and noted that certain NTRBs were in discussion about providing a coordinated approach (see Minister for Families, Community Services and Indigenous Affairs, 'Reforms to Native Title Representative Bodies to benefit Indigenous Australians' (Media Release, 7 June 2007). At: http://www.facsia.gov.au/Internet/Minister3.nsf/content/ntrb_7jun07.htm (viewed December 2008)). The Department of Families, Housing, Community Services and Indigenous Affairs informs me that a number of permutations considered before the amalgamations were finalised in 2008. The eventual outcome, which differs from that envisaged in the former Minister's Media Release, was the result of negotiations amongst the NTRBs themselves. (E McDermott, Department of Families, Housing, Community Services and Indigenous Affairs, *Email to Native Title Unit at the Australian Human Rights Commission for the Native Title Report 2008*, 23 December 2008).

63 I Kuch, Transition Manager, North Queensland Land Council, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 25 August 2008.

NQLC informs me that FaHCSIA:

...declared to all that there would be 'business as usual' at land councils affected by the boundary changes in Queensland. This is clearly nonsense as both organisations normal activities were interrupted leading up to the realignment on the 1st July 2008.⁶⁴

Queensland South Native Title Services, which is the body that now represents an area previously covered by three NTRBs, relayed similar concerns about how the amalgamations were undertaken and the impact that it will have on claims:

...it is a very large area with entrenched issues, different issues, large land mass, lots of underlying interests, lots of overlaps, to think that within a very short time frame you could actually effectively amalgamate or expand the Queensland South boundaries and just flick the switch on the 1st July and everything would be hunky dorey is an exercise in naivety... FaHCSIA knew what their program was, but they didn't engage change agents on the ground... it was very difficult to do with limited money and resources. The actual change process, the timing, and the resources weren't really thought through.⁶⁵

FaHCSIA provided some additional funding for one financial year to assist with the transition, but there has been no general increase in the annual budget. Yet both organisations had to perform significant additional activities, which have impacted directly on the Indigenous people they represent. For example, the bodies have to get across all the claims, from regions they previously didn't cover, quickly enough to address court orders and ensure the claims aren't struck out by the Court for a failure to comply with the orders.

In addition, the bodies have had to undertake consultations with members of all the claims about future arrangements requiring extensive, and expensive, community consultations and meetings, which the additional funding was hardly sufficient to cover.⁶⁶

Consequently, the amalgamations have consumed a significant proportion of the already scant resources available to representative bodies and that is impacting, and will continue to impact, upon the native title system across Queensland. In the end, the people who will bear the cost of the amalgamations are native title claimants, whose claims have potentially been jeopardised or put on hold, once again delaying recognition of their rights in the land.

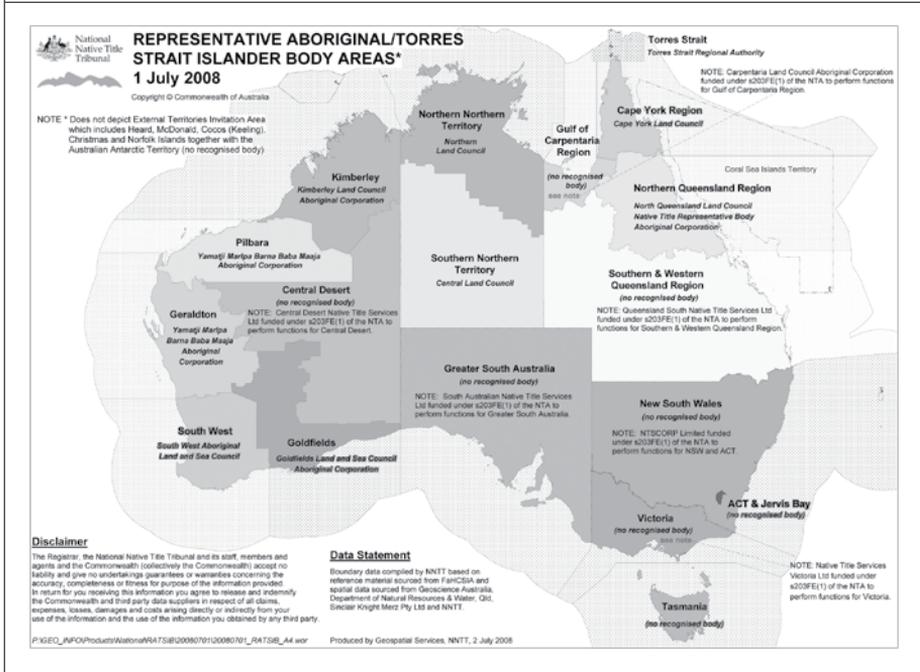
I recommend the Attorney-General closely monitor the impact of the amalgamations on the operation of the relevant NTRBs, and ensure that FaHCSIA is providing the direction, assistance and resources they need to transition to larger bodies.

64 I Kuch, Transition Manager, North Queensland Land Council, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 25 August 2008.

65 K Smith, CEO, Qld South Native Title Services Ltd, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 19 September 2008.

66 I Kuch, Transition Manager, North Queensland Land Council, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 25 August 2008.

Map 1: Representative Aboriginal/Torres Strait Islander Body Areas 1 July 2008



4. Changes to respondent funding

In 2007, changes were made to the respondent funding scheme. Under this scheme, the Attorney-General can grant legal or financial assistance to certain non-claimant parties to enable them to participate in native title proceedings.

The number of parties to any legal proceeding will necessarily increase the complexity, length, and expense of proceedings for all parties involved. However in native title proceedings, various parties who do not have a legal interest at risk in the proceeding can have standing to participate. The numbers of this type of respondent can reach over one hundred for one claim, seriously hampering its progress. Sometimes, the parties' participation is funded by the Attorney-General under the respondent funding scheme.

The 2007 changes were welcome, and have consequently been well received by various stakeholders. Both NTRBs and some governments have indicated that one of the major benefits of the 2007 changes were those made to the respondent funding scheme:⁶⁷

...[T]he provisions there were to allow a bit more rigour, and that's a good thing. When you have a plethora of respondent parties, if you're going to get a consent determination, then you have to get the consent of everyone. If there's a proliferation of parties because of a relaxed Federal Court Rule allowing anyone with an interest to become a respondent, and then there's eligibility to respondent funding, it behoves an organisation not to actually mediate a negotiated outcome, it almost perpetuates itself

67 South Australia Native Title Services, *Email to the Native Title Unit at the Australian Human Rights Commission for the Native Title Report 2008*, 18 July 2008.

to ensure there is no mediated outcome. So I think that was a good thing, but again, has there been an overall reduction in respondent funding, has it reduced the number of parties, has it made it a disincentive to be a party, I don't know.⁶⁸

The expenditure on the scheme has indeed been reduced, implying that the Attorney-General is considering the impact of these parties on native title claimants and proceedings. Expenditure for the respondent funding scheme fell from \$5.01 million in 2006-07 to \$4.25 million in 2007-08. This reduction in spending has been attributed to the 2007 changes which encourage agreement making and 'considerably limit assistance available to non-government respondents for court proceedings'.⁶⁹

However, many of the concerns I raised in the *Native Title Report 2007* have not been addressed or responded to by the Attorney-General. In summary, I am concerned that there is no information about how the scheme has been evaluated and no specific effort by the Attorney-General to determine how the funded parties impact on the proceedings or the native title rights and interests of Indigenous peoples. The Attorney-General has indicated to me that his assessment of the conduct of parties who are funded under this scheme, 'to a large degree' follows the lead of the Federal Court, NNTT and other parties.⁷⁰ In other words, the impact of these parties on the proceedings is not known. Perpetuating my concern is the fact that the details of which parties are being funded is confidential. Consequently, no one is able to hold the government accountable for how these public funds are being spent.

I encourage the Attorney-General to consider the recommendations I made in chapter 4 of the *Native Title Report 2007* to further improve the respondent funding scheme.

5. Changes to prescribed bodies corporate

Prescribed Bodies Corporate (PBCs) are essential to native title. They are the bodies that are established to hold native title on trust or as an agent for the native title holders. Their primary role is to protect and manage determined native title in accordance with the native title holders' wishes and provide a legal entity through which the native title holders can conduct business with others who are interested in accessing their land or waters. They are integral to the system and to achieving the broader outcomes from native title that communities and governments want to see:

PBCs are critical organisations that are going to have to deliver during outcomes from the native title process for native title holders and the wider Australian community, and the Government needs to fully understand and properly support this.⁷¹

Some of the changes made to the native title system in 2007 were intended to address a number of the problems PBCs face in order to operate. However, the changes are not sufficient to support the effective operation of PBCs. It is positive that the government has acknowledged the significance of these bodies and has

68 K Smith, CEO, Qld South Native Title Services Ltd, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 19 September 2008.

69 T Koch, Principal Legal Officer, Attorney-General's Department, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 28 October 2008.

70 R McClelland, Attorney-General, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 11 September 2008.

71 A Sweeney, *Practical and Strategic Considerations for PBCs* (Conference Paper for Native Title Conference, Perth, 3-5 June 2008). At: <http://ntru.aiatsis.gov.au/conf2008/ntc08papers/SweeneyA.pdf> (viewed September 2008).

committed to funding them appropriately on many occasions.⁷² I look forward to seeing how PBCs will be funded as an outcome from the government's review of funding of the native title system that will feed into the next federal Budget.

However, in the meantime, the role of PBCs is in jeopardy because of the poor level of support available for them and the role that they are expected to play in the community. Pila Nguru, a PBC based in the Tjuntjuntjara Community in Western Australia, highlights the difficult role that PBCs play:

Walking the line between upholding traditional responsibilities and making moves to secure a future for remote community can be tricky...I cannot see it is in anybody's interests to have PBCs collapse but I cannot equally see how they can continue without at least a skeletal funding base.⁷³

5.1 Financial support

As I have indicated, one of the most pressing concerns of PBCs is support for their operation; both financial and non-financial. The necessity of federal support for PBCs is strongly endorsed by state and territory governments.⁷⁴

The 2007 changes allowed for some additional mechanisms through which PBCs could gain support from the federal government, either directly through FaHCSIA or through NTRBs.⁷⁵ However, FaHCSIA have stated that:

In terms of the 2007 policy change to permit the provision of funding support for PBCs beyond their initial establishment phase, we have been limited to the extent to which we have been able to assist PBCs by the level of resources available to the program. The high level of demand for resources by NTRBs has made it difficult to secure funds for PBC support within existing funding...⁷⁶

At the end of June 2008, there were 57 Registered PBCs (known as Registered Native Title Bodies Corporate) on the National Native Title Register. A further 12 determinations of native title are awaiting a determination of a Prescribed Body Corporate to become the Registered Native Title Body Corporate.⁷⁷ Of these, only ten received funding from the federal government, to a cumulative total of \$380,000 which was sourced from funds allocated to NTRBs.⁷⁸

72 See Attorney-General, *Speech*, (Speech delivered at the Negotiating Native Title Forum Brisbane, 29 February 2008). At: http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/Speeches_2008_29February2008-NegotiatingNativeTitleForum (viewed March 2008); Minister for Families, Housing, Community Services and Indigenous Affairs, *Beyond Mabo: Native title and closing the gap*, (2008 Mabo Lecture, Townsville, 21 May 2008). At: http://www.facs.gov.au/internet/jennymacklin.nsf/print/beyond_mabo_21may08.htm (viewed May 2008); Australian Labor Party, *Australian Labor Party National Platform and Constitution*, 2007 At: <http://www.alp.org.au/platform/> (viewed May 2008).

73 P Twigg, Pila Nguru Aboriginal Corporation, *Email to the Native Title Unit at the Australian Human Rights Commission for the Native Title Report 2008*, 9 August 2008.

74 See below.

75 See T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Australian Human Rights Commission (2008), chapter 5 for more information on the changes and my concerns.

76 G Roche, Manager, Department of Families, Housing, Community Services and Indigenous Affairs, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 11 September 2008.

77 A Gordon, Principal Registry, National Native Title Tribunal, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 30 June 2008.

78 G Roche, Manager, Department of Families, Housing, Community Services and Indigenous Affairs, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 11 September 2008.

Although the establishment of a PBC is a requirement of the Native Title Act once a determination is made, the federal government has stated that it should 'not necessarily be considered a first stop for funding. Funding should also be sought as appropriate from state and territory governments and agencies, industry and other relevant Australian Government departments and agencies.'⁷⁹

With limited government money available, funding is becoming an increasingly urgent concern. In addition, as the native title system progresses, the number of PBCs in the country is rising, and the focus of native title policy is to some extent moving from interpretation of the Native Title Act to implementation of the rights granted. However, implementation and realisation of native title rights are stifled, and can even be extinguished and lost when the PBC cannot operate effectively.

So where can PBCs obtain funding? Because of the nature of native title rights and interests, PBCs can very rarely use native title to make a profit which would support their sustainability. However, where a claim group has managed to negotiate monetary or other benefits through an Indigenous Land Use Agreement or broader settlement, this may include provision for funding the PBC. But this funding typically comes from private interests, which is not consistent across Australia, or is an optional extra from state or territory governments.⁸⁰ As a result, there is nothing at all in the system which guarantees PBCs' viability, and therefore there is nothing in the system which guarantees that hard won recognition of native title rights will be effective into the future.

I recommend that the Attorney-General significantly increase financial support for PBCs as a separate funding base from that allocated for NTRBs. At a minimum, PBCs should be allocated a specific funding grant for the first year of the PBC's operation, to ensure it is established in accordance with the significant regulations that apply to them.

A related issue that has been raised with me is that some native title claimants are forming corporations through which they utilise the procedural rights afforded under the Native Title Act, and carry out other dealings with the land before a native title determination has been made. As these bodies are not yet PBCs under the law (as there is no determination of native title), there is no funding available through the Commonwealth for these corporations at all. Yet they are also essential to the system's operation and the protection of native title rights and interests prior to a determination. A determination itself will take many years if it is even sought. However, if a broader settlement is achieved (and the focus of significant stakeholders is shifting in this direction), a native title determination may never be made, and these corporations will have immense difficulty surviving and protecting their rights. Currently, many of these organisations are operating via the goodwill and pooled resources of a claim group, while the individuals who run it are stretched to their limit, simultaneously continuing with other paid employment and fulfilling their family and community commitments.

79 Australian Government, Department of Families, Community Services and Indigenous Affairs, *Native Title Program: Guidelines for Support of Prescribed Bodies Corporate (PBCs)* (2007). At: http://ntru.aiatsis.gov.au/major_projects/psc_guidelines.PDF (viewed December 2008). PBCs can apply to FaHCSIA for funding for their administrative costs to the total of \$100,000 per year.

80 AIATSIS and the NNTT have both been working to identify alternative sources of funding assistance for PBCs. See www.aiatis.gov.au.

Additionally, both the Attorney-General and the Minister for Indigenous Affairs have emphasised the need for native title agreements to result in broader outcomes for Indigenous communities. It is PBCs that will be the organisations that must implement these agreements and ensure those outcomes are attained. They are the vehicle that will be used to achieve a range of social, cultural, political and economic aspirations.⁸¹

When the government considers the level of support it will provide for PBCs, it should consider the broader roles that PBCs play in achieving and protecting Indigenous peoples' rights to their land, and attaining broader benefits for communities.

5.2 Fee for service

One of the 2007 changes did provide a potential funding source for PBCs by allowing them to charge a third party to a negotiation for costs and disbursements reasonably incurred in performing statutory functions. However, the provisions only commenced on 1 July 2008, and the PBCs that I received feedback from did not comment on whether they intend on using the provisions. FaHCSIA is also uncertain about whether the new power has been utilised or how much impact it will have:

The capacity to charge fees for costs incurred in undertaking negotiation of agreements etc ... is likely to have had some impact but we do not have sufficient information on the extent to which it has been applied in practice.⁸²

I raised concerns about how this scheme will operate in the *Native Title Report 2007*,⁸³ and I encourage the Attorney-General to monitor the new powers to identify how and to what extent they assist or hinder PBCs to obtain funds.

5.3 PBC Regulations

A number of the 2007 changes affecting PBCs have not been implemented. Many of the changes that were announced require the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (the PBC regulations) to be amended before they have any effect. These amendments relate to a host of changes to PBCs that were decided on, including PBC consultation requirements, standing authorisations, default PBCs, replacement PBCs and a raft of other issues.⁸⁴

In the *Native Title Report 2007*, I raised a number of issues that should be considered when drafting these amendments. I recommend the Attorney-General and the Minister for Families, Housing, Community Services and Indigenous Affairs consider these while they draft the regulations, and consult widely with PBCs, NTRBs and Indigenous people once a draft is available.

81 A Sweeney, *Practical and Strategic Considerations for PBCs* (Conference Paper for Native Title Conference, Perth, 3-5 June 2008). At: <http://ntru.aiatsis.gov.au/conf2008/ntc08papers/SweeneyA.pdf> (viewed August 2008).

82 G Roche, Manager, Department of Families, Housing, Community Services and Indigenous Affairs, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 11 September 2008.

83 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Australian Human Rights Commission (2008), pp 100-101.

84 See T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Australian Human Rights Commission (2008), chapter 5.

6. The CATSI Act 2006

The *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (the CATSI Act) came into effect on 1 July 2007. It provides for the incorporation and regulation of Aboriginal and Torres Strait Islander Corporations, and significantly changes the law that previously governed Indigenous corporations. The CATSI Act affects the native title system because PBCs must be incorporated under it.⁸⁵ Once a PBC is incorporated under this Act, it is registered on the National Native Title Registrar as a Registered Native Title Body Corporate (RNTBC⁸⁶).

In the *Native Title Report 2007*, I summarised the main changes to Indigenous corporations through the enactment of the CATSI Act, and my concerns about the impact it will have on the human rights of Indigenous Australians.⁸⁷ I raised the concern that PBCs will not receive the support and resources they need in order to comply with the CATSI Act and that, as a result, they risk losing control of their native title rights and interests, or jeopardising these interests in other ways.

Because corporations have up until 30 June 2009 to transition their constitutions to be in line with the new Act, the CATSI Act has not yet been fully implemented.

Consequently, the corporate regulator, the Office of the Registrar of Indigenous Corporations (ORIC), has not assessed the impact that the CATSI Act has had on Indigenous corporations. The Registrar has informed me that '[i]f an assessment of the impact of the CATSI Act is to be undertaken, it will be undertaken after 30 June 2009. What any assessment would include has not yet been decided'.⁸⁸

The Registrar also noted that:

Feedback on the CATSI Act has been far-reaching and both positive and negative. There has been no formal assessment of feedback on the CATSI Act to date and therefore I cannot comment on RNTBCs' views in this context.⁸⁹

In the meantime, ORIC has undertaken a number of initiatives such as producing guidelines, pre-populating some of the reports that PBCs need to submit to ORIC in order to comply with the reporting requirements, and providing training.⁹⁰

ORIC has reported that the number of registered PBCs that are not complying with the reporting and other regulatory requirements has fallen from 49 percent in October 2007, to 14.8 percent in October 2008. The Registrar considers that this is probably

85 Most Indigenous corporations can choose between incorporating under the CATSI Act or the Corporations Act 2000 (Cth). However, for a PBC to become a Registered Native Title Body Corporate, they must incorporate under the CATSI Act.

86 Although PBCs that are incorporated under the CATSI Act are then referred to as Registered Native Title Body Corporate, for ease of reference, I will continue to refer to them as PBCs in this section of this chapter.

87 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Australian Human Rights Commission (2008), chapter 6.

88 A Bevan, Registrar of Indigenous Corporations, Office of the Registrar of Indigenous Corporations, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 10 October 2008.

89 A Bevan, Registrar of Indigenous Corporations, Office of the Registrar of Indigenous Corporations, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 10 October 2008.

90 A Bevan, Registrar of Indigenous Corporations, Office of the Registrar of Indigenous Corporations, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 10 October 2008.

due to his office's regular contact with NTRBs, and the NTRBs' and ORIC's support for registered PBCs (including training).⁹¹

Encouragingly, the Registrar has also established a planning and research team which will research non-compliance and why Indigenous corporations go into administration. I look forward to reading the results and anticipate that they will be able to be utilised effectively by the Registrar and the government to benefit Indigenous corporations and assist them to operate independently and capably.

However, a number of factors remain a concern.

I have received feedback that because the CATSI Act appears to have been drafted largely with PBCs considered as just another form of corporation, many of the regulations are not consistent with or complementary to the native title system. This creates tension and confusion among PBC members:

Certainly I've noticed a big change in the compliance aspects of registration... the CATSI rule book is very complex particularly in the context of native title... you have to try and combine the two, and then you have to – other than explain it to people who speak English as a second language – you then have to have it all amended in accordance with your existing constitution and so on, it's actually very resource intense. And there's no funding specifically earmarked for this as far as I can tell... I think administratively the transition under the CATSI Act has really increased the burden for people that don't have independent assistance. I think those groups are going to really struggle to deal with it all because it really is very complex.

The whole problem with ORIC, is that the whole notion of PBCs and native title entities has been secondary, and almost an afterthought. The whole notion of contractual membership where you have to get each member to sign something requesting to become a member, and then having the Board of Directors say yes or no, seems to be completely out of kilter with the notion of native title groups; you're either a member or you're not in terms of the rules that apply under traditional law and custom. That's something that's been completely ignored or overlooked.⁹²

I am also concerned that while the law is still being implemented and the initial impacts are uncertain and mixed, there is no reliable data on why registered PBCs have been non-compliant with the regulatory requirements to date, whilst at the same time there is widespread recognition that these bodies are severely under-funded. Because of this, I recommend that the Registrar and FaHCSIA together undertake a review of the impact that the CATSI Act has on Indigenous corporations once implementation of the Act is complete. In particular, the review should examine the impact of the CATSI Act on PBCs' ability to protect and utilise their native title rights and interests.

Finally, in order to be able to comply with the regulatory requirements, PBCs need to have access to funding, resources and skills. The funding available to them from the government however is, at least in part, dependent on their capacity to govern themselves. Yet this inter-dependence between funding and governance has not been sufficiently recognised by government. The Registrar of Indigenous Corporations informed me that ORIC 'does not have any role or influence in determining FaHCSIA

91 A Bevan, Registrar of Indigenous Corporations, Office of the Registrar of Indigenous Corporations, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 10 October 2008.

92 T Wooley, public officer, De Rose Hill – Ilpalka Aboriginal Corporation and Yankunytjatjara Native Title Aboriginal Corporation, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 8 September 2008.

funding for RNTBCs⁹³. This is yet another example of government departments acting in silos, and I recommend that FaHCSIA work cooperatively with ORIC to ensure the funding of registered PBCs is consistent with the aim of building the capacity of these bodies to govern themselves and operate independently, securing the future and utilising their native title rights and interests.

7. Improving native title – as simple as an attitude change?

It is evident that the 2007 changes have not yet had any significant impact on the native title system. Perhaps it is too early to tell, but a broad range of stakeholders support my concern that the changes will not deliver the substantial changes that the system needs. It is doubtful whether the changes will be of any perceptible benefit to the Traditional Owners of the land, and it is unlikely the net result will be an increased protection of the human rights of Aboriginal and Torres Strait Islander peoples.

It is disappointing that the government spent a number of years, multiple reviews and countless resources to simply tinker with a system that is in dire need of reform. I hope that this trend does not continue, and that the government now concentrates on actions that will fulfil the commitments it has made over recent months to improve the system.

As I outlined in chapter 1 of this Report, while the government has recognised some of the fundamental flaws with the outcomes of native title and has committed to finding new solutions, the government's main focus will be altering the attitude of parties involved in native title:

I share the concerns expressed in the [*Native Title Report 2007*] about the outcomes being obtained through the native title system. The heart of the Native Title Act 1993 is the principle that the recognition of Indigenous people's ongoing connection with their land should occur through negotiation and mediation, not litigation, wherever possible. I have actively encouraged all parties to take a less technical approach to native title, and to use the opportunities presented by native title claims to facilitate the reconciliation process and to negotiate better and broader outcomes for Indigenous people.

...

I believe that the key to achieving better outcomes lies in all parties changing their behaviour and engaging more flexibly, to achieve and build upon recognition of the ongoing relationship of Indigenous people to the land.⁹⁴

Although there is benefit in this, I am concerned that this will not be sufficient, and that this policy needs to be complemented by changes to the underlying system if the outcomes the government would like to see are to be attained.

Firstly, 'attitudes' to policy are discretionary and dependent on the elected government for each jurisdiction. It does not create certainty, predictability or equity in native title outcomes across Australia. If a government changes, there is no guarantee that the 'flexible' approach will be maintained. The markedly different outcome from a simple change in approach is seen in chapter 3 of this Report, where the Northern Territory government changed during a compulsory acquisition case.

93 A Bevan, Registrar of Indigenous Corporations, Office of the Registrar of Indigenous Corporations, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 10 October 2008.

94 R McClelland, Attorney-General, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 11 September 2008.

Improvements to the system need to be enshrined in legislation to ensure that the rights of Indigenous peoples are always protected, and not swept aside when it's convenient.

Secondly, while supporting the flexible and less technical approach to native title, the Northern Territory (NT) Government has already warned:

[T]he Australian Government's proposal for broader settlements and regional initiatives using the native title process may be constrained by the legal requirements of the Native Title Act 1993 (Cth) and court processes.⁹⁵

That is, stakeholders consider that there are considerable constraints within the Native Title Act that may prevent them from making significant progress in improving the native title outcomes that are agreed.⁹⁶

Thirdly, I am concerned about the breadth of change that can be achieved when nearly all of the state and territory governments have indicated to me that they consider that they have already been acting in a flexible manner for years.⁹⁷ Consequently, they all naturally support the federal Attorney-General's approach, but this begs the question; how much more flexible will these governments be? For example South Australia's Attorney-General indicated:⁹⁸

South Australia supports the Commonwealth's new emphasis on achieving broader settlements through less technical and more flexible approaches and has been implementing that approach for nine years.

Because of these weaknesses, I recommend the government consider further legislative and policy changes that have been discussed in this, and previous, native title reports. In addition, the government could consider tying the announced funding to state and territory governments for native title compensation payments, to state and territory behaviour in native title agreement making and the settlement of broader agreements.⁹⁹

95 M Scrymgour, Northern Territory Minister for Indigenous Policy, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 September 2008.

96 Various native title reports, including this Report, have discussed the barriers in the native title system which may prevent broader outcomes being achieved through the system. Some of these relate to procedures in the Act, or legal interpretation of provisions. Others are related to government policy and funding. Some examples include the inability of the Act to recognise commercial rights; the pressure of court timing and processes on the parties when they are trying to reach an agreement which is broader than just a native title outcome; the funding, resourcing and capacity of PBCs and NTRBs to develop, negotiate and implement agreements.

97 J McNamara, Executive Director, Indigenous Services, QLD Department of Natural Resources and Water, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 September 2008; M Atkinson, Attorney-General of South Australia, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 September 2008; T Kelly, NSW Minister for Lands, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 1 September 2008; R Hulls, Attorney-General of Victoria, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 16 September 2008; J Stanhope, ACT Minister for Indigenous Affairs, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 9 September 2008.

98 M Atkinson, Attorney-General of South Australia, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 September 2008.

99 Attorney-General, 'Native Title Ministers' Meeting Communiqué', (Media release, 18 July 2008). At: http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/MediaReleases_2008_ThirdQuarter_18July-Communique-NativeTitleMinistersMeeting (viewed 21 July 2008). The Communiqué stated that the federal, state and territory governments will reach an agreement by 30 June 2009 on the federal funding to states and territories for native title compensation.

7.1 Further suggestions for improvement

Throughout this Report, and previous native title reports, I have made a number of recommendations for improvements that can be made to the native title system. In addition to these, government agencies, NTRBs and PBCs have offered me their own suggestions about how the system could be improved. Many of these are consistent with recommendations in native title reports. I recommend that the Attorney-General consider these suggestions.

(a) Federal Court's power over native title proceedings

Both Victoria's and South Australia's Attorneys-General have indicated a strong preference for the option of 'long-term adjournments' of native title claims at the request of all parties:

One area of reform Victoria believes is worthy of further exploration is the potential for the State and native title parties to approach the Court and obtain a 'suspension' or 'long-term adjournment' of a claim for a period of time to enable them to negotiate ancillary outcomes ... The problem sometimes arises where these broader outcomes are not being realised because of pressure from the Court to resolve the native title question more quickly. This can lead to missed opportunities for traditional owners, or ancillary agreements that are difficult to implement because the policy development behind them was rushed. Preparing for regular court appearances can divert resources from making progress on negotiating broader agreements.¹⁰⁰

Similarly, South Australia's Attorney-General commented:

...there must be scope to exclude the Federal Court and the NNTT from involvement where all parties agree that they want to proceed themselves...the threat of having a trial listed by the Court can also distract parties and divert resources from negotiations. This is especially so if the parties are trying to negotiate settlements that include benefits beyond a determination of native title. Those negotiations necessarily take more time while the Court is, generally, only interested in native-title results.¹⁰¹

I see the merit in this approach, and support such a proposal if both parties consent to an adjournment.

(b) Funding and support for Native Title Representative Bodies and Prescribed Bodies Corporate

Almost every organisation in the native title system has expressed serious concern about the impact that under-resourcing of NTRBs has on native title claims. Each state and territory government expressed this concern to me.

Victoria's Attorney-General identified the need for 'more robust and secure funding for NTRBs, including native title service providers...organisational capacity, expertise and good governance of these bodies... is critical to the functioning of the native title system as a whole'. He also stated that the Victorian Government would:

welcome a greater focus on enhancing capacity with respect to the statutory dispute resolution functions of these bodies, in relation to disputes between their constituents.¹⁰²

100 R Hulls, Attorney-General of Victoria, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 16 September 2008.

101 M Atkinson, Attorney-General of South Australia, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 September 2008.

102 R Hulls, Attorney-General of Victoria, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 16 September 2008.

This is a significant problem for Indigenous peoples. Approximately half of the complaints that FaHCSIA receives about the native title system are about authorisation or intra-Indigenous disputes.¹⁰³

Significant work has already been done on approaches to Indigenous decision-making and dispute management by the Indigenous Facilitation and Mediation Project (IFaMP).¹⁰⁴ The project, which was undertaken by the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), made a number of findings and recommendations on agreement making through non-adversarial approaches, some of which were specific recommendations to improve the native title system. The recommendations included funding and establishing an accredited national network of Indigenous process experts including mediators, facilitators and negotiators; the incorporation of Indigenous expertise into native title mediation processes and support for the development of Indigenous expertise and the development of specific native title national standards and/ or a code of ethical conduct which addresses the roles and responsibilities of all parties.¹⁰⁵ I encourage the Attorney-General to consider the recommendations made in the final report of the Project.

Victoria's Attorney-General also suggested that there should be greater support for PBCs to carry out the substantial responsibilities that the Federal legislation imposes on them. He has suggested that a program similar to the Aurora program be funded for building the capacity of PBCs.¹⁰⁶ AIATSIS already has a project underway which is aimed at supporting PBCs to hold and manage their country 'through research and participatory planning to support capacity-building in effective decision making and conflict resolution processes, frameworks, negotiation skills, agreement making, strategic planning and governance'.¹⁰⁷ This project could be further supported by government.

Similarly NSW's Minister for Lands considers that the Commonwealth Government:

...should examine further Commonwealth measures of support (both financial and non-financial) for native title representative bodies and prescribed bodies corporate.¹⁰⁸

I have discussed the issue of funding in chapter 1 of this Report and earlier in this chapter.

103 G Roche, Manager, Department of Families, Housing, Community Services and Indigenous Affairs, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 11 September 2008; see T Bauman, *Final Report of the Indigenous Facilitation and Mediation Project July 2003-June 2006: research findings, recommendations and implementation*, Report No. 6 (2006). At: http://ntru.aiatsis.gov.au/ifamp/research/pdfs/ifamp_final.pdf (viewed December 2008).

104 See T Bauman, *Final Report of the Indigenous Facilitation and Mediation Project July 2003-June 2006: research findings, recommendations and implementation*, Report No. 6 (2006). At: http://ntru.aiatsis.gov.au/ifamp/research/pdfs/ifamp_final.pdf (viewed December 2008).

105 See T Bauman, *Final Report of the Indigenous Facilitation and Mediation Project July 2003-June 2006: research findings, recommendations and implementation*, Report No. 6 (2006). At: http://ntru.aiatsis.gov.au/ifamp/research/pdfs/ifamp_final.pdf (viewed December 2008).

106 R Hulls, Attorney-General of Victoria, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 16 September 2008.

107 See Australian Institute of Aboriginal and Torres Strait Islander Studies, *Major Projects*, http://ntru.aiatsis.gov.au/major_projects/psc_rntbc.html (viewed December 2008).

108 T Kelly, NSW Minister for Lands, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 1 September 2008.

(c) Extinguishment of native title

The Queensland Department of Natural Resources and Water would like the Commonwealth Attorney-General to consider the necessity of the permanency of extinguishment of native title, and whether the principle of non-extinguishment can be extended:

The benefits of extending the operation of section 47 suite of the NTA which sees the disregarding of the extinguishment of native title occurring in certain circumstances.¹⁰⁹

Justice Wilcox also thinks that the Attorney-General should re-consider the permanency of extinguishment:

One change that could be made, and it's just a great shame that it's necessary. The current doctrine is that if there's ever been [extinguishment] by the Crown, whether a grant of freehold or a grant of lease, that terminates native title, even if the land is subsequently reverted to the Crown...Now why do we have to stick to that rule?... I think that's an area that can usefully be looked at.¹¹⁰

I agree that this approach would be beneficial, and would increase the possible recognition of native title, going some way to mitigating the impact of colonisation on Indigenous peoples' rights and interests. It would also be consistent with the Native Title Act's preamble that states: 'where appropriate, the native title should not be extinguished but revive after a validated act ceases to have effect.'¹¹¹

(d) Recognition of traditional ownership outside the native title system

The Native Title Act was intended to be just one of three complementary approaches to recognise, and provide some reparation for, the dispossession of Indigenous peoples' lands and waters on colonisation. The two other limbs were to be a social justice package and a land fund that would ensure that those Indigenous peoples who could not access native title would still be able to attain some form of justice for their lands being taken away.

It was in this context that the Native Title Act was drafted and passed by Parliament. However, the other two limbs did not eventuate in the form intended, and this abyss is one of the underlying reasons why the native title system is under the strain it is under today.

The social justice package never came to fruition. The new Rudd Government's Platform states that it will 'recognis[e] that a commitment was made to implement a package of social justice measures in response to the High Court's Mabo decision, and will honour this commitment'.¹¹² In an appendix to this Report I have summarised the main recommendations and proposals for a social justice package that were made at the time by the Aboriginal and Torres Strait Islander Commission and the former Aboriginal and Torres Strait Islander Social Justice Commissioner.¹¹³

The land fund commitment was realised through the Indigenous Land Corporation (ILC) which continues to operate today, but does not always provide an effective and accessible alternative form of land justice when native title is not available.

109 J McNamara, Executive Director, Indigenous Services, QLD Department of Natural Resources and Water, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 September 2008.

110 M Wilcox, former Justice of the Federal Court of Australia, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 23 July 2008.

111 *Native Title Act 1993* (Cth), preamble.

112 Australian Labor Party, *Australian Labor Party National Platform and Constitution* (2007). At: www.alp.org.au/platform/, Chapter 13 (viewed July 2008).

113 See Appendix 3.

Consequently, it could not be said to fulfil Australia's commitments to land rights, nor fulfil the function it was intended to as was set out in the preamble to the Native Title Act, which states:

It is also important to recognise that many Aboriginal peoples and Torres Strait Islanders, because they have been dispossessed of their traditional lands, will be unable to assert native title rights and interests and that a special fund needs to be established to assist them to acquire land.

(e) The Indigenous Land Corporation

The Native Title Act as passed in 1993 established a National Aboriginal and Torres Strait Islander Land Fund. However, a number of changes made since 1993 have meant that this fund, which is referred to now as the Land Account, is administered by the Indigenous Land Corporation (ILC).¹¹⁴

The Act which now provides the functions of the ILC is the *Aboriginal and Torres Strait Islander Act 2005* (Cth). The preamble to this Act also acknowledges the need for land justice for Australia's Indigenous peoples, but does not draw any connection to native title and the complementary role the Land Account was supposed to play:

And whereas they have been progressively dispossessed of their lands and this dispossession occurred largely without compensation, and successive governments have failed to reach a lasting and equitable agreement with Aboriginal persons and Torres Strait Islanders concerning the use of their lands...

It is this Act which dictates the ILC's functions, which primarily relate to land acquisition and land management. The Act only mentions native title twice, but never draws on the integral relationship between the Land Account, the functions of the ILC, and native title.

Recently, I have received an increasing number of inquiries and concerns about the ILC and the role it is playing in the realisation of land rights and justice for Indigenous people. Many Aboriginal people and Torres Strait Islanders are confused about its role, its activities and the outcomes it is achieving. Indigenous people have indicated to me that they are concerned that the ILC does not focus enough on reparation for dispossession, but instead is concerned with economic gain.¹¹⁵

Perhaps the link between dispossession and the role of the fund in the achievement of land justice and the native title system should be considered further, and the link made more explicit and direct. The Queensland Department of Natural Resources and Water would support such an approach. It suggests that the Attorney-General should consider 'how to increase the role of the Indigenous Land Fund in the resolution of native title claims'.¹¹⁶ I would support such a review and a consideration by government, in consultation with the community, of how the ILC's functions could better complement the native title system and contribute to the outcomes government would like to see.

114 The ILC was established in 1995 by the *Land Fund and Indigenous Land Corporation (ATSIC Amendment) Act 1995*. This Act repealed Part 10 of the Native Title Act (which had established the National Aboriginal and Torres Strait Islander Land Fund), and amended the *Aboriginal and Torres Strait Islander Commission Act 1989* (ATSIC Act) by adding a new Part 4A, establishing the ILC as a Commonwealth Authority with land acquisition and land management functions. See the ILC website at: www.ilc.gov.au.

115 Many of these comments were informal comments made to me at the AIATSIS Native Title Conference 2008, held in Perth, June 2008.

116 J McNamara, Executive Director, Indigenous Services, QLD Department of Natural Resources and Water, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 September 2008.

In the meantime, the two other social justice limbs referred to in the preamble to the Native Title Act do not operate in the way originally intended. Because of these constraints, there has been unforeseen pressure on the native title system to deliver even though native title was never intended to be the panacea for dispossession in Australia:

What we need to do is return to the preamble of the Act. The NTA was only considered to be a stepping stone to the realisation of Indigenous land aspirations. When you remove the other limbs, we all go scurrying towards the very thing that [Justice] Brennan said you're going to be in a world of pain to prove. To me, I think the preamble actually spells it out quite nicely. If you're going to be looking at these things you've got to look at it comprehensively and in that you don't need full blown connection. Right people, right country, and some mechanism to determine that.¹¹⁷

Recognising that native title is not producing land justice for the majority of Aboriginal peoples and Torres Strait Islanders, there is a discussion gathering momentum about how traditional ownership can be recognised short of a native title determination. After hearing a number of native title cases as a judge in the Federal Court, Justice Wilcox considers this:

What [Traditional Owners] are wanting, what they're crying out for, is for the people who represent authority figures to them, and it's the government or the courts speaking on behalf of government, I suppose that's the way they would see it, to say this is who you are and we recognise who you are. Now for that reason, I would like to see added to the Native Title Act, some provision that allows the court, even if not granting native title, or recognising native title, to determine the particular group are the people whose ancestors were there at the time of settlement and that they've maintained continuity as a people even if they can't prove continuity from generation to generation of observing the law... I think until we recognise that the system that was seen in Mabo, which after all was a remote island, hardly impacted by white settlement, simply doesn't work for [most Indigenous people]. And it's going to be a source of great disappointment, even a feeling that they've been conned... Here's the government of the country and Parliament passing statutes which seem to promise so much and yet when the claim is brought they just can't get there and then they get nothing, not even recognition...¹¹⁸

Justice Wilcox has linked the difficulty of the legal hurdles required to be jumped for native title, with the gridlock the system is in today, and sees an alternative form of recognition as one way of dealing with this problem:

What [Traditional Owners] are wanting I think more than anything is recognition and we could change that quite easily by just adding a new section to the Act... it wouldn't be as much satisfaction as actually winning a native title claim but it would go a long way to at least make an appeal that they are recognised as who they are.

I just find it really difficult to live with the idea that people like the Yorta Yorta and Larrakia and Noongar people just get kicked out with just nothing, and there'll be more cases like that. One of the problems is, one of the reasons why the native title list is in such a static condition in the court is I believe that many of the claimants have been advised that the case will not succeed and go nowhere but they can't bring themselves, or persuade those whom they represent perhaps, to just say ok we give up, we abandon it, because they see that as a being a concession that they're not who they are and so we've got 500 cases waiting in the list and there's hardly any movement in the list.

117 K Smith, CEO, Qld South Native Title Services Ltd, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 19 September 2008.

118 M Wilcox, former Justice of the Federal Court of Australia, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 23 July 2008.

I had a lot to do with the native title list and I just about went crazy trying to get cases up to the barrier and you couldn't and for a whole host of reasons, it wasn't justice but I think many of these cases they ought to be. Normally with any other litigation say, well this has been here for a long time and I'm going to set a date and it's going to go on that day. But you know that if they did that they'd probably just discontinue the claim ... or you'd come to the courts and you'd force them onto the situation where the whole thing is a mess... they've probably been told, look don't bring it on, you're not going to get anywhere. And yet they can't say this is hopeless. They're wanting the court to say you are who you are.¹¹⁹

Similarly, the Queensland government would like the Attorney-General to consider:

The establishment of a 'traditional owner' status under the NTA which could be by way of an extension of the claim registration process with the NNTT responsible for the recognition of the status. The status could carry with it a suite of benefits.¹²⁰

These ideas are closely connected to the limitations on the ILC's operation and its consequent inability to comprehensively fulfil the objectives that a native title land fund was intended to deliver. It is essential that this void is filled, be it through review of the ILC's role or amendments to the Native Title Act to provide an alternative form of recognition when native title is not available.

Recommendations

- 2.1 That any further review or amendment that the Australian Government undertakes to the native title system be done with a view to how the changes could impact on the realisation of human rights of Aboriginal and Torres Strait Islander peoples.
- 2.2 That the Australian Government respond to the recommendations made in the *Native Title Report 2007* on the 2007 changes to the native title system.
- 2.3 That the Australian Government and the National Native Title Tribunal draft a comprehensive and clear guide to the registration test. The Australian Government should consider whether further guidance on the registration test should be included in the law, through regulation or through amendment to the Native Title Act.
- 2.4 That the Australian Government monitor the impact of the Queensland NTRB amalgamations on the bodies' operation, and provide direction, assistance and resources to those bodies which require it.
- 2.5 That the Australian Government create a separate funding stream specifically for Prescribed Bodies Corporate and corporations which are utilising the procedural rights afforded under the Native Title Act.

119 M Wilcox, former Justice of the Federal Court of Australia, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 23 July 2008.

120 J McNamara, Executive Director, Indigenous Services, QLD Department of Natural Resources and Water, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 September 2008.

- 2.6 That once the CATSI Act has been implemented, the Registrar of Indigenous Corporations and the Minister for Families, Housing, Community Services and Indigenous Affairs, together review the impact the law has on Indigenous corporations. In particular, the review should examine the impact of the CATSI Act on PBCs' ability to protect and utilise their native title rights and interests.
- 2.7 That the Registrar of Indigenous Corporations and the Minister for Families, Housing, Community Services and Indigenous Affairs, work closely to ensure that funding provided to registered PBCs is consistent with the aim of building PBCs' capacity to operate.

Chapter 3

Selected native title cases: 2007-08

.....

Resolving native title is not simply about land, it is an historic opportunity for the State and Commonwealth to turn a new page in history...¹

Federal Court decisions between 2007-08 continue to evidence how the opportunity to turn the pages of history is rarely realised.

The strong, vibrant and committed Noongar peoples of the South West corner of Australia had their native title determination over Perth returned to square one. The Full Federal Court found that the first judge had made a number of errors in his decision and have sent the case back for consideration by a new judge, leaving the Noongar peoples uncertain about the future of their rights over the land. This is despite the Western Australian government openly acknowledging the Noongar peoples as the Traditional Owners of the land.

The High Court ruled that the Ngaliwurru and Nungali peoples of the Timber Creek area in the Northern Territory could have their native title rights and interests compulsorily acquired for the benefit of private business. Although the case went all the way to the High Court, because of a change of Government since the case began, the native title interests were never actually acquired. However, the Griffiths case makes it clear that the Northern Territory Government can acquire native title rights and interests for any purpose whatsoever, including for the private benefit of a third party.

Considering the results of court decisions of the past few years, one can't help but consider the Yaruwu peoples of the area surrounding Broome to be lucky that none of the opposing parties found a point of law that could deny the Yaruwu peoples their native title rights on appeal. However, to have their rights protected, the matter has been extensively litigated with a number of decisions delivered by the trial judge and a lengthy judgment in the Full Court appeal. There may also be more litigation to come, with the Western Australian government seeking leave to appeal to the High Court. The Yaruwu peoples will continue the long haul to have their rights recognised, but as the federal Attorney-General himself has said:

...there will sometimes not be clear cut legal answers or the court's decision will not be entirely predictable. So unless participants want to risk an all or nothing legal throw of the dice, there must be a will on both sides to devise workable solutions.²

1 South West Aboriginal Land and Sea Council, *The single Noongar claim*, Fact Sheet. At: http://www.noongar.org.au/documents/SNC_fact.pdf (viewed August 2008).

2 Attorney-General, *Speech* (Speech delivered at the Negotiating Native Title Forum Brisbane, 29 February 2008). At: http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/Speeches_2008_29February2008-NegotiatingNativeTitleForum (viewed March 2008).

2. Bodney v Bennell – the Noongar appeal

In my *Native Title Report 2007*, I summarised the Federal Court decision which held that the Noongar people have native title rights and interests in the southwest corner of Australia, including Perth.⁶ However, in April 2008 the Full Federal Court found that Justice Wilcox had erred in his judgment in that case.⁷ Allowing the appeal, the Full Federal Court held that in some respects Justice Wilcox had strayed from the questions and evidence that *Yorta Yorta* required him to address. The Full Court was not prepared to substitute its own answers on the issues of continuity and connection, and ultimately they could not determine whether or not native title rights and interests exist. The case was sent back to a new judge to decide how the matter should proceed.⁸ The parties have agreed to negotiate the claim.

Once again, the decision highlights how the Native Title Act and its procedures for a determination often result in unjust outcomes. These outcomes are not only out of step with the intent of Parliament in passing the Act, but they go against the government's policies of acknowledging past injustices and encouraging reconciliation.

2.1 The case

In *Bennell v Western Australia*⁹ (the first Noongar decision), the Federal Court held that the Noongar people, comprising 400 family names, held native title rights and interests over the Perth metropolitan area.

In the case, Justice Wilcox accepted that a single Noongar society existed in 1829 and that it continued through to today as a body united by its observance of some of its traditional laws and customs. In his decision, Justice Wilcox conceded the enormous impact of European settlement and the cessation of observance of many traditional laws and customs. Nevertheless, consciously referring back to words used by the High Court in *Yorta Yorta*,¹⁰ he said that the Noongar normative system was:

much affected by European settlement; but it is not a normative system of a new, different society.¹¹

The modifications to traditional law and custom that Justice Wilcox observed were, in his view, within the parameters of acceptable change, and so the story of the Noongar was one of continuity and adaptation.¹²

6 The decision at first instance was *Bennell v Western Australia* (2006) 230 ALR 603. This decision was discussed in T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Australian Human Rights Commission (2008), pp 146-150. The appeal decision is *Bodney v Bennell* [2008] FCAFC 63.

7 *Bennell v Western Australia* (2006) 230 ALR 603.

8 *Bodney v Bennell* [2008] FCAFC 63, 210 (Finn, Sundberg and Mansfield JJ).

9 *Bennell v Western Australia* (2006) 230 ALR 603. See T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Australian Human Rights Commission (2008) pp 146-150 for more information on the case at first instance.

10 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

11 *Bennell v Western Australia* (2006) 230 ALR 603, para 791 (Wilcox J), quoting *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

12 S Brennan, *Recent Developments in Native Title Case Law* (presentation at the Human Rights Law Bulletin Seminar, Australian Human Rights Commission, Sydney, 4 June 2007).

The decision of Justice Wilcox in the first Noongar case was appealed by the Western Australian and Commonwealth governments and other parties. The Full Federal Court allowed the appeal,¹³ deciding that Justice Wilcox had failed to consider two matters that the Noongar claimants were required to establish under s 223 of the Native Title Act if they were to be successful in proving their native title.

The first was that Justice Wilcox hadn't properly considered whether there had been continuous acknowledgment and observance of the traditional laws and customs by the Single Noongar Society from sovereignty until today.

The second was that Justice Wilcox hadn't properly considered whether the Noongar people had proven a connection with the specific area before the court. The area the Noongar people were claiming native title over in this case was the Perth Metropolitan Area. This area was labelled 'part A' of a broader claim area called the Single Noongar Claim, which had earlier been split in to part A and part B. The Full Federal Court considered that Justice Wilcox had wrongly taken the view that it was enough that the claimants had established a connection with the broader area of the Single Noongar claim (part A and part B combined). Some aspects of the decision have broader implications for native title and are of concern.

2.2 Successful appeal ground 1 – Continuity

There were a number of aspects of the requirement for continuity that the Full Federal Court commented on in the Noongar appeal. The Full Federal Court considered that Justice Wilcox had erred by asking whether the community survived, rather than whether the laws and customs in relation to land continued from sovereignty to the present:

Instead of enquiring whether the laws and customs have continued to be acknowledged and observed substantially uninterrupted by each generation since sovereignty, [Justice Wilcox] asked whether the community that existed at sovereignty continued to exist over subsequent years with its members continuing to acknowledge and observe at least some of the traditional 1829 laws and customs relating to land.¹⁴

The Full Federal Court also considered that Justice Wilcox did not give enough regard to whether the Noongar people had observed their law and customs 'generation by generation between sovereignty and the present time'.¹⁵ They considered that in deciding whether there had been continuity of observance, Justice Wilcox should have considered whether 'for each generation since sovereignty, acknowledgment and observance of the Noongar laws and customs have continued substantially uninterrupted'.¹⁶

As it has been stated in many native title reports, providing such evidence generation by generation, while being subject to the strict rules of evidence, is a herculean task for people of an oral culture with a history of dispossession and generations of

13 *Bodney v Bennell* [2008] FCAFC 63.

14 *Bodney v Bennell* [2008] FCAFC 63, 73 (Finn, Sundberg and Mansfield JJ), original emphasis.

15 *Bodney v Bennell* [2008] FCAFC 63, 89 (Finn, Sundberg and Mansfield JJ).

16 *Bodney v Bennell* [2008] FCAFC 63, 95 (Finn, Sundberg and Mansfield JJ).

children that were removed from their parents. It is also contrary to Australia's human rights obligations.¹⁷

In his decision, Justice Wilcox was careful to follow the precedent on what constitutes continuity, as set down by the High Court in *Yorta Yorta*. Despite this, the Full Federal Court did not agree with the manner in which he framed his application of the principles to the Noongar.

Although the Court considered that Justice Wilcox had focused on the continuity of society rather than continued acknowledgement and observance of laws and customs,¹⁸ they went on to consider Justice Wilcox's discussion of those traditional laws and customs. They then criticised Justice Wilcox for what they considered to be giving little consideration, as required by *Yorta Yorta*, to the level of adaptation and change that was acceptable.¹⁹

Finally, the Full Federal Court also criticised Justice Wilcox's failure to have regard to anthropologists' evidence which could have assisted him in considering whether there had been continuous observance of traditional laws and customs.²⁰

(a) The effects of white settlement?

The law provides that native title does not require strict proof of continuous acknowledgement and observation of traditional law and custom. In *Yorta Yorta* the High Court made it clear that there must not be *substantial* interruption of that observance, nor should there be too much adaptation or change to the content of the law and custom.²¹ That is, there is some, albeit very limited, room for traditional laws and customs to have changed since sovereignty and still be recognised by the law as it stands.

In the first Noongar decision, Justice Wilcox referred to the effects that white settlement have had on the Noongar people and their traditional laws and customs. However, as I noted above, he concluded that the modifications to traditional law and custom that he observed were within the parameters of acceptable change and adaptation.²²

The Full Federal Court did not agree with this reasoning. It held that Justice Wilcox had made too much allowance for the changes inflicted upon Noongar society by European settlement. The Full Federal Court stated that Justice Wilcox should have simply been examining whether the change meant that the law or custom was no longer traditional.²³

[A]cknowledging that the change from home areas to boodjas is a significant change, his Honour says at [78] that the change is readily understandable because it was forced

17 See below for a discussion about section 223 of the *Native Title Act 1993* (Cth) and the right to culture. See W Jonas, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2002*, Australian Human Rights Commission (2003), p 31 onwards. At: http://www.humanrights.gov.au/social_justice/nt_report/index.html#2002; W Jonas, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2003*, Australian Human Rights Commission (2004), p 149. At: http://www.humanrights.gov.au/social_justice/nt_report/ntreport03/index.htm.

18 *Bodney v Bennell* [2008] FCAFC 63, 76 (Finn, Sundberg and Mansfield JJ).

19 *Bodney v Bennell* [2008] FCAFC 63, 79 (Finn, Sundberg and Mansfield JJ).

20 *Bodney v Bennell* [2008] FCAFC 63, 95 (Finn, Sundberg and Mansfield JJ).

21 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

22 *Bennell v Western Australia* (2006) 230 ALR 603, 774-791.

23 *Bodney v Bennell* [2008] FCAFC 63, 79-82 (Finn, Sundberg and Mansfield JJ).

on the Aboriginal people by white settlement. The reason for such an important change is irrelevant: *Yorta Yorta HC* at [89].²⁴

The Court considered that the law's requirement that the continuous acknowledgment and observance of traditional laws and customs be 'substantially uninterrupted' as opposed to 'uninterrupted' is the mechanism for taking in to account the impact of European settlement on the community:

...But if, as would appear to be the case here, there has been a substantial interruption, it is not to be mitigated by reference to white settlement. The continuity enquiry does not involve consideration of *why* acknowledgment and observance stopped. *If this were not the case, a great many Aboriginal societies would be entitled to claim native title rights even though their current laws and customs are in no meaningful way traditional...* In reaching his conclusion that Noongar laws and customs of today are traditional, his Honour's reasoning was infected by an erroneous belief that the effects of European settlement were to be taken in account – in the claimants' favour – by way of mitigating the effect of change.²⁵

I do not agree with what the court is implying. An Indigenous person who revitalises their culture and practices their laws and customs is still traditional, and also has the right to practice their culture, law and customs and have those rights recognised, acknowledged and protected.²⁶

However, this finding and the words of the Full Federal Court do not only deny Indigenous peoples their rights, but it will limit any future judge's willingness to comment and give due recognition to the devastating impact of colonisation on Australia's Indigenous peoples. More concerning though, is that it also encourages claimants to deny the catastrophic impacts that colonisation and other white policies had on them and on their ancestors. At the Native Title Conference in June 2008, Chief Judge Joe Williams, the Chief Judge of the Maori Land Court put it as:

In Australia the surviving title approach to transitional justice requires the Indigenous community to prove in a court or tribunal that colonisation caused them no material injury. This is necessary because, the greater the injury, the smaller the surviving bundle of rights. Communities who were forced off their land lose it. Those whose traditions and languages were beaten out of them at state sponsored mission schools lose all of the resources owned within the matrix of that language and those traditions. This is a perverse result. In reality, of course, colonisation was the greatest calamity in the history of these people on this land. Surviving title asks aboriginal people to pretend that it was not.²⁷

2.3 Successful appeal ground 2 – Connection

The Full Federal Court also held that the Noongar claimants had not proven connection to the Perth Metropolitan area specifically. The court held that Justice Wilcox had erred by not inquiring into whether connection to that particular area by the laws and customs had been substantially maintained.²⁸

24 *Bodney v Bennell* [2008] FCAFC 63, 81 (Finn, Sundberg and Mansfield JJ).

25 *Bodney v Bennell* [2008] FCAFC 63, 97 (Finn, Sundberg and Mansfield JJ) (emphasis added).

26 See below for a discussion on s223 of the *Native Title Act 1993* (Cth) and the right to culture. See T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Australian Human Rights Commission (2008), chapter 8, for a discussion on the revitalisation of culture.

27 J Williams, *Confessions of a native judge – reflections on the role of transnational justice in the transformation of indigeneity*, (Speech delivered at the Native Title Conference, Perth, 5 June 2008).

28 *Bodney v Bennell* [2008] FCAFC 63, 167 and 185 (Finn, Sundberg and Mansfield JJ).

The Full Court noted Justice Wilcox's assessment that, statistically, a biological connection between some members of the wider Noongar community today and the occupants of the Perth area at sovereignty was likely. It said that even if that were correct, it did not show a present connection by those Noongar people specifically to the Perth area.

The conclusion reached by the Court raises questions about how strategies for running a native title case can be employed by governments and non-claimant parties to contest a native title claim. In the Noongar case, the State had initially suggested that the Single Noongar Claim be split in to two parts. This decision shows that a 'segmentation' strategy by respondents to whole of country native title claims may actually be rewarded by the kind of reasoning adopted by the Full Federal Court in this case. That is, if there are uneven levels of sub-group connection within a diverse claim area, a more built-up area could be hived off from what would otherwise possibly be a positive determination of native title. Yet again, this interpretation privileges a technical and legalistic approach to assertions of country, over holistic ones based in Indigenous cultural norms.

2.4 The future of the Noongar peoples' claim

The future of the Noongar peoples' claim is uncertain. The Full Federal Court refused to determine whether native title existed in the area.²⁹ The court remitted the question of whether native title rights and interests exist over part A (the Perth Metropolitan Area) to the docket judge, but left it to that judge to decide whether to determine part A separately or whether to consolidate it with a hearing over the remaining part B.³⁰

At the time of the decision, Glen Kelly, the chief executive of the South West Aboriginal Land and Sea Country (SWALC), the Native Title Representative Body for the region, said '[w]hat this decision means is back to square one, absolutely back to the beginning of proceedings'. But, he said, it was not a loss for the Noongar people. 'They didn't go so far as to make a ruling that native title does not exist.'

SWALC Chairman Ted Hart said that while they were ready to negotiate with the governments, the State's 'very aggressive' appeal had been insulting to Noongar people. However, after appealing the decision rigorously, the Western Australian government said that:

Native title agreements have the capacity to deliver much, much more if together we can demonstrate the courage, persistence and flexibility to make now big decisions with long term implications.³¹

And it has stated that it:

[Respects] the special relationship of Noongar people with land in the South-West and we look forward to continuing our negotiations with them. With this decision, we now have a clear and consistent understanding of the law, one that will give both the Government and Noongar people a solid platform for negotiations.'

29 *Bodney v Bennell* [2008] FCAFC 63, 210 (Finn, Sundberg and Mansfield JJ).

30 *Bodney v Bennell* [2008] FCAFC 63, 211 (Finn, Sundberg and Mansfield JJ).

31 E Ripper, *Keynote address*, (Speech delivered at the AIATSIS Native Title Conference, Perth, 5 June 2008).

The federal Attorney-General also signalled his preference for negotiating an outcome.³²

All parties have since agreed to mediate the claim. The mediation is limited to part A of the claim, and the parties have agreed that part B will be deferred. The parties will consider what areas of the claim will not be considered (that is, over which the Noongar peoples' rights have effectively been extinguished) and negotiate the six underlying regional claims asserted by the small distinct groups that form the single Noongar population.³³

While the outcome of the negotiations may take many more years, there appears to be increased and better engagement from all sides. The Western Australian Government is taking an active part in the negotiations, with the Australian Government and other respondents taking a minor role.³⁴

[The Western Australian government and Noongar peoples] have endeavoured to thaw what was previously a frosty relationship.³⁵

Since this time, the Western Australian government has changed, and I hope that the new government will approach the negotiations with a willingness and commitment to achieving a just outcome.

3. Western Australia v Sebastian – the Rubibi appeal

During the year, the Yawuru peoples' native title determination was confirmed by the Full Federal Court.³⁶

The State of Western Australia and a competing claimant appealed different aspects of the first instance decision of Justice Merkel³⁷ that determined that the Yawuru people held native title rights and interests over areas in and around the Western Australian coastal town of Broome. The Full Federal Court upheld Justice Merkel's findings in relation to communal native title, but overturned some of the findings on extinguishment, holding that there were more extensive native title rights than Justice Merkel had found. The decision paves the way for a slightly strengthened native title determination, amidst wider negotiations between the State and Rubibi over native title, compensation and heritage.

Although the Yawuru peoples were ultimately successful in having their native title rights and interests recognised, the case has taken far longer than it should have. Justice Merkel resolved the basic 'native title issues' in 'interim' judgments delivered in 2005 and 2006. Even earlier, in 2001, he determined the Yawuru to be the communal native title holders to adjacent territory, an Aboriginal law ground on the outskirts of Broome. Yet respondents continued to argue the native title issues on appeal. The fact that the State has sought special leave from the High Court to re-agitate some

32 Attorney-General, 'Single Noongar decision', (Media Release, 23 April 2008). At: http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/MediaReleases_2008_SecondQuarter_SingleNoongarDecision-23April2008 (viewed May 2008).

33 R Hickson, Principle Legal Officer, South West Aboriginal Land and Sea Council, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 20 November 2008.

34 R Hickson, Principle Legal Officer, South West Aboriginal Land and Sea Council, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 20 November 2008.

35 R Hickson, Principle Legal Officer, South West Aboriginal Land and Sea Council, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 20 November 2008.

36 *The State of Western Australia v Sebastian* [2008] FCAFC 65.

37 The first instance decision was *Rubibi Community v State of Western Australia* (No7) [2006] FCA 459.

extinguishment issues again shows how litigious behaviour frustrates outcomes, long after the 'right people' with whom to settle matters have been identified. This approach is contrary to the less litigious approach that all governments have now committed to.

3.1 The case

The background to the case is complicated, with multiple Federal Court decisions handed down since the application was made in early 1994. Some of the earlier decisions dealt with preliminary issues, such as who was an appropriate party to the litigation. Unusually, the judge's final conclusions on the native title application were spread across two 'interim' sets of published reasons as well as the final judgment and determination delivered in April 2006.

There were two competing native title groups in relation to the land and waters in and around the township of Broome in Western Australia.

The first claim, referred to as the 'Yawuru claim', was made by 12 applicants on behalf of the Yawuru community. The claim area includes three sub-areas: the Yawuru, the Walman Yawuru, and the Minyirr clans' claim areas.

The second competing claim, the 'Walman Yawuru claim' was made by three applicants on behalf of a subset of the Yawuru community – being the Walman Yawuru clan. The Walman Yawuru applicants were opposed to the assertion of communal native title, arguing that native title in the area is clan-based rather than communal.

Both of the claims were opposed by the State of Western Australia, the Commonwealth, and the Western Australian Fishing Industry Council (WAFIC).

The Western Australian and federal governments argued 'that neither claim group could demonstrate that it possessed rights and interests in any land or waters in the Yawuru claim area under a normative system of traditional laws and customs which has had a continuous existence and vitality since sovereignty'.³⁸ They disputed several aspects of the Yawuru claimants' case, and argued that in the northern portion of the claim area native title right and interests were traditionally held by a separate society, the Djugan people.

On 28 April 2006, Justice Merkel made a native title determination in favour of the Yawuru community.³⁹ In that decision, Justice Merkel found that the traditional laws and customs of the Walman Yawuru claimants were the same as those of the Yawuru community. Consequently, the Walman Yawuru claim was dismissed, with Justice Merkel finding that they did not have separate native title rights and interests, but shared in the communal native title as a sub-group of the Yawuru community.

All parties appealed different aspects of the decision, and the court heard 16 consolidated issues together. These were divided into issues which went to the heart of the findings of native title rights and interests and those which went to extinguishment.

38 *The State of Western Australia v Sebastian* [2008] FCAFC 65, 5 (Branson, North and Mansfield JJ) citing *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422. Sovereignty was asserted in 1829.

39 *Rubibi Community v State of Western Australia (No7)* [2006] FCA 459.

The Full Federal Court dismissed the aspects of the appeal relating to the content of the native title rights and interests. They clarified who held native title, finding that it is held by the Yawuru claimants as communal native title rights and interests in the whole of the claim area. They dismissed the appeal of the Walman Yawuru, upholding Justice Merkel's finding that they are a sub-group of the Yawuru community, and do not have any separate native title rights or interests in their capacity as clan members.

With regard to the aspects of the appeal dealing with extinguishment, the Full Federal Court upheld some findings but agreed that Justice Merkel had erred in respect of others. The net result was that native title had not been extinguished in some areas Justice Merkel considered it had been.

3.2 Content of native title rights and interests

The State appealed (unsuccessfully) on several issues that have featured many times before in Federal Court litigation. I offer three examples to illustrate the point I wish to make.

First, the State argued that Justice Merkel was wrong to find that a Yawuru individual's entitlements as a native title holder could derive from the mother's side and not just the father's side (that is, under a cognatic system rather than a patrilineal one). The objection is that cognatic systems in the contemporary era show a lack of continuity with the pre-sovereignty era and that is sufficient to defeat a native title claim. It is an objection that has been made in trials and appeals repeatedly by respondents in recent years,⁴⁰ and is mostly unsuccessful, as it was here in the *Rubibi* case.

Secondly, the State objected in various ways to the characterisation of Yawuru entitlements as a "communal" native title. As with other cases where similar objections have been made (also unsuccessfully),⁴¹ this was allied to arguments that highlighted allegedly distinct sub-group identities. The purpose of such arguments is to defeat the assertion of a communal native title on behalf of a regional grouping.

Thirdly, respondents have attempted several times to argue that declaration of a township is sufficient to defeat the beneficial operation of section 47B. This section allows past extinguishment to be disregarded, but its effect is nullified where the area is covered by a proclamation that "the area is to be used for public purposes or for a particular purpose". The argument that declaring a township precludes reliance on section 47B has now been rejected by a Full Court on at least three occasions.⁴²

This repeated litigation of issues designed to thwart native title recognition, despite several rebuffs at trial and appellate level, illustrates the litigious mindset that has dominated native title in Australia.

I hope that the new flexible and less technical approach to native title that each government has committed to will mean that we see a lot fewer of these arduous and technical appeal grounds raised at every point of the determination.

40 See also, for example, *Bodney v Bennell* [2008] FCAFC 63, 98-122; *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20, 129-146; *De Rose v State of South Australia (No 1)* [2003] FCAFC 286, 260-268; cf *Jango v Northern Territory* (2007) 159 FCR 531 and *Jango v Northern Territory* (2006) 152 FCR 150 (trial).

41 See, for example *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya native title claim group* [2005] FCAFC 135, 71, 79-85; *Bodney v Bennell* [2008] FCAFC 63, 132-159.

42 See for example, *The State of Western Australia v Sebastian* [2008] FCAFC 65, 226; *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya native title claim group* [2005] FCAFC 135, 187; *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20; and see also *Moses v State of Western Australia* [2007] FCAFC 79, 170.

(a) Descent system

Justice Merkel had found that while the descent system of the Yawuru community was traditionally patrilineal, their traditional law and custom had ‘contingency provisions’, which allowed others to lawfully become members of the group. He accepted that, by an evolutionary process, classical patrilineal rules for landholding had melded with these contingency provisions into a cognatic or ambilineal system.⁴³

The Western Australian Government argued that the primary judge erred in this finding. They argued that in fact the traditional law at the time of sovereignty was always patrilineal descent and therefore the current system is proof of a lack on continuity of traditional law and custom.

The Full Federal Court examined the evidence and dismissed this ground. In doing so they upheld Justice Merkel’s finding that:

...whatever the precise structure and traditional definition of the Yawuru people at sovereignty might have been, a change from a community similar to a patrilineal clan-based community at or before sovereignty to a cognatic or ambilineal based community is a change of a kind that was contemplated under the ‘contingency provisions’ of those traditional laws and customs.⁴⁴

(b) Succession

The Full Federal Court upheld Justice Merkel’s primary finding that the Djugan shared a common normative system with the Yawuru at sovereignty and that the Djugan, heavily impacted by colonisation, had been absorbed into the wider Yawuru community. The State also appealed against the primary judge’s alternative finding on the issue. This was that if, on appeal, the Djugan were shown not to be a sub-group of the Yawuru community at sovereignty, then any rights and interests that the Djugan may have had in the northern area of the claim area had passed to the Yawuru community in accordance with traditional rules of succession.

Justice Merkel had considered that the evidence from the Yawuru elders showed that principles of succession formed part of the traditions practiced in the Yawuru claim area.

However, the State argued that, while the judgment in *Yorta Yorta* recognised rules for the transmission of native title rights, the comments were directed to the intergenerational transmission of rights and interests within the claim group – rather than between claim groups. The State argued that ‘succession is not an acceptable basis for a finding of native title in circumstances where the purported succession of rights involves groups having different normative systems at sovereignty’,⁴⁵ and disagreed that the evidence in the *Rubibi* trial supported succession between tribes.

The Full Federal Court found that while the evidence on transmission rules was slight, it was sufficient to sustain Justice Merkel’s conclusion. The Full Court noted that there were only two practical possibilities: that the Yawuru have ‘imperialistically’ taken over the Djugan areas or that, in accordance with the common traditional laws and customs of the two clans, the Yawuru have succeeded to the northern part of the Yawuru claim area over time, as the Djugan have reduced in numbers.⁴⁶ The Full Court was prepared to accept that the evidence existed to support the latter conclusion.

43 *The State of Western Australia v Sebastian* [2008] FCAFC 65, 108 (Branson, North and Mansfield JJ).

44 *Rubibi Community v Western Australia (No 5)* [2005] FCA 1025, 363.

45 *The State of Western Australia v Sebastian* [2008] FCAFC 65, 96 (Branson, North and Mansfield JJ).

46 *The State of Western Australia v Sebastian* [2008] FCAFC 65, 104 (Branson, North and Mansfield JJ).

3.3 Extinguishment of native title rights and interests

Various grounds of appeal also dealt with Justice Merkel's findings about where native title has been extinguished and how that had occurred.

Both applicants and respondents argued, for instance, that Justice Merkel had incorrectly applied s 47B of the NTA. This section says that past extinguishment can be ignored if, at the time of claim, the land is essentially unallocated and unused except that it is 'occupied' by the native title holders.⁴⁷ Its net effect is that recognition of 'exclusive possession' native title becomes a much stronger possibility in the relevant area.

In relation to the extinguishment issues before the Full Federal Court, a number of appeal grounds were dismissed, but some were successful. The Full Federal Court overturned some of Justice Merkel's findings:

- The Yawuru people had proven that they had occupied some small areas at Kennedy Hill, in and around Broome, at the time the native title application was lodged (enabling past extinguishment to be disregarded).
- Reserve 631 was not validly created because the purpose for its creation was too broad and it didn't comply with the necessary regulatory requirements at the time it was created.
- The trial judge wrongly assumed that the Broome cemetery reserve had been vested in trustees, but the Western Australian government had not discharged the evidentiary onus to show this had actually occurred.

These findings mean that native title may exist in some areas it was previously thought not to, and that some native title rights may now be exclusive in areas where it was previously thought to be non-exclusive.

The Western Australian government has sought leave to appeal to the High Court in relation to the establishment of Reserve 631 for a public purpose and the alleged vesting of the cemetery reserve in appointed trustees.⁴⁸

3.4 The future of the Yawuru peoples' claim

In his first instance decision, Justice Merkel stated:

The determination of native title that is now able to be made brings to an end an epic struggle by the Yawuru people to achieve recognition under Australian law of their traditional connection to, and ownership of, their country.⁴⁹

However this is unfortunately not the end, with the Western Australian government effectively refusing to recognise the breadth and existence of the Yawuru peoples' rights. After the lengthy Full Federal Court appeal, the WA government is seeking leave to appeal to the High Court. In the meantime, the parties continue to negotiate over native title, heritage and compensation.

47 See section 47B of the *Native Title Act 1993* (Cth).

48 G Hiley, M McKenna and G Denisenko (eds), (2008) 8(10) *Native Title News* p 168.

49 *Rubibi Community v State of Western Australia (No 7)* [2006] FCA 459, 159 (Merkel J).

However the claim, which began over a decade ago, has proceeded through various attempts at mediation, the majority of which have failed and so the matter continues to come before the courts.⁵⁰ The parties have many significant issues to grapple with, including finalising extinguishment issues and considering liability to pay compensation or whether other remedies are available.⁵¹

4. Griffiths v Minister for Lands, Planning and Environment (Northern Territory)

On 15 May 2008, the High Court handed down the Griffiths⁵² decision. The case was an appeal by Alan Griffiths and William Gulwin on behalf of the Ngaliwurru and Nungali peoples, the Traditional Owners and native title holders for land around the town of Timber Creek in the Northern Territory (NT). The Traditional Owners were challenging the Northern Territory government's power to compulsorily acquire their native title rights and interests under the *Lands Acquisition Act 1989* (NT) (the LAA). The land was then going to be granted to private third parties for their commercial use.

The High Court found that the legislative provision to acquire land 'for any purpose whatsoever',⁵³ including native title, provided the power for the Minister to acquire the land. In exercising this power, the Minister legitimately extinguished the native title rights and interests in the land under the Native Title Act. In effect, the legal system had finally recognised the Ngaliwurru and Nungali peoples' native title rights and interests, only to confirm that at any time they can be taken away once again for the benefit of another person who wanted to use their land.

The government of the Northern Territory changed during the case. The new government changed the existing policy and decided not to proceed with the acquisition. The case demonstrates the tenuous protection of the relevant native title rights and interests under the law. Only the policy position of an incumbent government saves them. It also raises a more significant question about the extension of compulsory acquisition powers for the benefit of private interests and the appropriate application of these powers to Indigenous land rights.

4.1 The case

The land around Timber Creek in the Northern Territory was vacant crown land that had previously been subject to pastoral leases which had lapsed.

In 1997, a private individual applied under the *Crown Lands Act 1989* (NT) (the CLA) to purchase one of the Lots.⁵⁴ Over the next few years, the Northern Territory Minister for Lands, Planning and the Environment (the Minister) considered the individual's and subsequent other private developers' plans for the surrounding Lots.

50 For a history of the claims see *Rubibi Community v State of Western Australia* (No 7) [2006] FCA 459, 159-165.

51 J Turfrey, Yawuru Native Title Holders (RNTBC), *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 24 November 2008.

52 *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20.

53 Section 43(1) of the *Lands Acquisition Act 1989* (NT).

54 Section 9 of the *Crown Lands Act* (NT) empowers the Minister, by instrument in the appropriate form, to grant an estate in fee simple in or lease of vacant Crown land.

The Minister issued notices proposing to acquire all the interests in the land, including the native title rights and interests.⁵⁵ The government then intended to grant the land as Crown leases to the private entities which had submitted development plans. The notices were unsuccessfully appealed by the Traditional Owners to the Northern Territory Lands and Mining Tribunal. They then proceeded to the Supreme Court, which found in favour of the Traditional Owners. The Northern Territory Government successfully appealed the Supreme Court decision to the Court of Appeal, and the Traditional Owners sought leave to appeal to the High Court.

During this time, the Traditional Owners lodged native title claims over the area. Their native title was determined in August 2006 by the Federal Court who recognised that 'the Ngaliwurru and Nungali peoples had maintained their long-standing connection with the Timber Creek district in spite of early violent contact with European settlers...'⁵⁶ The Full Federal Court later varied the native title determination in the Traditional Owners' favour, holding that they hold their native title rights and interests exclusively.⁵⁷

The Traditional Owners, who held native title interests that were now formally recognised, appealed to the High Court, challenging the Northern Territory Government's compulsory acquisition on two alternative grounds:

1. That the compulsory acquisition of native title rights and interests *only* is not a valid extinguishment of native title under the Native Title Act. Section 24MD(2) of the NTA provides that extinguishment of native title by compulsory acquisition is only valid when all interests in the land are compulsorily acquired. They argued that the word 'all' requires that other, non-native title rights and interests must also be acquired; in this case there were no such interests, consequently the extinguishment was invalid.⁵⁸
2. That the LAA did not give the Minister the power to acquire land from one person to enable it to be sold or leased for the private use of another.⁵⁹

However, Justice Kirby put the ultimate question before the court as being:

... the particular problem that is now before this Court, namely a suggested deprivation and extinguishment of hard-won native title interests of [I]ndigenous Australians for the immediate private gain of commercial interests of other private interests, without needing the consent of the indigenous owners and their satisfaction with the price to be paid for the peculiar value to them of their native title interests.⁶⁰

55 In order for the Lots to be 'vacant', and therefore able to be alienated by the Territory through sale or lease for private use (under the CLA), there must be no other interests held in the land. Consequently, the Minister must acquire all the interests in the land under the *Lands Acquisition Act* (NT) (the LAA). Section 4 of the LAA defines interests in land to include native title rights and interests. Section 43(1) of the LAA empowers the Minister to compulsorily acquire land 'for any purpose whatsoever' by publishing a notice in the Gazette declaring the land to be acquired (after certain pre-conditions are met). Section 5A(1) of the LAA provides that acquiring native title rights and interests constitutes an 'act' under the *Native Title Act 1993* for the purposes of s 24MD(6A) and (6B) of that Act. This triggers the same procedural rights as those that holders of 'ordinary title in the land' would have had.

56 *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20, 60-61 (Kirby J), citing *Griffiths v NT* (2007) 243 ALR 72.

57 *Griffiths v Northern Territory* (2007) 243 ALR 72.

58 *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20, 20 (Gummow, Hayne and Heydon JJ).

59 *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20, 19 (Gummow, Hayne and Heydon JJ).

60 *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20, 117 (Kirby J).

In May 2008, the High Court handed down its decision allowing for the acquisition and extinguishment of the native title rights and interests held by the Ngaliwurru and Nungali peoples.

4.2 Ground 1: Acquiring native title only, where no other interests in the land exist

The High Court unanimously held that section 24MD of the Native Title Act allows for compulsory acquisition that would result in the extinguishment of native title when no other interests in the land exist, as well as when native title rights co-exist with other interests.⁶¹

All of the judges agreed that 'all' should be understood as 'any and all'. Any other reading, they suggest, would have an arbitrary result. Gleeson CJ pointed out that the key purpose of the provision of the NTA is to avoid racial discrimination...⁶²

The Court indicated that it was artificial to interpret the power of acquisition as confined only to situations where native title co-existed with other interests in the acquired land.

4.3 Ground 2: Acquiring land for the benefit of a third party

When considering the extent of the powers given to the Minister under the *Lands Acquisition Act*, the court was split five judges to two. The majority (Justices Gummow, Hayne, Heydon, with Chief Justice Gleeson and Justice Crennan agreeing) held that the LAA allowed for the compulsory acquisition of land, including native title rights and interests in that land, for any purpose whatsoever. Justices Kirby and Kiefel gave separate dissenting judgements.

The majority examined section 43 of the LAA, which empowers the Minister to compulsorily acquire land 'for any purpose whatsoever'. They agreed that, whether or not there were any ultimate limits on the broad phrasing of section 43, the power at least includes acquisition 'for the purpose of enabling the exercise of powers conferred on the executive by another statute of the territory'. In this case, section 9 of the *Crown Lands Act* provides that the Minister may grant estates in fee simple or lease Crown Land.

The case raised 'a central question of the power of the Crown to acquire the private rights of one citizen (or group of citizens) for the immediate benefit of another private citizen'.⁶³ However, the majority considered that the NT legislation rendered previous cases which establish 'a clear line of authority against local governments interfering with the private title of A for the private benefit of B'⁶⁴ inapplicable.

However, the two dissenting judges considered that the LAA did not grant the Minister the power to acquire land for the private benefit of a third party.

61 *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20, 48-49 (Gummow, Hayne and Heydon JJ), 7 (Gleeson CJ), 76 (Kirby J) and 156 (Kiefel J).

62 L Strelein, AIATSIS, 'Compulsory Acquisition powers: Griffiths v Minister for Lands Planning and Environment [2008] HCA (15 May 2008)', *Native Title Research Unit Resource Page*. At: http://ntru.aiatsis.gov.au/research/griffiths/compulsory_acquisition_griffiths.pdf, p 1 (viewed July 2008).

63 L Strelein, AIATSIS, 'Compulsory Acquisition powers: Griffiths v Minister for Lands Planning and Environment [2008] HCA (15 May 2008)', *Native Title Research Unit Resource Page*. At: http://ntru.aiatsis.gov.au/research/griffiths/compulsory_acquisition_griffiths.pdf, p 1 (viewed July 2008).

64 L Strelein, AIATSIS, 'Compulsory Acquisition powers: Griffiths v Minister for Lands Planning and Environment [2008] HCA (15 May 2008)', *Native Title Research Unit Resource Page*. At: http://ntru.aiatsis.gov.au/research/griffiths/compulsory_acquisition_griffiths.pdf, p 1 (viewed July 2008).

Justice Kiefel considered there must be read in to section 43(1) of the LAA a requirement that the acquisition be for a public purpose. She considered this on the basis of previous case law and the wording of the LAA. Specifically, she considered that section 43 requires that the acquisition be for a purpose which is connected with the Minister's act of acquiring the land. That is, that there should be a government purpose. In this case she found that:

It is abundantly clear that in the present case no use by the Minister or the Territory is proposed...the exercise of the power stands as no more than a clearing of native title interests in order to effect leases and grants of the land for private purposes.⁶⁵

Justice Kirby's lengthy dissent took a holistic approach, considering a number of key principles, including the importance of native title and its position in the Australian legal system. He found that in order the government to acquire private interests for the benefit of a private third party to be valid under the LAA, it must be enabled by a specific and unambiguous provision of the Act⁶⁶ and that, unless such an unambiguous provision exists, 'the well-established principles of the common law that are here invoked...on behalf of the Aboriginal native title holders', should be upheld.⁶⁷

4.4 Justice Kirby's dissenting judgment

Justice Kirby's dissent should be examined carefully as it raises a number of significant issues that the government and the broader public should consider. In his dissent, Justice Kirby considered the interpretation of the LAA through examining legal authority, legal principles and legal policy which 'demand respect for the legal rights to property of private individuals in Australia generally, and in particular the legal rights of Aboriginal Australians...'⁶⁸ He focused on the general principle of common law which requires that legislation depriving individuals of established legal rights must be clear and unambiguous:⁶⁹

Insisting upon this interpretation of the LAA is not to be regarded as denying the attainment of the constitutionally valid purposes of legislation, enacted in concededly broad terms. Instead, it is a course adopted out of respect for:

- the legislature's normal observance of great care in the deprivation of the basic rights of individuals, whoever they may be
- the special care to be attributed and expected (in light of history) to deprivation by a legislature of the native title rights of Aboriginal and other indigenous communities
- the serious offence which the opposite construction of the LAA does to common or hitherto universal features of legislative compulsory acquisition in our legal tradition.⁷⁰

He went on to consider a number of other legal principles, including the exceptional nature of any compulsory acquisition:

65 *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20, 181 (Kiefel J).

66 *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20, 57 (Kirby J).

67 *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20, 58 (Kirby J).

68 *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20, 57 (Kirby J).

69 *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20, 109 (Kirby J).

70 *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20, 151 (Kirby J).

From the earliest days of compulsory acquisition legislation in England and Australia, statutory provisions affording powers to governments or their agencies to acquire the property interests of individuals have been interpreted with considerable vigilance to protect those affected against abuse.⁷¹

He considered that this principle has greater significance when the acquisition is being used to benefit or advantage another person's private interests. He referred to United States Supreme Court decisions which interpret the Constitution as precluding the legislature from having the power to take property off one person for the sole purpose of transferring it to another. Justice Kirby also referred to British legal commentary that states:

[T]he assertion of a private form of eminent domain – the 'one-to-one transfer of property' for private rather than public benefit – remains anathema in most legal traditions. This is so even though the taking is coupled with an offer of full monetary compensation. It seems wrong that the coercive power of the state should be used to force an unconsented transfer from A to B where the operation of the open market has failed to generate the required bargain by means of normal arm's length dealing.⁷²

Justice Kirby did not think that these common law presumptions had been overridden by the general language of the LAA that allowed for acquisition 'for any purpose whatsoever':

Although a court's usual obligation is to give effect to the purpose of the legislature derived from the statutory text, when important values appear to have been overlooked, a court is entitled to conclude that apparently broad language does not, in law, achieve departure from those values, without an explicit indication to this effect in the text.⁷³

Particularly relevant for this Report are Justice Kirby's comments on the application of these principles to native title. Justice Kirby recognised that the general principles on the exceptionality of acquisition were even more significant in this case because of the nature of the rights being acquired, that is, because they were acquiring native title.

He considered that native title, which is not of the same origin or character as other property interests is 'more than an interest of an ordinary kind':⁷⁴

Thus a fundamental distinction between the acquisition of ordinary interests in land and the existence of interests giving rise to native title in Australia is the special spiritual relationship that exists between the native title owners in the land...⁷⁵

He referred to the various High Court cases in Australia that had recognised this special connection and relationship with the land.⁷⁶ Consequently, approaching Indigenous interests in the land in the same way as approaching non-Indigenous interests in land would be:

to miss the essential step reflected in the belated legal innovation expressed in *Mabo*. That new legal principle accepted that the common law of Australia would give recognition to native title without altering that title or imposing on it all of the characteristics of other interests in land derived from the different ... law of land tenures inherited by Australian law from English law upon settlement.⁷⁷

71 *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20, 115 (Kirby J).

72 *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20, 128 (Kirby J), citing Professor K Gray, 'There's No Place Like Home!', (2007) 11(1) *Journal of South Pacific Law* 73, pp 74-75.

73 *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20, 137 (Kirby J).

74 *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20, 90-93 (Kirby J).

75 *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20, 94 (Kirby J).

76 *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20, 95-99 (Kirby J).

77 *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20, 102 (Kirby J).

To pretend that native title in the Northern Territory 'is no more than another interest in land ... would be to ignore both legal and social reality... Importantly, it would needlessly involve a failure of our law to live up to the promise of *Mabo*':⁷⁸

Nevertheless, against the background of the history of previous non-recognition; the subsequent respect accorded to native title by this Court and by the Federal Parliament; and the incontestable importance of native title to the cultural and economic advancement of indigenous people in Australia, it is not unreasonable or legally unusual to expect that any deprivations and extinguishment of native title, so hard won, will not occur under legislation of any Australian legislature in the absence of provisions that are unambiguously clear and such as to demonstrate plainly that the law in question has been enacted by the lawmakers who have turned their particular attention to the type of deprivation and extinguishment that is propounded. In *Mabo Brennan J* cited authorities from Canada, the United States and New Zealand that support the contention that 'native title is not extinguished unless there be a clear and plain intention to do so'.⁷⁹

In conclusion, he found that if the legislature wants to modify or abolish native title, it must expressly address that outcome in the legislation.⁸⁰ 'In the absence of such legislative particularity, any impugned law will be interpreted protectively and construed in favour of Indigenous land rights':⁸¹

Australian legislatures, on this subject, must be held accountable to the pages of history. If they intend deprivation and extinguishment of native title to occur, reversing unconsensually despite the long struggle for the legal recognition of such rights, then they must provide for such an outcome in very specific and clear legislation that unmistakably has that effect.⁸²

4.5 The outcome of the case – disposable native title

Justice Kirby acknowledged the disappointing fact that had the private individual not made the application to purchase the land (triggering the first and then subsequent acquisition notices), then the 'inference is inescapable that the Ngaliwuru and Nungali peoples, living in and near Timber Creek, would have continued to use the land in harmony with the activities of the [private individual's] interests...'.⁸³

...Whether it was actually necessary, in order to procure the economic benefits, to acquire the interests of the Ngaliwuru and Nungali peoples by compulsion rather than by free negotiation in the open market, depriving them of rights of entrepreneurship that would otherwise belong to them by reason of their native title, is a matter of speculation.⁸⁴

Yet this is the path that the Northern Territory government (at the time) chose to take; easily disposing with Indigenous land rights without agreement or discussion, as it suited them.

In the end however, after years of litigation and this High Court decision, the Northern Territory government did not acquire the native title. This is because in 2001 the Northern Territory voted in a new government, with a different policy towards Indigenous land and native title. It is of course positive that the government changed its tune; however, the protection of native title and the respect for Indigenous land

78 *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20, 103 (Kirby J).

79 *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20, 105 (Kirby J).

80 *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20, 106 (Kirby J).

81 *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20, 106 (Kirby J).

82 *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20, 107 (Kirby J).

83 *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20, 66 (Kirby J).

84 *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20, 147 (Kirby J).

rights should not be left to the whim of the Government of the day, but should be protected by law.

This issue is not unique to the Northern Territory but applies across the country.

How native title is and can be acquired by governments differs in each state and territory. Each jurisdiction has separate laws providing for the compulsory acquisition of native title rights and interests and if relevant, the land granted to Aboriginals or Torres Strait Islanders under land rights regimes. These laws provide different procedural requirements for acquiring land, including when and how to give notice, how and when agreements can be reached and appeal procedures. They also differ in the reasons for which native title, or any other property rights, can be acquired.

In his dissenting judgment in *Griffiths*, Justice Kirby outlined the *sui generis* nature of native title, and the history of Indigenous land rights in Australia as reasons why the acquisition of native title should be treated differently to other interests in land. This approach is supported by the international human rights framework. I recommend that governments pursue a human rights based response which is consistent across state, territory and federal legislation.

(a) A human rights response

(i) *The international human rights framework*

From as early as 1995 Aboriginal and Torres Strait Islander Social Justice Commissioners have raised the human rights implications of a failure to negotiate or gain the consent of Traditional Owners before their native title rights are taken away once again.⁸⁵

As the then Social Justice Commissioner, Mick Dodson, said in 1995, international human rights standards require negotiation and consent before interference with vested rights can legitimately occur. Interference with property without even negotiating with the owner would interfere with property in a manner contrary to Article 17 of the *Universal Declaration of Human Rights*.⁸⁶ Consistent with the *International Convention on the Elimination of All Forms of Racial Discrimination* (the CERD),⁸⁷ Indigenous peoples are entitled to enjoy our property rights free from discrimination.⁸⁸

In general comment 23 to the Committee on the Elimination of All Forms of Racial Discrimination specifically provides for this situation, calling on State parties to:

... recognise and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return these lands and territories...⁸⁹

85 See M Dodson, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report July 1994-June 1995*, Australian Human Rights Commission (1995), p 142.

86 Article 17 of the Universal Declaration of Human Rights provides the following: (1) everyone has the right to own property alone as well as in association with others, (2) no one shall be arbitrarily deprived of his property.

87 Australia ratified the *Convention on the Elimination of All Forms of Racial Discrimination* on 30 September 1975.

88 See M Dodson, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report July 1994-June 1995*, Australian Human Rights Commission (1995), pp 142-143.

89 Committee on the Elimination of Racial Discrimination, *General Comment No. 23: Indigenous peoples*, UN Doc A/52/18, annex V (1997). At: <http://www.unhchr.ch/tbs/doc.nsf/0/73984290dfea022b802565160056fe1c?Opendocument> (viewed July 2008).

The Committee also recommends that states:

Ensure that ... no decisions directly relating to [Indigenous peoples'] rights and interests are taken without their informed consent.⁹⁰

The specific rights of Indigenous peoples with regards to their land have been further entrenched in the Declaration on the Rights of Indigenous Peoples. Article 28 requires that Indigenous peoples give their free, prior and informed consent before the approval of any project affecting our lands.

In the *Native Title Report 1997*, the compulsory acquisition of native title for the benefit of third parties was discussed in light of the Wik 10 point plan.⁹¹ The original NTA passed by Parliament provided for negotiation between the government, the registered native title party and other stakeholders in relation to any compulsory acquisition. Part of the Wik 10 point plan amendments, was to remove the right to negotiate for the acquisition of native title for the benefit of third party private interests when the land involved is inside a town or city.⁹² The amended Act reduced the right to negotiate to a much lesser procedural right to object.⁹³ In the *Native Title Report 1997*, the Social Justice Commissioner Mick Dodson raised concerns that state or territory legislation (none of which provided for acquisition for the benefit of a third party interest at this stage) would be amended to allow acquisitions for private purposes. Even though any such amendments would have to apply to all land in the jurisdiction to avoid breaching the *Racial Discrimination Act 1975*, Dodson considered that introducing state or territory laws with such powers in response to the Wik amendments, and therefore primarily for the purpose of acquiring native title, would in fact be discriminatory.

In the same year, the *Lands Acquisition Act* was amended. Although the compulsory acquisition power was already broadly worded, stating that 'the Minister may, under this Act, acquire land', it was amended in 1998 to include the words 'for any purpose whatsoever'. After this point, the Northern Territory government has issued 82 compulsory acquisition notices, and on every occasion the land was claimed or claimable by Aboriginal people.⁹⁴ Dozens of these have been town lands, and were therefore acquired without a right to negotiate the acquisition.⁹⁵

90 Committee on the Elimination of Racial Discrimination, *General Comment No. 23: Indigenous peoples*, UN Doc A/52/18, annex V (1997). At: <http://www.unhchr.ch/tbs/doc.nsf/0/73984290dfea022b802565160056fe1c?Opendocument> (viewed July 2008).

91 In response to the *Wik* case, the Australian Government amended the *Native Title Act*. The amendments, which are known as the Wik 10 point plan, reduced the right to negotiate so that it only applies to mining activities and some compulsory acquisitions; validated leases granted by governments that were thought to be invalid because of native title, and confirmed the extinguishment of native title on a range of leases and other land tenures, such as freehold land; upgraded pastoral leaseholds by increasing the activities that could take place under the lease without having to negotiate with native title holders; made it more difficult to register native title applications and introduced 'Indigenous Land Use Agreements' (ILUAs) which provide native title groups with an opportunity to negotiate voluntary but binding agreements with others, including pastoralists and mining companies, about their lands and waters. The 1998 amendments to the *Native Title Act* were referred to the United Nations Committee for the Elimination of Racial Discrimination (CERD) and found to be in breach of Australia's international human rights obligations. CERD has since twice reaffirmed its findings and continues to criticise the Australian Government for their failure to address this breach.

92 See M Dodson, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report July 1996-June 1997*, Australian Human Rights Commission (1997), pp 96-100.

93 S Brennan, 'Compulsory acquisition of native title land for private use by third parties' (2008) 19 *Public Law Review* 179.

94 S Brennan, 'Government expropriation for private profit hits Aboriginal land hardest' 7(6) *Indigenous Law Bulletin* 2.

95 S Brennan, 'Compulsory acquisition of native title land for private use by third parties' (2008) 19 *Public Law Review* 179, p 184.

(ii) *Consent as a traditional law and custom*

The Native Title Act attempts to translate Aboriginal and Torres Strait Islanders' traditional laws and customs into a form of western legal property right. In doing so, it unwittingly destroys many of the *sui generis* characteristics of the very laws and customs it was apparently designed to recognise and protect. One of these characteristics is the notion of controlling access to and activities on traditional estates, which is a consistent feature of Indigenous law. It is 'what a Pitjantjatjara man once defined as "the first law of Aboriginal morality – always ask"⁹⁶.

The cultural underpinning of a right to negotiate was presented in the evidence in the Croker Island case.⁹⁷ In that case Mary Yarmirr stated that the members of a Yuwurrumu (an estate group) had the right to make decisions about all aspects of the estate including a right to be asked and to apply conditions to entry:

In respect of my law and my culture, as I have respect for another culture, I'd ask them to come towards us and ask permission.

Q: All right. And if they ask permission, what rights would you have by your law in the way that you responded to their request?

A: As a yuwurrumu holder I would then sit down and negotiate and come to a settlement.

Q: Would you be able to say by your law 'No' to them?

A: Yes I have done that on numerous occasions.

Q: In respect of what?

A: In respect to oil exploration at Summerville Bay.

Q: So there have been requests for oil exploration at Summerville Bay?

A: That is correct.

Q: And what has happened on these occasions?

A: On those occasions, because they identify where they like to explore and it was on some of our sacred areas, we said to them due to respecting our old traditional laws and our culture we'd ask you to reconsider, maybe looking at another to avoid those sacred areas, which they did.

Q: All right. If the area was a suitable area as far as your yuwurrumu was concerned would you have the right to say not 'no' but 'yes'?

A: Yes.

Q: And you have spoken [of] negotiation. Would you have the right to say yes but subject to conditions?

A: That's correct.

There is no doubt in Mary Yarmirr's mind that according to her yuwurrumu there was a right in her people to control entry onto their seas and to apply conditions to that entry.⁹⁸

96 M Dodson, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report July 1995-June 1996*, Australian Human Rights Commission (1996), p 18.

97 *Yarmirr v Northern Territory* (1998) 156 ALR 370.

98 Z Antonios, Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1998*, Australian Human Rights Commission (1999), p 101 citing *Yarmirr v Northern Territory* (1998) 156 ALR 370 (the Croker Island case). At: http://www.humanrights.gov.au/pdf/social_justice/native_title_report_98.pdf.

This right was even recognised in the Griffiths native title decision. In the native title determination for the Ngaliwurru and Nungali peoples,⁹⁹ the Full Federal Court found that the Traditional Owners held their native title rights and interests exclusively because of the evidence presented about their control of the land:

The indigenous witnesses designated as 'yakpalimululu', someone who would deny others access to certain foraging areas...If a white person wished to go on the land that person would be expected to ask permission first. The purpose of the request would be to enable important sites to be identified presumably so that they might be protected.¹⁰⁰

When the Native Title Act was first passed by Parliament, there was some protection from compulsory acquisition through a right to negotiate. This protection was considered by many to have had its origins in traditional law and custom. It has been said by previous Social Justice Commissioners that the right to negotiate provisions (as they were originally enacted) were not a 'windfall accretion' or gift of government, but an intrinsic component of native title to the land.¹⁰¹

The control of entry to land is not an 'add on'; it is fundamental to the protection and maintenance of country:

Ownership of country and knowledge is manifested through rights to be asked. While Aboriginal people rarely say 'no', provided that the request is in keeping with what is appropriate for a given place or use, they insist upon the right to be asked, and hence upon their right to say either 'yes' or 'no'.¹⁰²

As was pointed out in the *Native Title Report 1996*, Justice Woodward recognised this in his report, which led to the enactment of the Northern Territory's land rights regime, when he said that to deny Aboriginal owners the power to control access and activities on their land was 'to deny the reality of their land rights under traditional law'.¹⁰³

The fact that the right to control access is an intrinsic right of native title has been forgotten as the procedural rights attached to native title have been amended or removed. Now native title rights are considered to be in the most precarious position of all Australian property rights.

(iii) *Protection of native title rights*

Native title is not simply another property right, but is *sui generis* in character, and should be protected in unique ways to recognise this. It is not good enough for governments to disregard native title, compulsorily acquiring it and extinguishing it as it sees fit, sometimes using the poor justification that it could possibly do the same to other property interests in land:

99 See box below on the Griffiths native title determination.

100 *Griffiths v Northern Territory* (2007) 243 ALR 72, 104 (French, Branson and Sundberg JJ).

101 M Dodson, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report July 1995-June 1996*, Australian Human Rights Commission (1996), p 19.

102 M Dodson, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report July 1995-June 1996*, Australian Human Rights Commission (1996), p 22.

103 M Dodson, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report July 1995-June 1996*, Australian Human Rights Commission (1996), p 22. The Northern Territory land rights regime is enshrined in the *Aboriginal Land Right Act (Northern Territory) 1974*.

It is misconceived to look to the title-rights of another genus of title and to use those rights as a benchmark of equal treatment where detriment results. This approach ignores the substantive difference in the source and character of a sui generis title. It fails to provide substantive equality of protection to native title.¹⁰⁴

Similarly, it is not good enough for governments to simply have a policy of acquiring native title rights as a last resort.¹⁰⁵ Native title rights and interests and other Indigenous land rights require greater protection by law.

The *Native Title Report 1998* included a discussion on the right to negotiate, rebutting the argument that it would be unfair if native title holders had a right to negotiate in relation to certain compulsory acquisitions while other holders of property rights do not:

[where] you have a situation where other Australians are sharing the land, we do believe— and we hold this view from the basis of a fundamental philosophical position— that procedural rights should be the same.¹⁰⁶

The arguments for distinct protection of Indigenous land rights that were put forward in the *Native Title Report 1998*, the *Native Title Report 1996* and Justice Kirby in his dissent in the Griffiths decision, all apply:¹⁰⁷

This notion of equal protection, accorded through holding exactly the same procedural rights as others, determinedly sets its face against the fact that the titles of others do not derive their nature and incidents from Indigenous law. The right to control and mediate access to traditional estates is not some sterile right of prohibition. It is integral to our manifold traditional rights and obligations to land which embrace social, cultural and spiritual life, as well as access to resources.¹⁰⁸

Differentiation is integral to the rights and freedoms which the human rights system seeks to protect. Two categories of non-discriminatory differentiation protected within a human rights framework are the right to express one's cultural identity, referred to variously as minority rights or cultural rights,¹⁰⁹ and the provision of measures by governments to facilitate the advancement of members of certain racial groups who historically have been disadvantaged by discriminatory policies.¹¹⁰ This latter category is commonly referred to as special measures – a principle which has been

104 M Dodson, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report July 1995-June 1996*, Australian Human Rights Commission (1996), p 22.

105 Many governments state, or have in the past stated, that compulsory acquisition of native title is a last resort. For example, see the Australian Local Government Association, *Compulsory acquisition of native title and compensation: Issues for local government*, Issues paper No.7. At: <http://www.alga.asn.au/policy/indigenous/nativeTitle/issuesPapers/issuePaper07.php> (viewed July 008). However, as I have stated in this Report, these policies are subject to change at the whim of government. There are recent reports of such disregard for native title in Western Australia, where it has been reported that the government considers native title as a 'hurdle' to new development and has stated that it will use compulsory acquisition powers to ensure that the government can pursue policies that are 'unashamedly pro-development'. See A O'Brien, 'I'll take West Australian native title land: Barnett', *The Australian*, 11 December 2008. At: <http://www.theaustralian.news.com.au/story/0,25197,24782899-5013945,00.html> (viewed December 2008).

106 Z Antonios, Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1998*, Australian Human Rights Commission (1999), p 94, citing Senator the Hon. Nick Minchin.

107 Z Antonios, Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1998*, Australian Human Rights Commission (1999), pp 84-116.

108 M Dodson, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report July 1995-June 1996*, Australian Human Rights Commission (1996), p 21.

109 See chapter 4 for more information on the right to culture. Article 27 of the *International Covenant on Civil and Political Rights* is the primary source of Indigenous peoples' rights to culture in Australia.

110 *Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969. Australia ratified the convention on 30 September 1975).

applied to both native title rights and interests and other Indigenous land rights.¹¹¹ Both the recognition and protection of distinct cultural rights, and special measures, are justified by their objective of ensuring the genuine, substantive enjoyment of common human rights.

The very concept of rights to culture in international human rights instruments recognises that people enjoy their rights in a culturally specific way. A classic example of a human right which is culturally specific and non-discriminatory is native title. The failure to recognise native title before the Mabo decision in 1992 can be seen, as it was in that case, as the failure to give equal respect and dignity to the cultural identity of Aboriginal and Torres Strait Islander peoples; to be racially discriminatory; and a violation of Aboriginal and Torres Strait Islander people's human rights:

Whatever the justification advanced in earlier days for refusing to recognise the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organisation of indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.

The Human Rights Committee has commented that article 27 of the International Convention on Civil and Political Rights (which encompasses Indigenous peoples' right to culture) requires the following:

...article 27 relates to rights whose protection imposes specific obligations on States parties. The protection of these rights is directed to ensure the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole... States parties, therefore, have an obligation to ensure that the exercise of these rights is fully protected.

As I have established, the right to give permission and consent is an expression of cultural rights by Indigenous peoples across Australia.

In order to achieve an outcome that is consistent with Australia's human rights obligations, I recommend that the Attorney-General pursue a consistent legislative protection of the rights to give consent and permission. A best practice model would be to legislatively protect the right of native title holders to give their consent to any proposed acquisition.

111 See the *Native Title Act 1993* (Cth), and the amendments made to that Act in 1998. See also the legislation that made up the Northern Territory Emergency Response. However, see M Dodson, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report July 1995-June 1996*, Australian Human Rights Commission (1996), p 23: Special protection of native title rights and interests from compulsory acquisition would not constitute a special measure in and of itself as the NTA attempts to achieve substantive equality through recognising and accommodating the inherently different character of native title.

A second best option would be to reinstate the right to negotiate for all compulsory acquisitions of native title, including those that take place in a town or city. That is, amend section 26 of the Native Title Act.

Text Box 1: Full Federal Court decision in Griffiths v Northern Territory (2007) 243 ALR 72¹¹²

In November 2007, the Full Federal Court found that the Ngaliwurru and Nungali peoples held their native title over the area surrounding Timber Creek to the exclusion of all others. The decision was significant because it explained what is required for claimants to prove they hold exclusive possession native title.

The Court was of the view that:

- It is not a necessary condition of exclusivity that the native title holders should, in their testimony, frame their claim as some sort of analogue of a proprietary right.
- It is not necessary that the native title claim group should assert a right to bar entry on the basis that it is 'their country'.
- If control of access to country flows from spiritual necessity, because of the harm that 'the country' will inflict upon unauthorised entrants, that control can nevertheless support a characterisation of native title as exclusive. The relationship to country is essentially a 'spiritual affair'.
- It is also important to bear in mind that traditional law and custom, so far as it bore upon relationships with persons outside the relevant community at the time of sovereignty, would have been framed by reference to relations with Indigenous people.
- The question of exclusivity depends upon the ability of the native title holders to effectively exclude from their country people not of their community.
- If, according to their traditional law and custom, spiritual sanctions are visited upon unauthorised entrants, and if they are the gatekeepers for the purpose of preventing such harm and avoiding injury to the country, then the native title holders have what the common law will recognise as an exclusive right of possession, use and occupation.
- The status of the native title holders as gatekeepers in this case was reiterated in the evidence of most of the Indigenous witnesses and by the anthropological report which was ultimately accepted at first instance.
- It is not necessary to exclusivity that the native title holders require permission for entry onto their country on every occasion that a stranger enters, provided that the stranger has been properly introduced to country by them in the first place.
- Exclusivity is not negated by a general practice of permitting access to properly introduced outsiders.¹¹³

The Court concluded that 'the appellants, taken as a community, had exclusive possession, use and occupation of the application area.'¹¹⁴

112 See National Native Title Tribunal, *Native title hot spots* (2008) 27, pp 33-40 for a summary of the case.

113 *Griffiths v Northern Territory* (2007) 243 ALR 72, 127 (French, Branson and Sundberg JJ).

114 *Griffiths v Northern Territory* (2007) 243 ALR 72, 128 (French, Branson and Sundberg JJ).

5. Blue Mud Bay – Northern Territory v Arnhem Land Aboriginal Land Trust

In my *Native Title Report 2007*, I summarised the Full Federal Court decision in Blue Mud Bay.¹¹⁵ In that case, the court held that the Traditional Owners of Aboriginal land granted under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) have the right to control access to, and use of, the tidal areas that are part of their land. The Northern Territory Government and others appealed the decision to the High Court.

On 30 July 2008, the High Court held that the *Fisheries Act* (NT) did not authorise or permit entry for fishing on Aboriginal land.¹¹⁶ The result is that in order to fish in intertidal waters (both coastline and river mouths) on Aboriginal land, an outsider needs the permission of the Traditional Owners.¹¹⁷

The case, which applies to all Northern Territory Aboriginal land,¹¹⁸ starkly contrasts with recent native title cases which have shown the extraordinarily difficult process that each claimant group must go through to have any native title right and interest recognised, let alone a right or interest which allows the claimants to control the use of and access to their land or waters.

However the case was not easily won. Djambawa Marawilli, one of the Traditional Owners said:

Our struggle was almost for 20 years. Now we had this right now. We had rights since 2000 years ago. Today it's been given to us in the eyes of most Australian people.¹¹⁹

That struggle was finally won and the Blue Mud Bay case, applying to 80 percent of the coastline in the Northern Territory, is the most significant land rights case in Australia for many years. It will have broader implications however, and will pressure other governments to similarly realise the rights of their Indigenous populations.

The Blue Mud Bay decision from the High Court stands as one of the most significant affirmations of Indigenous legal rights in recent Australian history ... The High Court's decision gives Australia the opportunity, belatedly, to catch up with Canada and New Zealand in building co-operative structures between government, business and Indigenous peoples in commercial fisheries...¹²⁰

I congratulate the Traditional Owners and the Northern Land Council for their dedication over the past decades to have the Australian legal system recognise rights that they always knew were theirs.

115 The decision of the Full Federal Court was *Gumana v Northern Territory of Australia* (2005) 218 ALR 292. This decision was summarised in T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Australian Human Rights Commission (2008), pp 227-229. At: http://www.humanrights.gov.au/social_justice/nt_report/ntreport07/index.html.

116 *Northern Territory v Arnhem Land Aboriginal Land Trust* [2008] HCA 29. The court was split 5 judges to 2. Gleeson CJ, Gummow, Hayne and Crennan JJ Kirby J agreeing; Kiefel and Heydon JJ dissented.

117 Under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), the relevant Land Council (in this case, the Northern Land Council) for any Aboriginal land, can grant permission for people to enter and remain on the land.

118 ALRA land is land that has been granted to an Aboriginal Trust under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) to be held for the benefit of the Aboriginal Traditional Owners.

119 M McLaughlin, 'Traditional owners win control of waters', *The 7.30 Report*, 30 July 2008. At: <http://www.abc.net.au/7.30/content/2008/s2319497.htm> (viewed August 2008).

120 S Brennan, 'Wet or Dry, It's Aboriginal Land: The Blue Mud Bay Decision on the Intertidal Zone' (2008) 7(7) *Indigenous Law Bulletin* 6.

5.1 The case

In 1980 the Governor-General, under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (the ALRA), granted two areas of land to the Arnhem Land Aboriginal Land Trust.¹²¹ The land is inalienable freehold which is held by the land trust for the benefit of the Traditional Owners. The land grants cover areas on the mainland and islands, and all grants extend to the low water mark.¹²²

The Traditional Owners of the land, which covers part of North East Arnhem Land including Blue Mud Bay, sought to clarify whether the Northern Territory *Fisheries Act* meant that the Northern Territory Government had the power to grant another person a licence to fish in waters that were within the boundaries of Aboriginal land.

The High Court considered the central issue:

[as] whether, without permission from the Land Trust, a person holding a licence under the Fisheries Act can fish in the intertidal zone within the boundaries of either the Mainland Grant or the Islands Grant, or in the tidal waters within those boundaries.¹²³

The main joint judgment considered the following.

1. Does the common law public right to fish apply? The court took note of earlier High Court authority that because the ‘common law right of fishing in the sea and in tidal navigable rivers is “a public not a proprietary right, [it] is freely amenable to abrogation or regulation by a competent legislature”.’¹²⁴ On this basis, the court looked to the *Fisheries Act* to see whether that common law right had been abrogated and found that it had.¹²⁵
2. Does the *Fisheries Act* provide that a person may enter and fish in waters that lie within Aboriginal land? The court found that ‘[n]either the licence itself nor any provision of the *Fisheries Act* confers any permission upon the holder to enter any particular place or area for the purpose of fishing... the *Fisheries Act* does not deal with where persons may fish. Rather, the Fisheries Act provides for where persons may *not* fish.’¹²⁶
3. Does the ALRA, and the grants made under it, permit the Land Trust to exclude persons who hold a licence under the *Fisheries Act* from entering waters that lie within the boundaries of the grants?¹²⁷ The court found that the grants made under the ALRA relate to defined geographical areas (as opposed to only the dry land or soil within those areas). The provisions of the ALRA that allow the Land Trust to control entry apply to the whole area within those boundaries and those boundaries extend to the low water mark.

121 In the case, the two areas are referred to as the Mainland Grant and the Islands Grant.

122 *Northern Territory v Arnhem Land Aboriginal Land Trust* [2008] HCA 29, 1-8 (Gleeson CJ, Gummow, Hayne, Crennan JJ).

123 *Northern Territory v Arnhem Land Aboriginal Land Trust* [2008] HCA 29, 8 (Gleeson CJ, Gummow, Hayne, Crennan J).

124 *Northern Territory v Arnhem Land Aboriginal Land Trust* [2008] HCA 29, 22 (Gleeson CJ, Gummow, Hayne, Crennan J).

125 *Northern Territory v Arnhem Land Aboriginal Land Trust* [2008] HCA 29, 27-28 (Gleeson CJ, Gummow, Hayne, Crennan J).

126 *Northern Territory v Arnhem Land Aboriginal Land Trust* [2008] HCA 29, 33 and 36 (Gleeson CJ, Gummow, Hayne, Crennan J).

127 *Northern Territory v Arnhem Land Aboriginal Land Trust* [2008] HCA 29, 41 (Gleeson CJ, Gummow, Hayne, Crennan J).

They considered:

The asserted distinction between dry land and the land in the intertidal zone when covered by water should not be drawn.¹²⁸

In conclusion, the court ordered that:

Sections 10 and 11 of the *Fisheries Act* (NT) do not confer on the Director of Fisheries (NT) a power to grant a licence under that Act which licence would, without more, authorise or permit the holder to enter and take fish or aquatic life from areas within the boundary lines described in the ... grant made under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).¹²⁹

The result is that in order to fish in an area within Aboriginal land, permission must be given by a Land Council to enter and remain on the land.¹³⁰

Justice Kirby generally agreed with the joint reasons, but he gave a separate judgment in which he discussed many of the principles of statutory interpretation which supported his reasoning in *Griffiths* (see above). Once again he highlighted his preference for a consistent approach to Indigenous peoples' traditional rights that operates on the premise that they can not be taken away without clear and express authority. He supported the joint decision because it is consistent with other principles he thinks applied. Namely, that:

- It preserves the Aboriginal interests concerned as a species of valuable property rights not to be taken away without the authority of a law clearly intended to have that effect.
- It does this against the background of the particular place that such Aboriginal rights now enjoy, having regard to their unique character as legally *sui generis*, their history, their belated recognition, their present purposes and the moral foundation...for respecting them.
- It ensures that, if the legislature of the Northern Territory wishes to qualify, diminish or abolish such legal interests it must do so clearly and expressly, and thereby assume full electoral and historical accountability for any such provision...¹³¹

5.2 The impact of the National Apology

A significant element of Justice Kirby's judgment was his consideration of the National Apology¹³² and its impact on legislative interpretation. Reflecting on the Apology, he considered it appropriate for the High Court 'to take judicial notice' of it:

The Court does not operate in an ivory tower. The National Apology acknowledges once again, as the preamble to the *Native Title Act 1993* (Cth) already did, the wrongs done in earlier times to the indigenous peoples of Australia, including by the law of this country. Those wrongs included the non-consensual denial and deprivation of basic legal rights which Australian law would otherwise protect and uphold for other persons

128 *Northern Territory v Arnhem Land Aboriginal Land Trust* [2008] HCA 29, 55 (Gleeson CJ, Gummow, Hayne, Crennan J).

129 *Northern Territory v Arnhem Land Aboriginal Land Trust* [2008] HCA 29, 62 (Gleeson CJ, Gummow, Hayne, Crennan J).

130 *Northern Territory v Arnhem Land Aboriginal Land Trust* [2008] HCA 29, 61 (Gleeson CJ, Gummow, Hayne, Crennan J). The Northern Territory legislation that provides for the Land Council's powers and responsibilities as trustee of the land is the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

131 *Northern Territory v Arnhem Land Aboriginal Land Trust* [2008] HCA 29, 67-69 (Kirby J).

132 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, pp 167-173 (The Hon Kevin Rudd MP, Prime Minister). See chapter 1 of this Report.

in the Commonwealth. In the case of traditional Aboriginals, these right included rights to the peaceful enjoyment of their traditional lands and to navigate and to fish as their ancestors had done for aeons before British sovereignty and settlement.¹³³

Justice Kirby acknowledged that although the National Apology had bipartisan support and ‘reflects an unusual and virtually unprecedented parliamentary initiative, it does not, as such, have normative legal operation...Yet it is not legally irrelevant to the task presently in hand. It constitutes part of the factual matrix or background against which the legislation in issue in this appeal should now be considered and interpreted. It is an element of the social context in which such laws are to be understood and applied, where that is relevant. Honeyed words, empty of any practical consequences, reflect neither the language, the purpose nor the spirit of the National Apology.’¹³⁴

5.3 The future of fishing in the NT

The decision affects all coastline in the Northern Territory that is part of Aboriginal land granted under the ALRA. In total Aboriginal land constitutes over 80 percent of the coastline of the Northern Territory. Most of the remaining 20 percent of the coastline is subject to an Aboriginal land claim, some of which has already been heard and recommended for grant.¹³⁵ I hope that the decision in this case does not affect the granting of the remaining land back to its Traditional Owners.

On a practical level the case has implications for all those who seek to access and use the intertidal zone.

For the past year, between the Full Federal Court and the High Court decisions, the Northern Land Council, which represents the Traditional Owners in the case, has been issuing free permits to commercial fishermen to use the inter-tidal zone. The Council has continued to issue temporary permits while they negotiate a long term system.¹³⁶ Those negotiations are now taking place between the Traditional Owners of all the Aboriginal land on the coastline, the government and the fishing industry.¹³⁷ But with the High Court’s findings, the Traditional Owners participate in the negotiations from a position of great strength.

The Traditional Owners have indicated that they will negotiate:

[The] Land Council has indicated that they will be looking to negotiate an outcome that will be workable for Aboriginal people, for recreational fishers and for commercial fishing interests. But the reality is that they if you like, Indigenous people, hold all the power and the levers in these negotiations and that’s what’s fundamentally different; and that’s the significance of this case.¹³⁸

133 *Northern Territory v Arnhem Land Aboriginal Land Trust* [2008] HCA 29, 70 (Kirby J).

134 *Northern Territory v Arnhem Land Aboriginal Land Trust* [2008] HCA 29, 71 (Kirby J).

135 C Graham, ‘Bay of plenty’, *National Indigenous Times*, 7 August 2008. At: <http://nit.com.au/News/story.aspx?id=15760> (viewed August 2008).

136 M McLaughlin, ‘Traditional owners win control of waters’, *The 7.30 Report*, 30 July 2008. At <http://www.abc.net.au/7.30/content/2008/s2319497.htm> (viewed August 2008).

137 R Levy, Principal Legal Officer, Northern Land Council, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 20 November 2008.

138 A Kirk, ‘Tidal rights decision, ‘extraordinarily significant’: academic’, *The World Today*, 30 July 2008 quoting J Altman. At: <http://www.abc.net.au/worldtoday/content/2008/s2318855.htm> (viewed August 2008).

As Ms Watson, an Indigenous lawyer has commented:

If it's [the Traditional Owner's] wish to negotiate so be it. Personally, I think there's a lot of bravery in that approach as well... sitting down at the negotiating table with people who have a history of not respecting your rights. I think that's brave and it demonstrates a lot of foresight. They're not only thinking of themselves, but of their children...¹³⁹

The outcome of these negotiations will have significant implications for the Traditional Owners, who have identified a number of different benefits that can be achieved through their newly recognised rights.

(a) Potential economic benefits

The intertidal zone is economically significant, being home to Barramundi, Mud Crab and Trepang (otherwise known as *Beche-de-mer*). All up, the value of these industries is in the hundreds of millions of dollars per year.

Djambawa Marawilli, a traditional owner involved in the case, says the decision opens up money-making opportunities for Indigenous people. 'It can be like crabbing, fishing and other economic things in the sea,' he said. 'This is the time to talk with each other now, this is the time for the Government and the balanda [non-Aboriginal people] to talk and make real smooth process to plan for the future.'¹⁴⁰

[The case is an] extraordinarily significant outcome for Indigenous people because it gives them, effectively a commercially valuable property right which is really unprecedented in the Australian context.¹⁴¹

(b) Controlling access

The decision also ensures that Traditional Owners have the ultimate control over their country. They can determine who enters all of their land and waters and what they do there. As I discussed in detail above, control of the land is a traditional law and custom of many Indigenous Australians, and in this case was one of the reasons the Traditional Owners instigated the case in the first place.¹⁴²

That is not to say that the Traditional Owners will exclude the hundreds of commercial operators and tens of thousands of recreational fisherman in the region.¹⁴³ Aboriginal leaders have pledged to negotiate in good faith with the government and fishermen.

The country is for everybody, the sea and the land,' Yolngu leader Djambawa Marawilla said yesterday. 'Fishermen, they are allowed to come to fish around in our country but through the permit and through the right communication.'¹⁴⁴

139 C Graham, 'Bay of plenty', *National Indigenous Times*, 7 August 2008, quoting Nicole Watson. At: <http://nit.com.au/News/story.aspx?id=15760> (viewed August 2008).

140 Australian Broadcasting Corporation, 'Compensation for Blue Mud Bay decision unlikely: Macklin', *ABC news*, 30 July 2008. At: <http://www.abc.net.au/news/stories/2008/07/30/2319441.htm> (viewed August 2008).

141 A Kirk, 'Tidal rights decision, 'extraordinarily significant': academic', *The World Today*, 30 July 2008, quoting J Altman. At: <http://www.abc.net.au/worldtoday/content/2008/s2318855.htm> (viewed August 2008).

142 M McLaughlin, 'Traditional owners win control of waters', *The 7.30 Report*, 30 July 2008. At: <http://www.abc.net.au/7.30/content/2008/s2319497.htm> (viewed August 2008); Northern Territory v Arnhem Land Aboriginal Land Trust [2008] HCA 29, 10-11 (Gleeson CJ, Gummow, Hayne, Crennan J).

143 C Graham, 'Bay of plenty', *National Indigenous Times*, 7 August 2008. At: <http://nit.com.au/News/story.aspx?id=15760> (viewed August 2008).

144 N Robinson and P Karvelas, 'Land rights reach into the sea', *The Australian*, 31 July 2008. At: <http://www.theaustralian.news.com.au/story/0,25197,24104643-2702,00.html> (viewed August 2008).

Recognising this, the chairman of the Northern Territory Seafood Council Rob Fish, voiced his confidence about the negotiations,¹⁴⁵ a sentiment echoed by the Prime Minister, Kevin Rudd.¹⁴⁶

(c) Looking after country

In previous native title reports I have emphasised the importance that looking after country has for the health and wellbeing of Aboriginal and Torres Strait Islanders. This decision will allow the Traditional Owners the power to look after their sea country:

Robert Browne, a senior Larrakia man, said the High Court judgment would mean rangers such as Danny Raymond and Keith Sailor could do more to look after their traditional lands and sea.¹⁴⁷

Finally, now that the case is completed, the Traditional Owners will have to consider one further question. Will the Traditional Owners decide to claim compensation for the 30 years of commercial and recreational fishing on Aboriginal land?

5.4 Implications of the case on native title and other land rights regimes

Strictly speaking, the Blue Mud Bay case only applies to Northern Territory Aboriginal land granted under the ALRA, and has no application to native title or other states' land rights regimes. However, the decision of the High Court may have moral or political suasion for future native title claims or claims for commercial rights over the sea:

...I think morally other Aboriginal people would now be able to argue that if these sorts of rights are being provided to Aboriginal people in the Northern Territory, they should be extended elsewhere... And given that the overarching aim of government policy is to close the gap between Indigenous and other Australians, a number of commentators including myself have said that this can only happen if you also provide Indigenous people with the commercially valuable property rights that they have historically missed out on in Australia.¹⁴⁸

Sean Brennan, a senior law lecturer, also considers this to be a new opportunity for all Indigenous land rights, including native title:

The broader policy answer is that it's a great opportunity for a new government which says it wants to take a more flexible and less litigious approach to native title and land issues, to do exactly that. To date, off-shore native title claims have not progressed very far in the courts, or in mediation.¹⁴⁹

145 Australian Broadcasting Corporation, 'Compensation for Blue Mud Bay decision unlikely: Macklin', *ABC news*, 30 July 2008. At: <http://www.abc.net.au/news/stories/2008/07/30/2319441.htm> (viewed August 2008).

146 Australian Broadcasting Corporation, 'Compensation for Blue Mud Bay decision unlikely: Macklin', *ABC news*, 30 July 2008 citing the Hon Kevin Rudd, Prime Minister: 'We are encouraged by the positive and constructive attitude which has been demonstrated thus far by organisations such as the Northern Territory Lands Council in terms of ensuring that there are flexible and sensible arrangements, negotiated arrangements put in place which can properly balance the rights and interests of fishers both commercial and recreational'.

147 N Robinson and P Karvelas, 'Land rights reach into the sea', *The Australian*, 31 July 2008. At: <http://www.theaustralian.news.com.au/story/0,25197,24104643-2702,00.html> (viewed August 2008).

148 A Kirk, 'Tidal rights decision, 'extraordinarily significant': academic', *The World Today*, 30 July 2008 quoting J Altman. At: <http://www.abc.net.au/worldtoday/content/2008/s2318855.htm> (viewed August 2008).

149 C Graham, 'Bay of plenty', *National Indigenous Times*, 7 August 2008, citing S Brennan. At: <http://nit.com.au/News/story.aspx?id=15760> (viewed August 2008).

We may not need to wait long to see whether this case, or the Government's new approach to native title will have any impact. The native title sea claim over the Torres Strait, which is being heard by the Federal Court in late 2008, may be influenced by the decision:

...the decision...has given heart to Torres Strait Islanders embroiled in a long-running claim for control of the vital seaway between the northernmost tip of Australia and Papua New Guinea...Torres Strait Islanders are already investigating the implications of the Blue Mud Bay ruling for their own long-running regional sea claim...They now hope the ruling will help their claim, vastly more complex because of issues involving the law of the sea, a boundary treaty with PNG, and Queensland law.¹⁵⁰

The strong and unequivocal protection of rights that was recognised in the Blue Mud Bay decision stands in stark contrast to the native title decisions of the courts over the last few years.

6. Conclusion

A change of government and a commitment to a new approach to native title (as detailed in chapter 1 of this Report) offer important opportunities. To avoid another round of disappointed hopes and expectations, this impetus needs to be converted into tangible change in the short and medium term. There are two levels on which the Commonwealth can work with Indigenous organisations and other key participants in the system in order to restore a greater sense of justice for Indigenous peoples in the native title system:

- policy and administration
- the law of native title.

I have discussed in this Report and others ways in which Commonwealth policy leadership can improve the fairness and quality of the native title system. Above all else, it is the main financier of a system that consumes hundreds of millions of dollars. The Commonwealth initiates national policy objectives in health, education, competition reform and many other fields of social and economic policy using the power of the purse-strings. It must use this power, and all other persuasive tools at its disposal, to convert the welcome rhetoric of all governments at the Native Title Ministers Meeting in July 2008, into action. For example, for many years the Commonwealth has notionally allocated compensation funds to meet State and Territory liabilities. Given the complete absence of formal compensation determinations there must surely have been a build-up of funds which could be sensibly reallocated from past projected compensation to creative forms of recognition in the present day.

A primary focus for potential legal reform lies in the area of proving native title. The appeal decisions affecting the Larrakia in 2007¹⁵¹ and the Noongar in 2008 show that the law about continuity of traditional connection needs to be brought back into line with the overall logic of *Mabo*. Justice Brennan in *Mabo* focused on the 'general nature of the connection between the indigenous people and the land' and the need for connection to be 'substantially maintained'. The High Court in *Yorta Yorta* embarked on an analysis of continuity that has been widely criticised for its abstraction from the realities of how cultures continue to grow and develop and the realities of Australian history. Their test of continuity set a very high bar for native title

150 G Ansley, 'The right to fish', *New Zealand Herald*, 2 August 2008. At: http://www.nzherald.co.nz/world/news/article.cfm?c_id=2&objectid=10524843 (viewed August 2008).

151 See chapters 7 and 8 of T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Australian Human Rights Commission (2008).

claimants. A few Full Federal Court decisions since *Yorta Yorta* in 2002 have shown some latitude exists, to recognise the impacts of colonisation. But the cases of the Larrakia and the Noongar demonstrate that strong vibrant contemporary Indigenous communities with strong roots in the pre-colonial past may be deemed insufficiently 'traditional' to qualify for native title recognition.

While further legislative intervention at this point into an already complicated legal regime is not straightforward, the Commonwealth Parliament must consider ways of realigning the proof of native title with the original ethos of *Mabo*.

6.1 Section 223

As the dust on native title has settled in recent years, commentators who have intimate knowledge of the system are becoming increasingly vocal about their concerns that the system is unjust, cruel, disappointing and even dangerous.¹⁵²

The perversity lies in the reality that after two hundred years of valiantly and defiantly withstanding waves of colonisation the legislation that delivered some hope might in fact be the tsunami that dashes all hope.¹⁵³

The section that is identified as the major source of these problems is section 223 of the NTA – the definition of native title. As I highlighted in the *Native Title Report 2007*, the interpretation of section 223 clearly breaches Australia's human rights obligations.¹⁵⁴ The United Nations Human Rights Committee and the Committee on the Elimination of Racial Discrimination have both confirmed this in their comments on Australia.¹⁵⁵ Given the lack of significant progress or change to native title in recent years, I suspect these bodies will once again report that Australia has breached its international human rights obligations in their upcoming comments on Australia's member reports to the Human Rights Committee and the Committee on the Elimination of Racial Discrimination.

The practical impact of section 223 on communities is tangible. Its interpretation by the courts has resulted in more than one occasion where a court has recognised that the people who are before them are the same people who occupied the land at sovereignty, yet their native title rights were denied because they couldn't prove continuity under section 223.¹⁵⁶ As Justice Wilcox said:

Here's the government of the country and Parliament passing statutes which seem to promise so much and yet when the claim is brought they just can't get there and then they get nothing, not even recognition.¹⁵⁷

152 B Smith and F Morphy (eds), *The social effects of native title: recognition, translation, coexistence* (2007), p 2.

153 K Smith, *Proving native title; discharging a crushing burden of proof*, (Speech delivered at the Judicial Conference of Australia National Colloquium, Gold Coast, 10 October 2008).

154 See T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Australian Human Rights Commission (2008); T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2006*, Australian Human Rights Commission (2007). At: http://www.humanrights.gov.au/social_justice/nt_report/ntreport06/index.html; T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2005*, Australian Human Rights Commission (2005). At: http://www.humanrights.gov.au/social_justice/nt_report/ntreport05/index.html.

155 Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc CERD/C/AUS/CO/14 (2005); Human Rights Committee, *Concluding observations of the Human Rights Committee: Australia*, UN Doc A/55/40, paras 498-528.

156 M Wilcox, former Justice of the Federal Court of Australia, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 23 July 2008.

157 M Wilcox, former Justice of the Federal Court of Australia, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 23 July 2008.

Section 223 requires the native title claimants prove continuous observance and acknowledgement of traditional laws and customs since the date of sovereignty. Chief Justice French has summarised it as requiring the following:

Determination of the existence of traditional laws and customs requires more than a determination of behaviour patterns. They must derive from some norms or a normative system. Because there is a requirement that the rights and interests be recognised at common law, the relevant normative system must have had 'a continuous existence and vitality since sovereignty'. A breach or interregnum in its existence causes the rights or interest derived from it to cease beyond revival. It is on this point in particular that great difficulty can arise. These requirements impose the burden of determining continuity of existence of their native title rights and interests upon the applicants at least by inference or extrapolation from various kinds of evidence... If by accident of history and the pressure of colonisation there has been dispersal of a society and an interruption of its observance of traditional law and custom, then the most sincere attempts at the reconstruction of that society and the revival of its law and custom seem to be of no avail.¹⁵⁸

The burden of this task, for a culture that has been subject to a history such as ours, is virtually impossible. As Justice Wilcox said there is 'absolutely no question that proving continuity as the main barrier to native title.'¹⁵⁹

We have come to a time where fixing the dysfunctional operation of section 223 must be tackled head on by government. Even the Chief Justice of the High Court of Australia has implied that this problem requires legislative amendment:

...In the absence of a national land rights statute, the rules for the determination and definition of native title rights set out in the [Native Title] Act cannot seem to shake off the logistical difficulties imposed by the requirement for proof of connection.¹⁶⁰

What these amendments entail should be determined in consultation with Indigenous people, however many suggestions have already been put forward from a variety of stakeholders.¹⁶¹

6.2 Presumption of continuity

As I have outlined in this chapter and in previous native title reports, the burden of proving continuity is too great. The requirement that the Indigenous claimants prove that 'each successive generation' has acknowledged and observed laws and customs from sovereignty until today,¹⁶² is extraordinarily difficult, even if the court can make inferences about the content of the law and customs at earlier times.¹⁶³ It is unjust to impose such an obligation on our Indigenous peoples who were the innocent subjects of colonisation and various subsequent policies which continue to have devastating impacts on communities.

158 R French CJ, *Rolling a rock uphill? – native title and the myth of Sisyphus*, (Speech delivered at the Judicial Conference of Australia National Colloquium, Gold Coast, 10 October 2008).

159 M Wilcox, former Justice of the Federal Court of Australia, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 23 July 2008.

160 R French CJ, *Rolling a rock uphill? – native title and the myth of Sisyphus* (speech delivered at the Judicial Conference of Australia National Colloquium, Gold Coast, 10 October 2008).

161 See also S Young, *The trouble with tradition* (2008); R French CJ, *Rolling a rock uphill? – native title and the myth of Sisyphus*, (Speech delivered at the Judicial Conference of Australia National Colloquium, Gold Coast, 10 October 2008); and Justice Merkel in *Rubibi Community v State of Western Australia (No 7)* [2006] FCA 459.

162 See for example, *Bodney v Bennell* [2008] FCAFC 63, 75 (Finn, Sundberg and Mansfield JJ).

163 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 27.

As a result, a number of people have considered whether:

...statutory changes to s223 would help considerably. Presumptions of continuity would be a good start.¹⁶⁴

The Queensland government has similarly suggested to me that the Attorney could consider ‘amending the requirements in the [NTA], as they are interpreted, for the need to establish continuity of connection for there to be a finding of native title. This could also consider, for example, whether a rebuttable presumption in favour of continuity of connection would assist...’.¹⁶⁵

A presumption of continuity would require more than the non-claimant party simply being able to throw doubt on the case made by the claimants, but that the non-claimant would have to prove, on the balance of probabilities, that there has been a ‘substantial interruption’ to the observance of law and custom by the claimants.

Depending on the policies that the Traditional Owners of the land had been subject to over the past 200 years, such a presumption could, at times, be reasonably easily disproven. Consequently, a presumption of continuity would not do away with any other reforms that are necessary to ensure the native title system operates fairly and justly. However, it could modestly reduce the onerous burden of proof on the applicants and could have a substantive impact in some cases.

Finally, it should be noted that although such a change in the law would raise a number of difficult questions in itself, including what will give rise to the application of a presumption, I do consider that the benefits would be such that it is worthy of serious consideration by the Attorney-General.

6.3 Capacity of the court to take into account reasons for change

Another issue that has arisen in the cases this year, and that I commented on in last year’s native title report as well, is the court’s consideration for the reasons for an interruption in the continuity of observance of traditional law and custom. The court in *Yorta Yorta* stated that:

But the inquiry about continuity of acknowledgement and observance does not require consideration of why, if acknowledgement and observance stopped, that happened.¹⁶⁶

This rule is applied strictly. For example in the Noongar appeal discussed above, Justice Wilcox’s reflections on the effects of white settlement were commented on by the Full Federal Court as being substantially irrelevant.

However, although the law considers the reasons for interruption in continuity to be irrelevant, those reasons are not irrelevant to the impact and outcomes that the native title system achieves today, nor to the Indigenous people who were subject to decades of policies which were aimed at destroying their culture.

164 K Smith, *Proving native title; discharging a crushing burden of proof*, (Speech delivered at the Judicial Conference of Australia National Colloquium, Gold Coast, 10 October 2008).

165 J McNamara, Executive Director, Indigenous Services, QLD Department of Natural Resources and Water, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 September 2008.

166 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 90.

The law today is also inconsistent with the Australian Government's approach to reconciliation and partnership with the Indigenous population. The new Government started its term with a National Apology to the Stolen Generations, an act that acknowledged the impact of previous Government policies on Indigenous peoples today.

In the Apology, the Prime Minister stated:

... We apologise for the laws and policies of successive Parliaments and governments that have inflicted profound grief, suffering and loss on these our fellow Australians.

We apologise especially for the removal of Aboriginal and Torres Strait Islander children from their families, their communities and their country.

And for the indignity and degradation thus inflicted on a proud people and a proud culture, we say sorry. We the Parliament of Australia respectfully request that this apology be received in the spirit in which it is offered as part of the healing of the nation.

...

We today take this first step by acknowledging the past and laying claim to a future that embraces all Australians.

A future where this Parliament resolves that the injustices of the past must never, never happen again.

A future where we harness the determination of all Australians, Indigenous and non-Indigenous, to close the gap that lies between us in life expectancy, educational achievement and economic opportunity.

A future where we embrace the possibility of new solutions to enduring problems where old approaches have failed.

A future based on mutual respect, mutual resolve and mutual responsibility.

A future where all Australians, whatever their origins, are truly equal partners, with equal opportunities and with an equal stake in shaping the next chapter in the history of this great country, Australia.¹⁶⁷

In order to bring the Native Title Act into line with this Government's new approach to acknowledging the past and creating a fairer and respectful relationship, this part of the native title system should be amended.

One way of doing this would be to consider an amendment to the Native Title Act which addresses the court's inability to consider the reasons for interruption in continuity. Such an amendment could state:

In determining a native title determination made under section 61, the Court shall treat as relevant to the question whether the applicant has satisfied the requirements of section 223:

- whether the primary reason for any demonstrated interruption to the acknowledgment of traditional laws and the observance of traditional customs is the action of a State or Territory or a person who is not an Aboriginal person or Torres Strait Islander

¹⁶⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, p. 167 (The Hon Prime Minister Kevin Rudd MP). As I stated in chapter 1 of this Report, the policies of removing children from their homes cannot be separated from native title, as in many cases, this removal of children may have broken their connection to their land and in doing so, denied them their native title rights under the Native Title Act.

- whether the primary reason for any demonstrated significant change to the traditional laws acknowledged and the traditional customs observed by the Aboriginal peoples or the Torres Strait Islanders is the action of a State or Territory or a person who is not an Aboriginal person or Torres Strait Islander.

6.4 Revitalisation of culture

The United Nations Human Rights Committee has emphasised that the protection of the right to culture in article 27 of the ICCPR includes a protection of not only traditional means of livelihood, but their adaptation to modern times.

The right to enjoy ones culture cannot be determined in abstracto but has to be placed in context. In this connection, the Committee observes that article 27 does not only protect traditional means of livelihood of national minorities, as indicated in the State party's submission. Therefore, that the authors have adapted their methods of reindeer herding over the years and practice it with the help of modern technology does not prevent them from invoking article 27 of the Covenant.¹⁶⁸

Although the case law in Australia provides that native title rights and interests can be adapted, there are questions over the extent to which traditional laws and customs may change before they cease to be 'traditional'.¹⁶⁹

The level of adaptation generally allowed under s 223 of the NTA has been interpreted quite narrowly,¹⁷⁰ retaining a romanticised image of how Aboriginal Australians ought to live in order to be 'cultural' or 'traditional'. Section 223 has been said to hold Indigenous people to an '[i]mpossible standard of authentic traditional culture'.¹⁷¹

Yet there is 'an increasing body of research highlighting that reinterpretation, reinvention and in some cases revival of cultural practice are integral elements to the maintenance and assertion of tradition...revitalisation of the celebration of ANZAC day as an example that would not meet the test of 'continuing tradition' as applied by the NTA'.¹⁷²

The question is how the Australian law can reflect the rights of Indigenous peoples to revitalise their culture?

Currently, section 223 is inadequate in fulfilling Australia's international human rights obligations in this regard:

[the law is unable] to deal adequately with the issue of cultural change over time. In order to overcome these new problems of injustice, we need to approach the issue of cultural change over time more seriously, and not necessarily equate change with a loss of identity or authenticity.¹⁷³

168 M Scheinin, *Indigenous peoples' land rights under the International Covenant on Civil and Political Rights*, (Paper for Torkel Oppsahls minneseminar, Oslo, 28 April 2004), citing Ilmari Lansman et al v Finland (Communication 511/1992).

169 See T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Australian Human Rights Commission (2008), p 54 for revitalisation of culture.

170 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Australian Human Rights Commission (2008).

171 M Barcham, 'The limits of recognition' in B Smith and F Morphy (eds), *The social effects of native title: recognition, translation, coexistence* (2007), p 209.

172 B Scamary, "'No vacancies at the Starlight Motel": Larrakia identity and the native title claims process', in B Smith and F Morphy (eds), *The social effects of native title: recognition, translation, coexistence* (2007), pp 152-153.

173 M Barcham, 'The limits of recognition' in B Smith and F Morphy (eds), *The social effects of native title: recognition, translation, coexistence* (2007), p 203.

This necessarily leads us to the question of whether the Native Title Act should be amended so that the s 223 definition of 'traditional' is redefined to be whether the culture 'remains identifiable through time'. Some commentators suggest that amendment to the Act may not be necessary, but that *Yorta Yorta* would need to be overturned:

[the *Yorta Yorta*] approach to the recognition of native title was dependent upon the existence of an authentic form of aboriginal culture – an argument which can be seen to flow from the original *Mabo* ruling which argued that 'native title has its origins in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory'. However, this original argument in no way negates the possibility that cultures, and so too a society's lore, norms and traditions, can change over time... However, as Lisa Strelein has argued 'the radical title of the Crown at the time of the acquisition of sovereignty was burdened not by native title rights and interests then existing, but was burdened by the fact of the existence of native title'. And so, in the Australian case at least, problems associated with the inability of the native title process to adequately deal with questions of change stem not from the law itself but rather from its interpretation.¹⁷⁴

However, another alternative would be to tie in rights to revitalisation of culture with another form of recognition of Traditional Ownership, as discussed in chapter 2 of this Report. This would not necessarily require amending s 223 of the Native Title Act, but creating a second tier of recognition with different rights attached.

6.5 Recognition and healing

As I highlighted earlier in this chapter and in chapter 2 of this Report, recognition of Traditional Owners rights to their country are essential. The strict application of section 223 of the NTA plays a significant role in the strength and healing of a community and in doing so can provide psychological benefits:

I don't want to dismiss or understate the value of the achievements to date. Achievements that have not only resulted in tangible economic and cultural benefits from having native title recognised but important intangibles; being, the emotional and psychological strengthening of Indigenous people individually and collectively...¹⁷⁵

In his judgment in *Rubibi No 7*, Justice Merkel recognised that '[a]chieving native title to traditional country can lead to the enhancement of self respect, identity and pride for indigenous communities.'¹⁷⁶ However, he also recognised the flip side of the effects if native title is denied.

It is also important that indigenous communities appreciate the risk, which recent experience reveals is far from hypothetical, of failure in a native title claim. Where that occurs, it can have devastating consequences for the claimant community... native title may prove to be yet another of the prospects held out to indigenous communities where the realisable gain falls short of that originally expected as a result of the decision in *Mabo v Queensland (No 2)* (1992) 175 CLR 1.¹⁷⁷

174 M Barcham, 'The limits of recognition' in B Smith and F Morphy (eds), *The social effects of native title: recognition, translation, coexistence* (2007), p 211.

175 K Smith, *Proving native title; discharging a crushing burden of proof*, (Speech delivered at the Judicial Conference of Australia National Colloquium, Gold Coast, 10 October 2008).

176 *Rubibi Community v State of Western Australia (No 7)* [2006] FCA 459.

177 *Rubibi Community v State of Western Australia (No 7)* [2006] FCA 459.

Some of the ongoing impacts of the policies of forcibly removing children from their families, and other policies have ongoing effects on communities that also affect their native title claims. The need for healing within groups and the resolution of intra-Indigenous dispute is essential:¹⁷⁸

I think if you're going to be talking about different land holding or different ways of recognising people, you also have to deal with the pain of dispossession and 200 years of that impact, and you're not going to get there spontaneously, you have to get there through a process...¹⁷⁹

The Attorney-General stated that 'being unable to meet the required standard for a determination of native title at a particular point in history does not mean those Indigenous people do not have strong relationships with the land and with each other.'¹⁸⁰ The Larrakia case, which I considered in last year's report, is an example of this connection, even though native title wasn't recognised by the courts. However, the current legal system operates in such a way that if the strict, technical legal requirements of native title are not met, there is nothing to ensure that Traditional Owners rights are formally recognised. The lack of any recognition is discussed in chapter 2 of this Report.

However, it is important that when the government considers the benefits and broader role of native title and how it can be improved, that the psychological impacts of recognition (or being denied recognition) are considered. Such impacts will greatly effect the government's commitment to reconciliation and improving the life chances of Indigenous peoples.

Recommendations

- 3.1 That the Australian Government pursue consistent legislative protection of the rights of Indigenous peoples to give consent and permission for access to or use of their lands and waters. A best practice model would legislatively protect the right of native title holders to give their consent to any proposed acquisition. A second best option would be amend s 26 of the Native Title Act to reinstate the right to negotiate for all compulsory acquisitions of native title, including those that take place in a town or city.
- 3.2 That the Australian Government amend the Native Title Act to provide a presumption of continuity. This presumption could be rebutted if the non-claimant could prove that there was 'substantial interruption' to the observance of traditional law and custom by the claimants.
- 3.3 That the Australian Government amend the Native Title Act to address the court's inability to consider the reasons for interruption in continuity. Such an amendment could state:

178 For more information on healing, see T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2008*, Australian Human Rights Commission (2009).

179 K Smith, CEO, Qld South Native Title Services Ltd, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 19 September 2008; T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2008*, Australian Human Rights Commission (2009) for more on healing.

180 Attorney-General, *Speech*, (Speech delivered at the Negotiating Native Title Forum, Brisbane, 29 February 2008). At: http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/Speeches_2008_29_February2008-NegotiatingNativeTitleForum (viewed March 2008).

In determining a native title determination made under section 61, the Court shall treat as relevant to the question whether the applicant has satisfied the requirements of section 223:

- whether the primary reason for any demonstrated interruption to the acknowledgment of traditional laws and the observance of traditional customs is the action of a State or Territory or a person who is not an Aboriginal person or Torres Strait Islander
- whether the primary reason for any demonstrated significant change to the traditional laws acknowledged and the traditional customs observed by the Aboriginal peoples or the Torres Strait Islanders is the action of a State or Territory or a person who is not an Aboriginal person or Torres Strait Islander.

3.4 That the Australian Government amend the Native Title Act to define 'traditional' for the purposes of s 223 as being satisfied when the culture remains identifiable through time.

Chapter 4

Climate change context – International and Domestic

.....

*I am convinced that climate change, and what we do about it, will define us, our era, and ultimately the global legacy we leave for future generations. Today, the time for doubt has passed.*¹

Ban Ki-moon, Secretary-General, United Nations

Climate change poses an enormous global challenge and will have significant impacts on all countries, governments, companies, communities, families and individuals. As the impacts of climate change increases people's vulnerability to poverty and social deprivation, it has the potential to exacerbate inequality and threaten human rights. In particular, the livelihoods of women and children, and low socio-economic populations including the worlds' Indigenous peoples are at high risk.

The former President of the Australian Human Rights Commission identified the potential challenges that we will face as follows:

The human rights lens shows populations becoming increasingly vulnerable to poverty and social deprivation as large tracts of previously fertile land become useless. We can anticipate conflicts over limited water supplies becoming more severe and frequent. We see problems in controlling infectious diseases, which are also spreading wider. We see rising sea-levels submerging low-lying atoll countries and delta regions, or making them uninhabitable by inundating their fresh water tables.

These are scenarios which directly threaten fundamental human rights; rights to life, to food, to a place to live and work as well as rights to shelter and property, rights associated with livelihood and culture and migration and resettlement... the worst effects of climate change are likely to be felt by those individuals and groups whose rights are already precarious.²

The climate change debate has so far largely focused on economic impacts and developing new technologies to mitigate and adapt to climate change. Consideration of the human rights impact has generally been minimal.³

Addressing climate change requires a multifaceted policy approach that ensures the protection of fundamental human rights, ensuring that the rights of the most vulnerable are at the forefront of the debate. With climate change policy developing rapidly, governments need to be

1 United Nations Secretary-General, *Climate change and indigenous peoples*, (2007). At: www.un.org/esa/socdev/unpfii/en/climate_change.html (viewed 21 July 2008).

2 J von Doussa, *Climate change and human rights: a tragedy in the making*, (Speech delivered at the Australian Human Rights Commission Human Rights Law Seminar, Sydney, 20 August 2008) At: <http://www.humanrights.gov.au/legal/seminars/index.html> (viewed 26 August 2008).

3 International Council for Human Rights Policy, *Climate change and human rights: a rough guide*, (2008), p 14. At: http://www.ichrp.org/files/reports/36/136_report.pdf (viewed 28 August 2008).

mindful of international obligations and commitments under the various international mechanisms, and be sure to address more than just the environmental and economic impacts of climate change.

Text Box 1: What is climate change?⁴

The UNFCCC defines climate change as a change in climate which is attributed directly or indirectly to human activity, which alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.

This change in climate is due to the release of greenhouse gases over a period of time. This is also known as greenhouse gas emissions or carbon emissions. There are six main greenhouse gases:

- carbon dioxide
- methane
- nitrous oxide
- hydrofluorocarbons
- perfluorocarbons
- sulphur hexafluoride.

Many human activities contribute to the emission of greenhouse gases, particularly carbon dioxide. This means that greenhouse gas emissions have increased significantly since pre-industrial times and continues to increase. This is because people keep on using fossil fuels for electricity and power to provide heating, transportation, and for industry. Fossil fuels include gas, coal, oil and oil-derived products like diesel.

Since 1750, anthropogenic (human induced) greenhouse gases have made up 14 percent of synthetic greenhouse gas emissions and continue to increase. According to the Intergovernmental Panel on Climate Change (IPCC), global emissions of greenhouse gases increased by 70 percent between 1970 and 2004.

1. An historical overview

Climate change is not a recent phenomenon. Scientists have been studying changes in climate since the 1700s. While changes in climate occur naturally, the current changes are significantly human induced, and are a direct result of industrialisation.

The link between climate change and the burning of fossil fuels was realised as early as the 1890s.⁵ Since then, governments, community organisations, and scientists have been monitoring, assessing, and trying to manage the consequences of the industrial revolution. This has resulted in the build up of carbon dioxide and other greenhouse gases in the earth's atmosphere, changing our global environment, in some instances permanently.

The environment was formally placed on the global agenda for the first time at the first United Nations Conference on Environment and Development, 'the Earth Summit', held in Stockholm, Sweden in 1972. While climate change was not specifically discussed until the World Climate Change Conference in Geneva in 1979, the Earth Summit established the United Nations Environment Programme (UNEP).

4 *United Nations Framework Convention on Climate Change*, 1992, art 1.

5 Greenhouse Network, *Climate Change: Timeline*. At: <http://www.greenhousenet.org/resources/timeline.html> (viewed 5 September 2008).

In 1998, the UNEP created, in partnership with the World Meteorological Organisation, the Intergovernmental Panel on Climate Change (IPCC). It is constituted by governments, scientists, and the United Nations body (representing the people). The role of the IPCC is to 'assess on a comprehensive, objective, open and transparent basis, the latest scientific, technical and socio-economic literature produced worldwide relevant to the understanding of the risk of human induced climate change, its observed and projected impacts and options for adaptation and mitigation'.⁶ The findings of the first IPCC Assessment Report in 1990 played a decisive role in establishing the United Nations Framework Convention on Climate Change (UNFCCC). The UNFCCC was signed in 1992 and commenced in 1994. The well-known Kyoto Protocol is a protocol to this convention.

A number of reviews have also been conducted which consider the impacts of climate change and suggest solutions to address issues arising from climate change. The more recent of these reports, recognise that climate change is supported by scientific evidence, is more advanced than initially thought, and is a global issue that requires global solutions.

Unfortunately, many of these reviews have focused on the economic implications of climate change and the development of new technologies to assist with the mitigation and adaptation of climate change, without specifically addressing the human rights implications. One of the original government initiated reviews was the British government's 'Stern Review'⁷ which examined the evidence of the economic impacts of climate change and explored the economics of stabilising greenhouse gases in the atmosphere. It also considered the policy challenges involved in establishing and transitioning to a low-carbon economy. Australia has begun its own review, *The Garnaut Review*, which is discussed later in this chapter.

Text Box 2: Responding to climate change

The main focus for responses to climate change have generally included:

- *Mitigation*: The United Nations Development Programme (UNDP) refers to mitigation as one part of a twin strategy that offers 'insurance against catastrophic risks for future generations of humanity, regardless of their wealth and location'.⁸ Governments have considered a primary response to minimise the impacts of climate change as the introduction of measures to lower its rate of acceleration, mainly by aiming to reduce greenhouse gas emissions.

6 Intergovernmental Panel on Climate Change, About IPCC. At: www.ipcc.ch/about/index/htm (viewed 3 September 2008).

7 HM Treasury, *Stern Review on the economics of climate change*, Executive Summary. At: http://www.hm-treasury.gov.uk/media/4/3/executive_summary.pdf (viewed 6 September 2008).

8 United Nations Development Programme, *Fighting climate change: Human solidarity in a divided world*, Human Development Report 2007/2008 (2008), p 167.

- *Adaptation*: 'Adaptation' refers to actions taken to adjust lives and livelihoods to the new conditions brought about by warming temperatures and associated climate changes.⁹ The impacts of climate change are significantly advanced and in some instances irreversible, even with successful mitigation. Governments will be required to establish measures that support affected communities to adapt to climate change.
- *Relocation*: there are communities around the world that are already being displaced by climate change. While some migration policies have been introduced, to date there has been no coordinated response from the international community to address the needs of 'climate change refugees'.¹⁰

These responses are considered in the Australian Indigenous context in chapter 5.

2. The International Framework

For at least the last 60 years, governments in the developed world in particular have downplayed the significance of climate change, in order to secure their place in the world as economic leaders. This is despite the fact that they are the same governments that developed the international treaties and standards designed to assist in managing the risk of climate change.

At international law there are two instruments that address the issue of climate change specifically:

- The United Nations Framework Convention on Climate Change (UNFCCC) developed at the Earth Summit in Rio de Janeiro in 1992
- The Kyoto Protocol, negotiated in Japan in 1997, and entered into force in February 2005.

Appendix 4 provides a comprehensive summary of the existing international and domestic frameworks that directly or indirectly addresses climate change.

(a) The United Nations Framework Convention on Climate Change

The UNFCCC has been ratified by 192 countries, including Australia, all of whom have committed to stabilising their greenhouse gas emissions to what they were in 1990. The Convention provides for a minimum standard of emissions and reporting mechanisms on progress, including submitting periodic statements of greenhouse gas emissions, developing strategies to adapt to climate change, and cooperating on research and technology.

Although the Convention is not binding on its signatories, the emissions targets apply to developed countries in recognition of the fact that industrialised or developed countries have contributed more to climate change than developing countries.¹¹ To date no emission cuts have been imposed on developing countries.

9 International Council for Human Rights Policy, International Council for Human Rights Policy, *Climate change and human rights: a rough guide*, (2008), p 14. At: http://www.ichrp.org/files/reports/36/136_report.pdf (viewed 28 August 2008).

10 Australian Human Rights Commission, *Climate Change and Human Rights*. At: <http://www.humanrights.gov.au> (viewed 26 August 2008).

11 Developed countries are also referred to as Annex countries which are further divided into Annex I and Annex II countries. Annex II countries are industrialised nations which pay for the costs of any developing country's emission reductions. For further discussion see State Library of New South Wales, Hot Topics: Legal Issues in Plain Language, *Climate Change*, Hot Topics 63 (2007), p 3.

However, some countries were able to negotiate different emission reduction targets. Australia obtained special concessions allowing greenhouse gas emissions to increase 8 percent above 1990 emission levels up to 2012.¹²

Each year, a ‘Conference of the Parties’ (COP) is held for parties to the UNFCCC. At the third COP (otherwise known as COP-3) in 1997, the first set of binding rules to the UNFCCC, the Kyoto Protocol, was negotiated.¹³

(b) The Kyoto Protocol

The Kyoto Protocol is an international agreement linked to the UNFCCC. To date, it has been ratified by 182 nations. The Kyoto Protocol was adopted in Kyoto, Japan, on 11 December 1997, and entered into force on 16 February 2005. The objective of the Protocol is the ‘stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system’.¹⁴ It sets binding targets and timetables for emissions reductions. While the Convention encouraged industrialised countries to stabilise greenhouse gas emissions, the Kyoto Protocol commits them to do so.

Signatory countries must meet their targets primarily through national measures. However, the Kyoto Protocol also includes market based mechanisms to assist them to meet their targets. The Kyoto mechanisms are:

- Emissions trading – known as ‘the carbon market’
- The clean development mechanism
- Joint implementation.¹⁵

These mechanisms are discussed further in chapter 5.

The Protocol also includes systems for:

- the registration of Party transactions under the Kyoto mechanisms
- the submission of annual emissions inventory reports and national reports by the Parties¹⁶
- compliance, to ensure Parties are meeting their commitments and if they are not assists them to do so
- adaptation, designed to assist countries in adapting to the adverse effects of climate change. The Protocol facilitates the development and deployment of techniques that can help increase resilience to the impacts of climate change.¹⁷

12 Australian Government, *Implementing the Kyoto Protocol in Australia, Fact Sheet*, Department of Climate Change. At: <http://www.climatechange.gov.au/international/publications/fs-kyoto.html> (viewed 26 September 2008).

13 State Library of New South Wales, Hot Topics: Legal Issues in Plain Language, *Climate Change*, Hot Topics 63, (2007) p 3.

14 State Library of New South Wales, Hot Topics: Legal Issues in Plain Language, *Climate Change*, Hot Topics 63, (2007) p 3.

15 United Nations Framework Convention on Climate Change, *Kyoto Protocol*. At: http://unfccc.int/kyoto_protocol/items/2830.php (viewed 5 August 2008).

16 Under the Kyoto Protocol, Australia must submit a national inventory of emissions and removals of greenhouse gases to the United Nations in accordance with the UN Framework Convention on Climate Change. For further information, see National Greenhouse Gas Inventory. At: www.greenhouse.gov.au/international/unfccc.html (viewed 5 August 2008).

17 United Nations Framework Convention on Climate Change, *Kyoto Protocol*. At: http://unfccc.int/kyoto_protocol/items/2830.php (viewed 5 August 2008).

Parties to the Kyoto Protocol developed and adopted detailed rules for implementation at COP-7 in Marrakesh in 2001, they are called the ‘Marrakesh Accords’.¹⁸

(c) International human rights framework

The international human rights framework recognises the basic, but fundamental rights that each individual is entitled to. These rights are provided for under particular international instruments, including the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

However, the international framework also provides for the recognition and protection of distinct rights of peoples’ whose way of life comes under threat from particular circumstances such as climate change. This includes issues that relate to specific areas of concern such as the ownership of traditional lands and territories, natural and cultural heritage, biodiversity, intellectual property rights, poverty reduction, and economic development.

Although the international climate change framework is integrally linked to a number of other international instruments that address issues related to climate change, this link is rarely given the weight it deserves. Appendix 4 provides an overview of the international human rights framework that provides specifically for the engagement of Indigenous peoples in climate change policy.

Text Box 3: Examples of how human rights will be negatively affected by climate change

- **Right to Life:** The effect of climate change on the right to life may be immediate; for example, death caused by extreme climate-change induced weather. It may also appear gradually; for example, when climate change causes people’s health to deteriorate, limits their access to safe drinking water and makes them more susceptible to disease.
- **Right to Adequate Food:** Increased temperatures and changes in rainfall patterns will lead to erosion and desertification. This will make previously productive land infertile and reduce crop and livestock. Rising sea levels will make coastal land unusable and cause fish species to migrate, while more frequent extreme weather events will disrupt agriculture.
- **Right to Water:** As the earth gets warmer, heat waves and water shortages will make it difficult to access safe drinking water and sanitation. There will be lower and more erratic rainfall in the tropical and sub-tropical areas of the Asia Pacific, which will get worse as the Himalayan glaciers melt.
- **Right to Health:** Climate change will have many impacts on human health. These will mainly be caused by disease and malnutrition. For example, changes in temperature will affect the intensity of a wide range of vector-borne, water-borne and respiratory diseases.

18 United Nations Framework Convention on Climate Change, *Kyoto Protocol*. At: http://unfccc.int/kyoto_protocol/items/2830.php (viewed 5 August 2008).

- **Human Security:** Climate change has the potential to aggravate existing threats to human rights. The impacts of climate change will increase people's vulnerability to poverty and social deprivation. People whose rights are poorly protected are also generally less equipped to adapt to climate change impacts.
- **Rights of indigenous peoples:** Climate change has a big impact on indigenous peoples around the world. It impacts them in a unique way; due to the deep engagement they have with the land. For example, it has been predicted that Aboriginal and Torres Strait communities will bear the brunt of climate change and will face serious health risks from malaria, dengue fever and heat stress, as well as loss of food sources from floods, drought and more intense bushfires.¹⁹

2.2 The Millennium Development Goals

The Millennium Development Goals (MDGs) were established under the Millennium Declaration and adopted at the Millennium Summit in 2000.

The MDGs are time-bound and quantified targets for addressing extreme poverty in its many dimensions including: poverty, hunger, disease, lack of adequate shelter, and exclusion; while promoting gender equality, education, and environmental sustainability. They are also basic human rights, the rights of each person on the planet to health, education, shelter, and security.²⁰

Governments around the world, including Australia,²¹ have committed to accomplishing all eight MDGs aimed at eradicating global poverty by 2015.²²

Text Box 4: The Millennium Development Goals

- Goal 1:** Eradicate Extreme Hunger and Poverty
- Goal 2:** Achieve Universal Primary Education
- Goal 3:** Promote Gender Equality and Empower Women
- Goal 4:** Reduce Child Mortality
- Goal 5:** Improve Maternal Health
- Goal 6:** Combat HIV/AIDS, Malaria and other diseases
- Goal 7:** Ensure Environmental Sustainability
- Goal 8:** Develop a Global Partnership for Development

19 Australian Human Rights Commission, *Climate Change and Human Rights*. At: <http://www.humanrights.gov.au> (viewed 26 August 2008).

20 The Millennium Project, Commissioned by the UN Secretary General, and supported by the UN Development Group. At: <http://www.unmillenniumproject.org/index.htm> (viewed 28 August 2008).

21 Australia is a signatory to the MDGs. However, our government is not currently using the goals as specific targets. Additionally, the Australian Government see the MDGs as only related to their regional and international obligations rather than as a mechanism to guide the advancement of their Indigenous peoples domestically. This also means that Indigenous Australians are not often able to access international mechanisms such as the MDGs to assist with the development of poverty reduction strategies. This is a significant issue for Indigenous communities where not only are we over represented in all areas of socio-economic disadvantage, but the impacts of climate change will exacerbate this situation.

22 For more information about the Millennium Development Goals see: <http://www.unmillenniumproject.org/index.htm>.

Climate change poses a significant threat to biodiversity, addressed by Goal 7 of the MDGs to achieve a sustainable environment. Biodiversity conservation and maintenance of ecosystem integrity are essential to the reduction of people's vulnerability to climate change and to the achievement of the MDGs.

Consequently, those who are signatories, to the MDGs are obliged to:

...make every effort to ensure the entry into force of the Kyoto Protocol...and to embark on the required reduction in emissions of greenhouse gases.²³

Recent reports of the World Health Organization (WHO) and the Millennium Ecosystem Assessment²⁴ reveal that biodiversity resources provide the necessary food to combat malnutrition and undernourishment, an important cause of child mortality. Other ecosystem services provided by biodiversity includes the promotion of health by filtering toxic substances from air, water and soil, and by breaking down waste and recycling nutrients, as well as providing an irreplaceable source of medicines.

The United Nations and governments should consider the MDGs a guiding framework in the development of climate change policy. This will ensure that mitigation and adaptation strategies do not undermine progress that has been made towards achieving the goals and that the targets for poverty reduction remain firmly on the agenda.

2.3 United Nations Permanent Forum on Indigenous Issues

The UN Permanent Forum on Indigenous Issues (UNPFII) is an advisory body to the Economic and Social Council, with a mandate to discuss indigenous issues related to economic and social development, culture, the environment, education, health and human rights.

The seventh session of the UNPFII firmly placed the issue of climate change for Indigenous people on the international agenda, recognising that:

...[T]he magnitude, accelerated pace and compound effects of climate change today are unprecedented, thus presenting major challenges to indigenous peoples' capacity to adapt. Further, some of the mitigation measures seen as solutions to climate change are also having negative impacts on indigenous peoples.

As stewards of the world's biodiversity and cultural diversity, Indigenous peoples' traditional livelihoods and ecological knowledge can significantly contribute to designing and implementing appropriate and sustainable mitigation and adaptation measures. Indigenous peoples can also assist in crafting the path towards developing low-carbon release and sustainable communities.²⁵

At the session held in April 2008, indigenous peoples from around the world voiced concerns, predicting that Indigenous people will bear the brunt of climate change impacts. We also expect that we will be required to contribute our cultural and intellectual knowledge on valuable biodiversity, to develop mitigation strategies 'in the national interest'.

23 State Library of New South Wales, Hot Topics: Legal Issues in Plain Language, *Climate Change*, Hot Topics 63, (2007), p 16.

24 Millennium Ecosystem Assessment. Biodiversity Synthesis. 2005, as cited by: The Secretariat of the Convention on Biological Diversity, *Biodiversity, Climate Change, and the Millennium Development Goals (MDGs)*. At: <http://www.cbd.int/doc/bioday/2007/ibd-2007-factsheet-03-en.pdf> (viewed 26 August 2008).

25 United Nations Economic and Social Council, *Recommendations on the special theme, 'Climate Change, biocultural diversity and livelihood: the stewardship role of indigenous peoples and new challenges'*, Permanent Forum on Indigenous Issues, E/C.19/2008/14 (2008), p 1.

(a) Outcomes of the Permanent Forum

The Permanent Forum found that as indigenous peoples have the smallest ecological footprints, we should not be asked to carry the 'heavier burden of adjusting to climate change.' The forum concluded that mitigation and adaptation strategies must be 'holistic and take into account not only the ecological dimensions of climate change, but also the social impacts, human rights, equity and environmental justice'.²⁶

The members of the UNPFII made a number of recommendations to the United Nations Economic and Social Council regarding the impacts of climate change on indigenous peoples, including:

- that States develop mechanisms through which they can monitor and report on the impacts of climate change on indigenous peoples, which considers our socio-economic limitations as well as our spiritual and cultural attachment to lands and waters
- a call to all UN agencies and States to support traditional practices and laws which can contribute to global solutions to climate change, and respects the right to self-determination of indigenous peoples to decide on mitigation and adaptation measures in the our lands and territories
- a call to States to implement the United Nations Declaration on the Rights of Indigenous Peoples and the principles of sustainability. This is particularly relevant to transnational corporations and highly industrialised States engaging in development activities.²⁷

The Permanent Forum have also appointed two of their members as special rapporteurs to prepare a report on various models and best practices of mitigation and adaptation measures undertaken by indigenous peoples from around the world. This report will include a draft declaration of action on climate change and indigenous peoples.

2.4 Declaration on the Rights of Indigenous Peoples

The Declaration on the Rights of Indigenous Peoples (the Declaration), adopted by the United Nations General Assembly in September 2007, also forms part of the international framework addressing climate change. In particular, the declaration supports the full participation and engagement of Indigenous peoples in the development and implementation of national and international policy. This will be particularly important for Indigenous peoples in responding to climate change.

The Declaration strengthens the international human rights system as a whole, elaborating upon existing international human rights norms and principles as they apply to indigenous peoples.

The Declaration on the Rights of Indigenous Peoples specifically recognises our rights to our lands and territories, our waters, our culture, our natural resources and our rights to self determination and sustainable economic development. It also formalises the right of indigenous people to give our free, prior and informed consent before certain actions affecting our lands and waters can occur. The declaration recognises:

26 United Nations Economic and Social Council, *Recommendations on the special theme, 'Climate Change, biocultural diversity and livelihood: the stewardship role of indigenous peoples and new challenges'*, Permanent Forum on Indigenous Issues, E/C.19/2008/14 (2008), p 1.

27 United Nations Economic and Social Council, *Recommendations on the special theme, 'Climate Change, biocultural diversity and livelihood: the stewardship role of indigenous peoples and new challenges'*, Permanent Forum on Indigenous Issues, E/C.19/2008/14 (2008), pp 3-7.

- a right to the land we traditionally own
- a right to compensation for land if it is taken, occupied, used or damaged without our free, prior and informed consent
- a right to the conservation and environmental protection of our country
- a right to determine and develop priorities and strategies for the development or use of our lands and resources.

This approach to Indigenous rights is also reflected in the 1992 Rio Declaration, which recognises the vital role of indigenous communities' knowledge and traditional practices in environmental management; and Agenda 21, which promotes the development of national policy approaches to indigenous participation in land and resource management through caring for country and economic development.

It is imperative that those governments who have not yet adopted the Declaration, including Australia, do so as a priority.

2.5 The Second International Decade on the World's Indigenous People

The Second International Decade on the World's Indigenous People which commenced on 1 January 2005,²⁸ follows on from the First International Decade which took place from 1995-2004. The Second Decade covers the period 2005-2015 and recognises the continued problems that indigenous peoples around the world face across all social indicators of disadvantage.

A Programme of Action was developed by the Coordinator of the Second Decade and Under-Secretary-General for the Department of Economic and Social Affairs with the input of member States, the United Nations system and other intergovernmental organisations, indigenous peoples' organisations, other non-governmental organisations, the private sector and other parts of civil society. The Programme of Action includes five objectives for the Decade, including:

- **promoting non-discrimination and inclusion** of indigenous peoples in the design, implementation and evaluation of international, regional and national processes regarding laws, policies, resources, programmes and projects
- **promoting full and effective participation** of indigenous peoples in decisions which directly or indirectly affect their lifestyles, traditional lands and territories, their cultural integrity as indigenous peoples with collective rights or any other aspect of their lives, considering the principle of free, prior and informed consent
- **redefining development policies** that depart from a vision of equity and that are culturally appropriate, including respect for the cultural and linguistic diversity of indigenous peoples

28 In December 2004, the General Assembly adopted a resolution (59/174) for a Second International Decade on the World's Indigenous people. International Work Group for Indigenous Affairs, *Second International Decade of the World's Indigenous Peoples (2005-2014)*, Fact Sheet. At: <http://www.iwgia.org/sw8961.asp> (viewed 11 December 2008).

- **adopting targeted policies, programmes, projects and budgets** for the development of indigenous peoples, including concrete benchmarks, and particular emphasis on indigenous women, children and youth
- **developing strong monitoring mechanisms and enhancing accountability** at the international, regional and particularly the national level, regarding the implementation of legal, policy and operational frameworks for the protection of indigenous peoples and the improvement of their lives.²⁹

The Second Decade addresses the areas of action consistent with the United Nations Permanent Forum on Indigenous Issues being: Culture; Education; Health; Human Rights; the Environment; and Social and Economic Development.

The Programme of Action³⁰ recognises that:

Climate change and other stressors, in particular pollutants and the ecologically unsustainable use of natural resources, present a range of challenges for the health, culture and well-being of indigenous peoples, and pose risks to the species and ecosystems that those communities and cultures rely on.³¹

The Coordinator of the Second Decade and Under-Secretary-General for the Department of Economic and Social Affairs recommend that it will be essential to:

- a) work closely with indigenous and local communities to help them to adapt to and manage the environmental, economic and social impacts of climate change and other stressors
- b) implement, as appropriate, sustainable and adaptive management strategies for ecosystems, making use of local and indigenous knowledge and indigenous peoples full and effective participation, and review nature conservation and land and resource- use policies and programmes
- c) stress the importance of promoting procedures for integrating indigenous local knowledge into scientific studies, and partnerships among indigenous peoples, local communities and scientists in defining and conducting research and monitoring associated with climate change and other stressors.

29 United Nations General Assembly, *Draft Programme of Action for the Second International Decade of the World's Indigenous People, Report of the Secretary General*, Sixtieth session, Item 70 of the Provisional Agenda, Indigenous Issues, A/60/207, 18 August 2005. At: <http://daccessdds.un.org/doc/UNDOC/GEN/N05/464/96/PDF/N0546496.pdf?OpenElement> (viewed 3 December 2008).

30 The Programme of Action for the Second International Decade of the World's Indigenous People was adopted by the General Assembly on 29 November 2005. For further information see United Nations General Assembly, *Indigenous issues, Report of the Third Committee*, Sixtieth session, Agenda item 68, A/60/506, (2005). At: <http://daccessdds.un.org/doc/UNDOC/GEN/N05/622/49/PDF/N0562249.pdf?OpenElement> (viewed 2 December 2008).

31 United Nations General Assembly, *Draft Programme of Action for the Second International Decade of the World's Indigenous People, Report of the Secretary General*, Sixtieth session, Item 70 of the Provisional Agenda, Indigenous Issues, A/60/207, (2005). At: <http://daccessdds.un.org/doc/UNDOC/GEN/N05/464/96/PDF/N0546496.pdf?OpenElement> (viewed 3 December 2008).

Text Box 5: The Second International Decade on the World's Indigenous People – Programme of Action – Recommendations regarding the Environment

It is recommended that:

- the indigenous related elements of the programme of work of the Convention on Biological Diversity and the Cartagena Protocol on Biosafety, especially on fair and equitable sharing of benefits from the use of genetic resources, should be considered as part of the Programme of Action, and in particular sustainable development and the protection of traditional knowledge should remain urgent priorities regarding the world's indigenous peoples.
- programmes to strengthen synergies between indigenous knowledge and science should be developed to empower indigenous peoples in processes of biodiversity governance and assessment of impacts on territories, as part of the intersectoral project of UNESCO on Local and Indigenous Knowledge Systems.
- the Akwe:Kon Guidelines for the conduct of cultural, environmental social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites on lands and waters traditionally occupied and used by indigenous local communities, must be taken into consideration and implementation in programmes and projects carried out during the Decade.
- programmes and projects planned on traditional indigenous territories or otherwise affecting the situation of indigenous peoples should foresee and respect the full and meaningful participation of indigenous peoples.
- indigenous persons who promote the protection of the environment should not be persecuted or harassed for their activities.
- all relevant actors are encouraged to develop and implement programmes and projects for natural disaster management at the national and community levels with indigenous peoples' full and meaningful participation.³²

The Programme of Action for the Second International Decade on the World's Indigenous People provides guidance for action during the Decade. As such I recommend that the Australian Government and its State and Territory counterparts fully implement the Programme of Action for the Second Decade on the World's Indigenous People, and use these guidelines in the development of climate change and related law and policy.

³² United Nations General Assembly, *Draft Programme of Action for the Second International Decade of the World's Indigenous People, Report of the Secretary General, Sixtieth session, Item 70 of the Provisional Agenda, Indigenous Issues, A/60/207*, (2005). At: <http://daccessdds.un.org/doc/UNDOC/GEN/N05/464/96/PDF/N0546496.pdf?OpenElement> (viewed 3 December 2008).

3. The Domestic Framework

Australia has not yet decided on a comprehensive response to the climate change dilemma. With a new government elected in October 2007, the Australian Government has stepped up its efforts to address the climate change catastrophe. It began this effort by ratifying the Kyoto Protocol in December 2007, and by initiating the Garnaut Review. Shortly after, it began developing its national climate change policy.

Identified as one of the highest priorities requiring action, the Australian Government has acknowledged that 'addressing climate change is one of the key economic and environmental challenges facing Australia and the rest of the world'.³³

While the main focus of the Australian Government has been on the development of an emissions trading scheme, during the 2007 election, the Australian Government committed to establishing a legal framework providing for Indigenous participation in carbon markets.

This is intended to be achieved by:

- encouraging partnerships between the private sector and Indigenous communities
- conducting research around scientific and market potential.

This will include supporting land councils and Indigenous businesses to develop carbon credit schemes.³⁴ It is still unclear what this policy will actually entail in practice.

The Australian Government has also identified potential benefits the carbon market has to offer Indigenous communities:

Together with emerging carbon market opportunities, biodiversity benefits created by Indigenous land management services also have the potential to be a commodity in Australia and markets overseas. Management of those natural resources sits alongside the other land based industries offering huge potential for these communities, like sustainable time productions, tourism, horticulture and pastoral work.³⁵

Again, it is unclear how these potential benefits for Indigenous communities will be realised.

However, what is clear is that, as a party to a series of international treaties and protocols, and in the light of other international guidelines and standards, Australia has an obligation to protect individuals against threats posed to human rights by climate change. The challenge for the Australian Government is to develop a response to climate change that distributes rights and responsibilities equally. This challenge is further complicated by the need to address the migration of peoples from the neighbouring Asia Pacific region.

33 Australian Government, Department of Climate Change, *Carbon Pollution Reduction Scheme, Green Paper, July 2008 Summary Report*. (At: <http://www.climatechange.gov.au/greenpaper/summary/summary-report.html> (viewed 29 August 2008).

34 Australian Labor Party, 'Federal Labor to create up to 300 Rangers as part of Indigenous Economic Development Strategy', (Media Release, 5 October 2007).

35 Australian Labor Party, 'Federal Labor to create up to 300 Rangers as part of Indigenous Economic Development Strategy', (Media Release, 5 October 2007).

3.1 Australian Government Reviews

The Australian Government has begun to consider its response to climate change for Australia and the broader Asia Pacific Region. It has done this through a number of reviews including *The Garnaut Review*, and the *Green Paper – Carbon Pollution Reduction Scheme*.

(a) The Garnaut Review

The Garnaut Climate Change Review³⁶ has been commissioned by Australia's Commonwealth, state and territory governments to examine the impacts, challenges and opportunities of climate change for Australia. The Garnaut Review is a compilation of reports including:

- an Interim Report³⁷ released in February 2008
- the Draft Report³⁸ released on 4 July 2008
- a Supplementary Draft Report³⁹ released on 5 September 2008
- the Final Report⁴⁰ released on 30 September 2008.

The Garnaut Review considers a number of issues concerning Australia's response to climate change including:

- the evaluation of the costs and benefits of climate change mitigation
- the application of the science of climate change to Australia
- the international context of Australian mitigation
- Australian mitigation policy.⁴¹

The Review focuses on economic implications and the costs involved in mitigating climate change, and does not specifically consider in any detail the human rights implications. In particular, it provides a detailed discussion on the impacts of climate change to the national and global economy, and the development of a national emissions trading scheme. It is anticipated that the Supplementary Draft Report will consider four categories of climate change:

- The first category is market impacts, about which there is already sufficient information to assess economic effects through a general equilibrium model.
- The second is the market impacts, about which there is currently insufficient information to assess through general equilibrium modelling.

36 Garnaut Climate Change Review, *Garnaut Climate Change Review*. At: <http://www.garnautreview.org.au/CA25734E0016A131/pages/home> (viewed 6 September 2008).

37 R Garnaut, *Garnaut Climate Change Review, Interim Report to the Commonwealth, State and Territory Governments of Australia*, Commonwealth of Australia, February 2008.

38 R Garnaut, *The Garnaut Climate Change Review, Draft Report*, Commonwealth of Australia, 4 July 2008. At: <http://www.garnautreview.org.au/CA25734E0016A131/pages/all-reports--resources-draft-report> (viewed 17 October 2008).

39 R Garnaut, *The Garnaut Climate Change Review, A Supplementary Draft Report – Targets and Trajectories*, Commonwealth of Australia, September 2008. At: [http://www.garnautreview.org.au/CA25734E0016A131/WebObjGarnautReviewTargetsandtrajectoriesSupplementaryDraftReport5Sept2008\(Accessibilityenabled\)/\\$File/Garnaut%20Review%20Targets%20and%20trajectories%20Supplementary%20Draft%20Report%205%20Sept%202008%20\(Accessibility%20enabled\).pdf](http://www.garnautreview.org.au/CA25734E0016A131/WebObjGarnautReviewTargetsandtrajectoriesSupplementaryDraftReport5Sept2008(Accessibilityenabled)/$File/Garnaut%20Review%20Targets%20and%20trajectories%20Supplementary%20Draft%20Report%205%20Sept%202008%20(Accessibility%20enabled).pdf) (viewed 17 October 2008)

40 R Garnaut, *The Garnaut Climate Change Review, Final Report*, Cambridge University Press, Commonwealth of Australia (2008). At: <http://www.garnautreview.org.au/chp22.htm> (viewed 17 October 2008).

41 Garnaut Climate Change Review, *Garnaut Climate Change Review*. At: <http://www.garnautreport.org.au/draft.htm> (viewed 6 September 2008).

- The third is the chance of much more serious and possibly catastrophic outcomes. Here the issue is how much it is worth paying for insurance against outcomes that may not be very likely, but which will be extremely damaging if they occur.
- The fourth and final category is the impacts that are not valued in conventional markets but have considerable worth to Australians.⁴²

The human rights implications and the impacts on the lives of Aborigines and Torres Strait Islanders should be considered in the final report, particularly under the third and fourth category above.

(b) The Green Paper – Carbon Pollution Reduction Scheme

In July 2008, the Australian Government released a Green Paper outlining a three pillar strategy which seeks to:

- reduce Australia's greenhouse gas emissions
- adapt to the climate change we cannot avoid
- help shape a global solution that both protects the planet and advances Australia's long-term interests.⁴³

The Green Paper also includes a proposal to introduce a Carbon Pollution Reduction Scheme in 2010.

The Carbon Pollution Reduction Scheme, more broadly referred to as an 'emissions trading scheme', is a market based approach based on a 'cap and trade' scheme. There are two elements of a cap and trade scheme— a cap, and an ability to trade. The cap achieves the environmental outcome of reducing greenhouse gas pollution. It is the limit on greenhouse gas emissions imposed by the Carbon Pollution Reduction Scheme.⁴⁴ The act of capping emissions creates a carbon price, while the ability to trade ensures that emissions are reduced at the lowest possible cost.

Text Box 6: What is an emissions trading scheme?

Emissions trading aims to achieve the reduction of greenhouse gas emissions through efficient, low cost strategies. Emissions trading schemes are also called 'cap and trade' schemes. These schemes may apply to all industries and sectors, however many of them begin with the 'stationary energy sector' which includes coal-fired and gas-fired power stations.⁴⁵

42 Garnaut Climate Change Review, *Garnaut Climate Change Review Update*, Bulletin 3, (2008). At: [http://www.garnautreview.org.au/CA25734E0016A131/WebObj/FINALAuguste-bulletin_29Aug08/\\$File/FINAL%20August%20e-bulletin_29%20Aug%2008.pdf](http://www.garnautreview.org.au/CA25734E0016A131/WebObj/FINALAuguste-bulletin_29Aug08/$File/FINAL%20August%20e-bulletin_29%20Aug%2008.pdf) (viewed 6 September 2008).

43 Australian Government, *Carbon Pollution Reduction Scheme, Green Paper*, July 2008 Summary Report, Department of Climate Change, (2008). At: <http://www.climatechange.gov.au/greenpaper/summary/summary-report.html> (viewed 29 August 2008).

44 Australian Government, *Carbon Pollution Reduction Scheme, Green Paper*, July 2008 Summary Report, Department of Climate Change, (2008). At: <http://www.climatechange.gov.au/greenpaper/summary/summary-report.html> (viewed 29 August 2008).

45 State Library of New South Wales, Hot Topics: Legal Issues in Plain Language, *Climate Change*, Hot Topics 63, (2007) p 9.

Emissions trading programs involve the creation of a market based mechanism that introduces an annual cap or limit on greenhouse gas emissions. The limit of emissions a party has is allocated through permits and is decreased progressively to ensure that the parties overall emissions are reduced over time. The permits may be allocated for free, or sold at auction. However, many schemes have preferred to provide industry with free permits to compensate for the reduction of their emissions levels.⁴⁶ The cap applied should not be exceeded and in most cases penalties apply for non-compliance.

The creation of a carbon market provides for those parties who have gone over their limit to purchase permits from other parties who may not have reached their limit. The parties may also bank left over permits for future use. An important objective of an emissions trading scheme is that it encourages emitters to introduce technologies which will reduce their emissions. The levels of abatement achieved through the use of new technologies provides cash incentives created from tradable credits resulting from lower emissions.

There are many 'carbon markets' including compulsory markets (the Kyoto Protocol), voluntary markets (Chicago climate exchange, Australian carbon exchange, general contract offsets for advertising/carbon neutral ambitions) as well as emissions offsetting required under other regulatory regimes (planning and environmental approvals for development – the Western Arnhem Land Fire Abatement Project in Australia).

Emissions trading schemes are already operating around the world, including in the United Kingdom, the United States and the European Union. While Australia is in the process of developing a national emissions trading scheme, the New South Wales Government has had a scheme in place since 2003.⁴⁷

For example:

The New South Wales Greenhouse Gas Abatement Scheme

The NSW Greenhouse Gas Abatement Scheme began in 2003 and applies only to electricity retail suppliers and electricity generators. Emitters are given annual emissions reductions targets which are on a per capita basis until 2021. To achieve these targets industry can either take onsite measures to reduce their emissions, or offset emissions by purchasing 'abatement certificates' from companies that have not reached the limits and have 'credits'.

While the scheme is thought to have worked well, the NSW Government has been criticised for failing to set new per capita reduction targets for the period 2007-2021. This means that as the population continues to grow overall emissions will also increase.

The Government have identified:

...emissions trading as the key mechanism for achieving substantial emissions mitigation in a responsible and flexible manner and at the lowest possible cost. The Carbon Pollution Reduction Scheme represents a continuation of Australia's economic reform path, addressing economic and social matters by harnessing flexible market processes.⁴⁸

46 State Library of New South Wales, Hot Topics: Legal Issues in Plain Language, *Climate Change*, Hot Topics 63, (2007) p 9.

47 State Library of New South Wales, Hot Topics: Legal Issues in Plain Language, *Climate Change*, Hot Topics 63, (2007) pp 8-9.

48 Australian Government, *Carbon Pollution Reduction Scheme*, *Green Paper*, July 2008 Summary Report, Department of Climate Change, (2008). At: <http://www.climatechange.gov.au/greenpaper/summary/summary-report.html> (viewed 29 August 2008).

A challenge for government in its attempt to substantially reduce Australia's national emissions, will be getting the right balance between the need for significant structural economic reform, and convincing the Australian people and industry, that in order to achieve the necessary results and significantly curb the impacts of climate change, each and every one of us will need to take some responsibility. This means that we will all need to contribute and compromise.

While the government argues that a cap and trade scheme will achieve the environmental outcome of reducing greenhouse gas emissions, the environment itself will be increasingly stressed by the imposition of carbon investors seeking out lands with high biodiversity value to cash in on carbon abatement opportunities. The government have already identified Australia's Indigenous Protected Areas⁴⁹ (IPAs) and other Indigenous owned or managed lands and waters. Sixteen percent of Australia is identified as important 'biodiversity hotspots' for carbon abatement and biodiversity protection, with an increasing economic value in environmental and carbon related markets.⁵⁰

To date, Indigenous engagement in carbon markets is predominantly considered in the context of forestry and fire management. The Governments Green Paper states that:

The Government is committed to facilitating the participation of Indigenous land managers in carbon markets and will consult with Indigenous Australians on the potential for offsets from reductions in emissions from savanna burning and forestry opportunities under the scheme.⁵¹

Emissions trading offers a number of opportunities to Indigenous communities across a broad range of areas. However the government must be mindful in their development of a national emissions trading scheme that projects and policies developed with the intent of reducing Australia's greenhouse gas emissions, and mitigating and adapting to the impacts of climate change, are not to the detriment of Indigenous peoples, our lands and waters, and the sustainability of our livelihoods and our communities. Further consideration of the impacts and opportunities arising from climate change relevant to Indigenous people is discussed in chapter 5.

4. Complimentary Legislation

There are existing laws and policies in Australia that will affect and compliment the response to climate change. At the federal level the main piece of legislation relevant to climate change and the environment is the *Environmental Protection and Biodiversity Conservation Act 1999* (EPBCA). With rights to water also becoming increasingly significant, the *Water Act 2007* has also been recently enacted. This legislation is also a federal act and is particularly relevant to the Murray-Darling River Basin. Further consideration on issues regarding Indigenous peoples' rights to water will be discussed at chapter 6.

49 The World Conservation Union (IUCN) defines a protected area as 'an area of land or sea specially dedicated to the protection and maintenance of biodiversity and associated cultural resources and management through legal and/or other effective means'. In Australia, they include areas of land also known as national parks, nature reserves and marine parks and traditional Indigenous owners enter into agreements with the Australian Government to promote biodiversity and cultural resource conservation. For more information see: <http://www.environment.gov.au/indigenous/ipa/background.html> (viewed 6 September 2008).

50 Australian Labor Party, 'Federal Labor to create up to 300 Rangers as part of Indigenous Economic Development Strategy', (Media Release, 5 October 2007).

51 Australian Government, *Carbon Pollution Reduction Scheme, Green Paper*, July 2008 Summary Report, Department of Climate Change, (2008) p 136. At: <http://www.climatechange.gov.au/greenpaper/summary/summary-report.html> (viewed 29 August 2008).

State and territory governments have also begun to consider what is required to respond to the impacts of climate change in their regions. Appendix 5 provides a summary of the legislative arrangements, policies and programs currently being implemented by the states and territories.

4.1 Environmental Protection and Biodiversity Conservation Act 1999

The *Environmental Protection and Biodiversity Conservation Act 1999* (EPBCA) was passed in response to the international Convention on Biodiversity (CBD).

The EPBCA provides a legal framework to protect and manage matters of national and international environmental significance being:

- world heritage sites
- national heritage places
- wetlands of international importance⁵²
- nationally threatened species and ecological communities
- migratory species
- Commonwealth marine areas
- nuclear actions.⁵³

The EPBCA applies to any individual or group who may have an impact on matters of environmental significance: developers; farmers; local councils and state and territory governments and land owners. It aims to balance the protection of these crucial environmental and cultural values with our society's economic and social needs. As well as providing a legal framework, the EPBCA creates a decision-making process based on the guiding principles of ecologically sustainable development.

Unfortunately, as this law was passed prior to Australia's adoption of the Kyoto Protocol, there is currently no trigger for the EPBCA to address issues affected by climate change. The provisions of the Act are only triggered where there is a likely impact on a matter of national environmental significance listed above.

At the recent Conference of the Parties to the Convention on Biodiversity, (COP-9) held in Bonn, Germany, the Parties to the Convention were urged to:

[E]nhance the integration of climate change considerations related to biodiversity in their implementation of the Convention with the full and effective involvement of relevant stakeholders...and consider consumption and production models, including vulnerable components of biodiversity within these areas with regard to the impacts on indigenous and local communities.⁵⁴

This illustrates how important it will be for the Australian Government to ensure it takes a broad holistic perspective when determining its climate change policy. The government must conduct a review of all domestic legislation to evaluate how existing mechanisms affect the response to climate change.

52 Often called 'Ramsar' wetlands, as covered by the Ramsar Convention.

53 Australian Government, *Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act) Fact Sheet*. At: <http://www.environment.gov.au/epbc/publications/pubs/epbc-act-fact-sheet.pdf> (viewed 29 August 2008).

54 Convention on Biodiversity, *Conference of the Parties- COP-9 – Decisions, Biodiversity and climate change*, COP-9 Decision IX/16 (2008). At: <http://www.cbd.int/decisions/cop9/?m=COP-09&id=11659&lg=0> (viewed 1 September 2008).

5. The need for a human rights-based approach to climate change policy

The International Council on Human Rights Policy observed in its seminal report on climate change and human rights⁵⁵ this year that the worst effects of climate change are likely to be felt by those individuals and groups whose rights are already precarious. This is because populations whose rights are poorly protected are likely to be less well-equipped to understand or prepare for climate change effects; and more likely to lack the resources needed to adapt to expected alterations of their environmental and economic circumstances.

In February 2008 Ms Kyung-wha Kang, the United Nations Deputy High Commissioner for Human Rights stated that:

[G]lobal warming and extreme weather conditions may have calamitous consequences for the human rights of millions of people. They can be among the leading causes or contributing factors that trigger hunger, malnutrition, lack of access to water and adequate housing, exposure to disease, loss of livelihoods and permanent displacement. Ultimately, climate change may affect the very right to life of countless individuals.⁵⁶

Archbishop Desmond Tutu, voiced his concern that we are drifting into a world of 'adaptation apartheid' where the world's poor are left to sink or swim through a problem that is not of their making, while citizens of the rich world are protected from harm.⁵⁷

Yet, while governments have traditionally focused on the environmental and more recently the economic, dimensions of climate change, the social and human rights implications have not been considered in great detail.

Under a human rights-based approach:

- Individuals are seen as rights-holders, putting responsibility on government to make channels available for their participation and input into policy development.
- There is an emphasis on local knowledge of the environment and ways to protect it, for example, incorporating traditional cultural practices of indigenous communities into climate change responses.
- The principles of non-discrimination and substantive equality are a key element of policy formulation. Decision makers must weigh up the likely impact on disadvantaged or vulnerable groups when deciding on policy, ensuring 'that measures taken in response to climate change do not disproportionately impact low-income, disadvantaged or marginalised groups'.⁵⁸

55 International Council for Human Rights Policy, *Climate change and human rights: a rough guide*, (2008), p 1. At: http://www.ichrp.org/files/reports/36/136_report.pdf (viewed 28 August 2008).

56 K Kang, *Climate Change, Migration and Human Rights*, (Speech delivered at the Conference on Climate Change and Migration: Addressing Vulnerabilities and Harnessing Opportunities, Geneva, 19 February 2008). At: http://www.iom.int/jahia/webdav/shared/shared/mainsite/events/docs/hsn/hsn_address_kang.pdf (viewed 5 September 2008).

57 United Nations Development Program, *Human Development Report 2007/2008 – Fighting climate change: Human solidarity in a divided world* (2007), p 166.

58 J von Doussa, *Climate change and human rights: a tragedy in the making*, (Speech delivered at the Australian Human Rights Commission Human Rights Law Seminar, Sydney, 20 August 2008) At: <http://www.humanrights.gov.au/legal/seminars/index.html> (viewed 26 August 2008).

- Core minimum human rights standards guide decision makers when they are weighing up competing demands on limited resources.⁵⁹

To support and strengthen the human rights approach, there must be the capacity for monitoring and assessing policies. This can be done through human rights compliance statements which would accompany new laws and policies. Where either the policy or enabling legislation does not meet recognised human right norms, the statement would have to identify and explain the reasons for the shortcoming. This type of policy formulation process would be analogous to the processes enacted into the Human Rights Charters now in place in the United Kingdom, New Zealand, the Australian Capital Territory and Victoria.⁶⁰

This human rights based approach should be guiding policymakers and legislators when weighing competing demands on limited resources; helping to ensure, for example, that budget allocations prioritise the most marginalised and disadvantaged.⁶¹

6. Indigenous peoples', human rights, and climate change

Climate change presents a unique risk to the livelihoods of indigenous peoples. In particular, indigenous peoples could face further political and economic marginalisation, increasing the potential for human rights violations through the disengagement and exploitation of indigenous lands, waters and natural resources. It also poses a significant threat to the health of our communities, and the maintenance and sustainability of our social life, traditional knowledge's, languages and cultures.⁶²

Climate change will have an impact on every aspect of Indigenous peoples' lives. Not only in the obvious situation where our lands and territories may become uninhabitable due to the impacts of climate change, but in situations where government and industry will continue to use Indigenous lands to maintain and increase the wealth of the country through the exploitation of resources.

Additionally, both Australia and those from other countries around the world will be looking to indigenous peoples, our lands and territories to help them to mitigate or lessen the impacts of climate change, threatening the ownership and custodianship of our lands, waters and resources. This is despite the fact that Indigenous people have a significantly lower carbon footprint than the wider global population, and our efforts to care for and maintain our lands, territories and waters have been significantly strained by the ever increasing industrialisation of the world.

Despite this, there is little analysis on the direct impacts of climate change on Indigenous peoples.

59 Australian Human Rights Commission, *Submission to the Australia 2020 Summit, April 2008*. At: http://www.humanrights.gov.au/legal/submissions/2008/080415_2020summit.html (viewed 26 August 2008).

60 J von Doussa, *Climate change and human rights: a tragedy in the making*, (Speech delivered at the Australian Human Rights Commission Human Rights Law Seminar, Sydney, 20 August 2008) At: <http://www.humanrights.gov.au/legal/seminars/index.html> (viewed 26 August 2008).

61 J von Doussa, *Climate Change: Catastrophic Impacts and Human Rights*, (Speech delivered at the Presentation by John von Doussa and Chancellor of the University of Adelaide, Adelaide, 11 December 2007). At: http://www.humanrights.gov.au/about/media/speeches/speeches_president/2007/20071211_Climate_Change.html (viewed 26 August 2008).

62 International Work Group for Indigenous Affairs, *Indigenous Affairs, Climate Change and Indigenous Peoples*, 1-2/08, ISSN 1024-3283.

In order to fully appreciate the impact of climate change on the world's indigenous peoples, The United Nations Permanent Forum on Indigenous Issues recommended that:

The United Nations University Institute of Advanced Studies, university research centres and relevant United Nations agencies conduct studies on the impacts of climate change and climate change responses on Indigenous peoples. Particularly, those who are living in highly fragile ecosystems; semi-arid and arid lands and dry and sub-humid lands; tropical and subtropical forests; and high mountain areas.⁶³

Additionally, the Permanent Forum recommended that States develop mechanisms to monitor and report on the impacts of climate change on Indigenous peoples, keeping in mind the socio-economic limitations as well as spiritual and cultural attachments to lands and waters.⁶⁴

6.1 Indigenous participation in climate change policy

So far, the policy debate around climate change has had little participation from Indigenous stakeholders. Indigenous people must be recognised as major stakeholders in climate change policy and the development of policies concerning climate change.

Governments around the world must work together with the full engagement and participation of Indigenous people in developing domestic and international policies from the outset. Involvement of Indigenous peoples in policy development is essential to ensure the effectiveness and success of adaptation and mitigation strategies relevant to both Indigenous communities and broader society.

There are a number of reasons why. In developing a global climate change strategy, reliance on Indigenous traditional knowledge, innovations, and land management and conservation practices will be crucial to maintaining biological diversity. The reduction of greenhouse gases and carbon abatement globally will also rely heavily on Indigenous lands and waters. The human rights approach tells us that this must be on the basis of obtaining the free, prior and informed consent of Indigenous people.

An example of where Indigenous participation is critical, is in international negotiations for a post Kyoto climate change regime.

In these negotiations, it is essential for the international community to develop and commit to international principles for Indigenous engagement that link directly to the Kyoto mechanisms: emissions trading; the clean development mechanism; and joint implementation. This will be particularly important in the protection of Indigenous peoples' rights to their lands, territories, waters, natural resources and their intellectual property.

With the demand for carbon credits growing, both here in Australia and overseas, the Government have also committed to developing an *Indigenous Emissions Trading Program*.⁶⁵

63 United Nations Economic and Social Council, *Recommendations on the special theme, 'Climate Change, biocultural diversity and livelihood: the stewardship role of indigenous peoples and new challenges'*, Permanent Forum on Indigenous Issues, E/C.19/2008/14 (2008), p 5.

64 United Nations Economic and Social Council, *Recommendations on the special theme, 'Climate Change, biocultural diversity and livelihood: the stewardship role of indigenous peoples and new challenges'*, Permanent Forum on Indigenous Issues, E/C.19/2008/14 (2008), p 5.

65 Australian Labor Party, 'Federal Labor to create up to 300 Rangers as part of Indigenous Economic Development Strategy', (Media Release, 5 October 2007).

Emissions trading markets will provide opportunities for the purchase of carbon credit from changes in land management, and specifically fire management in Northern Australia.

A Rudd Labor Government will provide opportunities for Indigenous participation in fledgling carbon markets by establishing the legal framework for creation of carbon credits for altered fire regimes and providing \$10m to build local capacity, build partnerships between the private sector and Indigenous communities, research its scientific and market potential and promote sales to growing national and international markets.

Indigenous engagement in national and international carbon and emissions trading markets, will require the development of national principles that ensure the protection of Indigenous people's rights. During the 2007 election campaign, the Rudd Labor Government committed to the development of a *National Standard for Carbon Offsets* in order to ensure consumer confidence in the rapidly developing carbon offset market.⁶⁶ However, with Indigenous land, waters, natural resources, and traditional knowledge considered important in climate change mitigation measures, national principles will also require specific provisions related to Indigenous peoples and our interests.

Guidelines for engagement with Indigenous peoples, contained in *Engaging the marginalised: Partnerships between indigenous peoples, government and civil society*,⁶⁷ provide an excellent framework to build upon to formulate an extensive set of principles for Indigenous engagement in climate change negotiations. Further discussion on this topic is included in chapter 5 of this report.

Additionally, there is currently no support for Indigenous attendance at other relevant international forums, (outside the UNPFII) such as the Conference of the Parties to the Kyoto Protocol and the Convention on Biodiversity.

In order to facilitate this, governments must ensure that the economic and technical resources required to respond to social and environmental challenges created by climate change, are available to Indigenous communities. This may require the United Nations to work proactively with member states to establish a well-funded mechanism which facilitates Indigenous engagement at the international level on climate change related matters.

7. Conclusion

While I acknowledge that in any response to climate change the economic and environmental implications are crucial, governments and others working on the development of strategies to address climate change, must also be mindful of the social and human rights implications.

This chapter argues that at both the international and domestic levels we have an existing framework with which to start. However, an urgent stocktake is required on what policy is already available to address climate change, and where further development is required.

This framework can be built upon to ensure that global and domestic responses to climate change are holistic in their approach and do not disproportionately impact low-income, disadvantaged or marginalised groups.

66 Australian Labor Party, *Credible Credits: A National Standard for Carbon Credits*, (Media Release, 6 June 2007).

67 Human Rights and Equal Opportunity Commission and United Nations Permanent Forum on Indigenous Issues, *Engaging the marginalised: Report of the workshop on engaging with Indigenous communities*, (2005). At: http://www.humanrights.gov.au/social_justice.

Recommendations

- 4.1 That the Australian Government formally support and develop an implementation strategy on the Declaration on the Rights of Indigenous Peoples as a matter of priority.
- 4.2 That particular attention be paid to the impacts of climate change on Indigenous peoples in the formulation of Australia's climate change strategies. The recommendations of the United Nations Permanent Forum on Indigenous Issues (on the special theme of climate change and Indigenous peoples) and the provisions of the Program of Action for the Second International Decade of the World's Indigenous People provide important guidance in this regard.
- 4.3 That the Australian Government review the existing domestic mechanisms that are relevant to Indigenous peoples and climate change, and identify any inconsistencies or impediments and where further policy development or amendment is required.
- 4.4 That the Australian Government actively engage Indigenous Australians in post Kyoto negotiations, particularly in relation to the utilisation of the Kyoto mechanisms, international investment in carbon abatement, and issues around the urban migration of both internally displaced peoples and those that will require relocation in the region.
- 4.5 That the Australian Government actively engage Indigenous Australians in the development of the Carbon Pollution Reduction Scheme, particularly in relation to:
 - a. the protection and maintenance of Indigenous lands, waters, natural resources, and cultural heritage
 - b. to identify and facilitate access to economic opportunities arising from carbon abatement and mitigation.
- 4.6 That the regulatory framework for Australia's climate change policy guarantees and protects Indigenous peoples' engagement and participation. This should include Indigenous involvement in all aspects of climate change law and policy such as development, implementation, monitoring, assessment and review.

Chapter 5

Indigenous peoples and climate change

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Climate change has been regarded as a diabolical policy problem globally. The potential threat to the very existence of Indigenous peoples is compounded by legal and institutional barriers raise distinct challenges for our cultures, our lands and our resources.¹ More seriously, it poses a threat to the health, cultures and livelihoods of Indigenous peoples both here in Australia and around the world.

The importance of culture and its relevance to Indigenous people's relationship to our lands, is not completely understood and acknowledged in Australia. This is evidenced by the fact that governments continue to develop Indigenous land policy in isolation from other social and economic areas of policy. This is apparent in the development of climate change policy which has generally fallen on the shoulders of government departments responsible for climate change and the environment, absent of involvement from those departments responsible for Indigenous affairs or the social indicators such as health and housing.

Understanding the significance of the impacts of climate change on Indigenous peoples requires an understanding of the intimate relationships we share with our environments: our lands and waters; our ecosystems; our natural resources; and all living things is required. Galarrwuy Yunipingu expresses this relationship:

I think of land as the history of my nation. It tells me how we came into being and what system we must live. My great ancestors, who live in the times of history, planned everything that we practice now. The law of history says that we must not take land, fight over land, steal land, give land and so on. My land is mine only because I came in spirit from that land, and so did my ancestors of the same land...My land is my foundation.²

Professor Mick Dodson has also provided an explanation of the relationship between Aboriginal people and our 'country':

The word country best describes the entirety of our ancestral domains. All of it is important – we have no wilderness. It is place that also underpins and gives meaning to our creation beliefs – the stories of creation form the basis of our laws and explain the origins of the natural world to us – all things natural can be explained. It is also deeply spiritual. It is through our stories of creation we are able to explain the features of our places

1 United Nations Permanent Forum on Indigenous Issues, *Climate Change and Indigenous peoples*. At: http://www.un.org/esa/socdev/unpfii/en/climate_change.html (viewed 21 July 2008).

2 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report, January – June 1994* (1994). At: <http://www.austlii.edu.au/au/other/IndigLRes/1995/3/index.html>, (viewed 30 June 2008). As cited in Australian Catholic Social Justice Council, *Recognition: The Way Forward*.

and landscape. It is the cultural knowledge that goes with it that serves as constant reminders to us of our spiritual association with the land and its places. Even without the in depth cultural knowledge, knowing country has spiritual origins makes it all the more significant and important to us.

Country for us is also centrally about identity. Our lands our seas underpin who we are. Where we come from. Who our ancestors are. What it means to be from that place from that country. How others see and view us. How others identify us. How we feel about each other. How we feel about our families and ourselves. Country to us is fundamentally about our survival as peoples.³

The words of Yunipingu and Dodson highlight the fact that our land is fundamental to our health and well-being. Indigenous law and life originates in and is governed by the land. Indigenous identity and sense of belonging comes from our connection to our country. In contrast to non-Indigenous understandings of land as a commodity, land is our 'home'.

The responsibilities that go with our home do not allow us to sell up or move on when it is no longer tenable. The land is our mother, it is steeped in our culture, and we have a responsibility to care for it now and for generations to come. This care in turn sustains our lives – spiritually, physically, socially and culturally – much like the farmer who lives off the land.

National climate change policy development is developing rapidly in Australia.⁴ Despite the Government's expectation that the Indigenous estate will provide economic outcomes from carbon markets,⁵ Indigenous stakeholders have largely been left out of the debate and there is little analysis available on the direct or indirect impacts of climate change on Indigenous peoples in Australia.

However, at the local level, there is a significant amount of discussion and project development by Indigenous stakeholders who are concerned about the impacts of climate change on their communities. We are particularly concerned that Indigenous lands and waters will be a key element in the national policy response to climate change, yet we have not been engaged in the domestic or international policy debates.

1. Overview of key climate change issues for Australia's Indigenous peoples⁷

The International Working Group for Indigenous Affairs stress that 'for Indigenous peoples around the world, climate change brings different kinds of risks and opportunities, threatens cultural survival and undermines Indigenous human rights'.⁶ Climate change, will specifically affect the way Indigenous people exercise and enjoy our human rights at a time when the human rights of all people are being threatened.

3 M Dodson, *Indigenous Protected Areas in Australia*, International Expert Group Meeting on Indigenous Peoples and Protection of the Environment, Khabarovsk, Russian Federation, 27-29 August 2007, pp 2-4.

4 According to Department of Climate Change timeframes, exposure draft legislation for the national emissions trading scheme, the Carbon Pollution Reduction Scheme, will be released in February 2009 with a view to introducing a bill into Parliament in May 2009.

5 Shadow Minister for Indigenous Affairs and Reconciliation, the Hon J Macklin, Shadow Parliamentary Secretary for Northern Australia and Indigenous Affairs, the Hon W Snowdon, *Indigenous economic development*, Australian Labor Party – Election 2007. At: http://www.alp.org.au/download/now/indig_econ_dev_statement.pdf (viewed 15 December 2008).

6 International Working Group for Indigenous Affairs, *Indigenous Affairs, Climate Change and Indigenous Peoples*, 1-2/08, International Secretariat Denmark, ISSN 1024-3283.

In Australia these risks and opportunities will also be diverse, and in some regions are already being experienced.⁷ Problems that Indigenous Australians will encounter include:

- people being forced to leave their lands particularly in coastal areas. Dispossession and a loss of access to traditional lands, waters, and natural resources may be described as cultural genocide; a loss of our ancestral, spiritual, totemic and language connections to lands and associated areas.
- the migration of Indigenous peoples from island and coastal communities and those communities dependent on our inland river systems to relocate to larger islands, mainland Indigenous communities or urban centres.
- no longer being able to care for country and maintain our culture and traditional responsibilities to land and water management. Such a disconnect will result in environmental degradation and adverse impacts on our biodiversity and overall health and well-being.
- in tropical and sub-tropical areas, an increase in vector-borne, water-borne diseases (such as malaria and dengue fever).
- a disruption to food security, including subsistence hunting and gathering livelihoods and biodiversity loss, increase in the need for and the cost of food supply, storage and transportation, and an increase in food-borne diseases.
- the risk of being excluded from the establishment and operation of market mechanisms that are being developed to address environmental problems, for example water trading, carbon markets and biodiversity credit generation.

The issues that Indigenous people in Australia will face are evidenced and exacerbated by climatic changes including:

- the increased number and intensity of cyclones and storms, leading to flash floods
- the rising sea levels and inundation of fresh water supplies by salt water
- coastal erosion and changes to ecosystems, such as mangrove systems
- the bleaching and sustainability of our reefs
- the drying up of water systems that were once never empty
- the frequency and intensity of bushfires and drought and desertification
- the changing migratory patterns of our sea animals and birds
- the dying out of particular wildlife and plant life in our ecosystems and environments.

The impacts mentioned above highlight the importance of Indigenous participation in the development and implementation of responses to climate change, particularly, where responses will be required to address a diverse range of issues, dependent on the region and its climatic features. This includes responses that appropriately respect the link between local culture and tradition and local physical environments. For example, the needs of Indigenous peoples who rely on the river systems of the Murray-Darling Basin will require different responses and have access to different opportunities than those living in the tropical regions of Northern Australia. Map 2 below shows the diversity in climate across Australia.

⁷ See Case Study 1 of this Report on Climate Change and the human rights of the Torres Strait Islanders.

There will also be native title and land rights implications including effects on our rights to:

- manage our lands and waters rich in biodiversity
- protect and secure the ownership and custodial rights to the Indigenous estate
- contribute, as major landholders, to the development of adaptation and mitigation strategies to address climate change
- ensure responses to climate change do not introduce laws and regulations that limit our ongoing use and enjoyment of country.

While there will be devastating impacts for some Indigenous communities that will require intensive support, other communities will be better placed to benefit from the opportunities arising from climate change. Indigenous communities will require Governments support in a number of areas in order to respond to the impacts of climate change. For instance technical and economic support will be required to ensure that the necessary governance structures are in place and infrastructure is available to communities to respond appropriately. Governments will need to give serious consideration to the provision of resources to ensure that this support is available to those Indigenous communities that require it.

As identified by the United Nations Permanent Forum on Indigenous Issues (UNPFII), Governments must work together at all levels with the full participation of Indigenous people on a 'holistic' response to climate change that takes account of not only the ecological dimensions of climate change, but also the social impacts and principles of human rights, equity and environmental justice.

2. The Indigenous Estate – 'our' greatest asset?

Text Box 1: The Indigenous Estate

In February 2005, Senator Amanda Vanstone referred to Indigenous peoples in Australia as being 'land rich and dirt poor'.⁸

While Indigenous people have varying degrees of access and control of up to 20 percent of the Australian continent, much of which is rich in natural resources, we are also the most disadvantaged group in Australia by all social indicators.

At 30 June 2006, the Indigenous estimated resident population of Australia was 517,200 or 2.5 percent of the total population, with the majority of Indigenous people living in major cities, or regional Australia. While 25 percent of the Indigenous population live in remote Australia, the majority of the Indigenous land estate, located in remote areas, is managed by 1,200 discrete Indigenous communities.⁹ Up to 80 percent of adults living in these discrete communities rely on their natural environment for their livelihoods, including through fishing and hunting for foods, but also the use of natural resources and the environment for commercial activity such as arts and crafts, and tourism.

8 Minister for Immigration and Multicultural and Indigenous Affairs, Senator the Hon Amanda Vanstone, Address to National Press Club, 23 February 2005. At: http://www.atsia.gov.au/media/speeches/23_02_2005_pressclub.htm (viewed 31 August 2005).

9 Australian Bureau of Statistics, *Population Distribution, Aboriginal and Torres Strait Islander Australians, 2006*, last updated 15 August 2007. At: <http://www.abs.gov.au/ausstats/abs@.nsf/b06660592430724fca2568b5007b8619/14e7a4a075d53a6cca2569450007e46c!OpenDocument> (viewed 7 October 2008).

Many of our Indigenous communities are comparative to third world countries. However we are not afforded third world status and therefore do not have access to international programs such as those climate change programs facilitated by the United Nations Development Programme (UNDP), specifically developed for building sustainable Indigenous communities in third world countries.

Indigenous Australians have access to varying levels of ownership, control, use and access, or management of approximately 20 percent of the Australian continent. The Minister for Families, Housing, Community Services and Indigenous Affairs, in her Mabo Lecture, reiterated the frustration that we as Indigenous peoples feel about our limited ability to use this significant asset to meaningfully leverage economic, social, and cultural outcomes.¹⁰

Australia has an extremely high biodiversity value. The Indigenous land estate in Australia includes bioregions that are of global conservation significance, with many species found only on our continent and in our marine areas.¹¹

In the context of both national and international interests in the conservation and sustainable management of biodiversity, Indigenous peoples as custodians have a responsibility to ensure the integrity and maintenance of ecosystems on our lands and waters. The Indigenous knowledge around these ecosystems which have high biodiversity value will be integral to the development of adaptation and mitigation climate change strategies.

In the face of the many significant impacts of climate change, more can and should be done to collaborate and include appropriate opportunity for Indigenous knowledge contribution in the design of solutions, not to mention the ongoing management and preservation of biodiverse and ecologically significant areas. Emerging law and policy should not restrict traditional practices or activities in these areas (including National Parks and World Heritage areas). Instead, law and policy should promote these activities and practices along with Indigenous knowledge and understandings where it is culturally appropriate or allowable.

The importance of protecting the Indigenous estate represents a significant challenge for government in developing responses to climate change. Indigenous landholders are severely under resourced and have limited capacity and infrastructure to respond to the challenges they face as a result of human induced climate change.

There is a desperate need for substantial public investment in the capacity of Indigenous people to manage this vast estate. Additionally, there is a considerable need for the Australian Government to commit to the development of a comprehensive policy for Indigenous land and sea management which co-ordinates tenure and other issues concerning the Indigenous estate.

10 Minister for Families, Housing, Community Services and Indigenous Affairs, J Macklin, *Beyond Mabo: Native title and closing the gap*, 2008 Mabo Lecture, James Cook University, Townsville, 21 May 2008. At: http://www.fahcsia.gov.au/Internet/jennymacklin.nsf/content/beyond_mabo_21may08.htm (viewed 1 July 2008).

11 For example, Kakadu National Park in the Northern Territory is a World Heritage site with Ramsar listed Wetlands well known for its spectacular wilderness, nature conservation values, rich diversity of habitats, flora and fauna, and cultural significance. At: <http://www.environment.gov.au/ssd/publications/ssr/164.html> (viewed 27 November 2008). The Wet Tropics World Heritage Listed area in North Queensland is home to more than 50 animal species that are unique to the area. A third of Australia's marsupial species, a quarter of the frogs and reptiles and about 60 percent bat and butterfly species live in the wet tropics. At: https://www.epa.qld.gov.au/parks_and_forests/world_heritage_areas/wet_tropics/ (viewed 27 November 2008).

The government has started to consider the implications for Indigenous lands and waters, identifying areas included in the National Reserve System, such as Indigenous Protected Areas (IPA's), as a potential opportunity for economic development arising from the developing carbon markets.

However, the Indigenous estate is governed by a number of legislative and policy arrangements that will determine the extent to which Indigenous peoples engagement in the climate change debate, and the rights derived from it, can be achieved. These legislative arrangements include:

- the *Native Title Act 1993* (Cth)
- various State and Territory land rights regimes
- the National Reserve System
- Cultural Heritage legislation
- a range of other laws and policies that affect lands, waters and resources including, legislation and policy associated with Australia's Carbon Pollution Reduction Scheme (see below for further discussion).

I have consistently argued that some of these mechanisms have seriously limited Indigenous involvement in development opportunities. However, if Government are serious about Indigenous peoples leveraging economic benefits from the Indigenous estate, they must fully acknowledge that traditional practices, and caring for country can be of particular value in the new world of responding to climate change. It is only once this is realised that there will be scope for the protection and advancement of Indigenous interests.

As a first step in identifying climate change opportunities and issues that may arise on the Indigenous estate, State Governments will need to work with Indigenous groups to resolve outstanding tenure issues.

The States can facilitate this process by providing a full inventory that maps the various tenures (ie. Aboriginal freehold, national parks etc), where native title rights and interests have been determined, the capacity for engagement in carbon markets, and identifies lands where tenure resolution is required. This information will need to be available to Indigenous peoples and their governing organisations such as Prescribed Bodies Corporate and Indigenous Land Trusts.

2.1 Native Title

The *Native Title Act 1993* (Cth) (Native Title Act), provides a degree of protection for native title rights and interests held by Indigenous peoples:

Native title rights and interests in land can be an important foundation for Indigenous economic and social development. Economic returns can flow from Indigenous people developing the land and the resources contained on the land, from companies seeking access to the land and resources for development purposes, and from the cultural assets of the group and their unique relationship to the land.¹²

The ability of Indigenous people to take the greatest advantage of the native title system for our economic and commercial benefit – to leverage the system – is contingent on many factors that are often outside our control.

¹² Aboriginal and Torres Strait Islander Social Justice Commissioner, *Promoting Economic and Social Development through Native Title*, Land, Rights, Laws: Issues of Native Title, Vol 2, Issues Paper No. 28, p 7, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, August 2004.

The extent of recognition and protection, as confirmed by the High Court in *Western Australia v Ward*,¹³ is restricted by the ability for native title applicants to prove a continued system of traditional law and custom, and in considering extinguishment, an examination of the intention of any conflicting legislation or any inconsistency in the nature of legal interests conferred by statute.¹⁴

The potential for native title to achieve real outcomes for Indigenous people is also limited by a general lack of recognition of commercial rights. Native title is subject to various caveats in terms of how rights and interests can be exercised on the lands and waters and whether native title rights and interests will be protected from new development and activities by negotiations with governments and other stakeholders.

As many people are aware, the resolution of native title claims can take years. This puts serious limitations on the enterprise options for the land. In many instances, native title rights and interests have been granted for non-commercial use only. This has significantly restricted Indigenous people's ability to leverage native title rights to achieve economic outcomes.

In the context of climate change and the potential to leverage economic development opportunities from carbon markets, clarification is required as to the legal recognition of carbon rights in trees on Indigenous lands. As noted by Gerrard:

The nature of these carbon rights varies across jurisdictions. There is inconsistency in relation to the land on which these carbon rights may be created, whether these carbon rights create an interest in land, and whether harvesting rights are separate from sequestration rights. As a result, the interaction between carbon rights in trees and other legal interests, including native title is complex. New laws, regulations and markets present the possibility of a further decrease of Indigenous peoples' rights and interests through extinguishment or suspension of native title and restricting rights in relation to access and use of natural and biological resources.¹⁵

In order to maximise the benefits and opportunities available to Indigenous people from climate change, Government agencies with responsibility for native title will need to give serious consideration to the current operation of the native title system. This will include an assessment of the legislative arrangements.

(a) Agreement Making

Native title agreement making, through Indigenous Land Use Agreements (ILUAs), provides an opportunity for native title holders to bring to the negotiation table their agenda for economic and social development. These agreements may also include issues about use and development on their lands, economic and employment outcomes and other outcomes such as the protection of cultural heritage.

13 *State of Western Australia v Ward on behalf of the Mirriuwung Gajerrong* [2002] HCA 28 (8 August 2002).

14 E Gerrard, Impacts and Opportunities of Climate Change: Indigenous Participation in Environment Markets, *Land, Rights, Laws: Issues of Native Title*, Native Title Research Unit, Volume 3, Issue Paper No. 13, April 2008, citing *State of Western Australia v Ward on behalf of the Mirriuwung Gajerrong* [2002] HCA 28 at [78]-[80] per Gleeson CJ, Gaudron, Gummow and Hayne JJ (8 August 2002).

15 E Gerrard, Impacts and Opportunities of Climate Change: Indigenous Participation in Environment Markets, *Land, Rights, Laws: Issues of Native Title*, Native Title Research Unit, Volume 3, Issue Paper No. 13, April 2008 p 5.

Through this process governments come to understand and respond to the social and cultural context for the development objectives of the group. Native title agreements can then be tailored to the development needs of the claimant group.¹⁶

For example, template ILUAs such as the Central Queensland Agreement template,¹⁷ may provide a framework for future agreements and engagement around environmental and carbon markets. Agreements such as these may be a useful tool where industry and governments will be considering carbon offset options on Indigenous lands, in providing non-native title outcomes.

The outcomes of agreements are in large part determined by the attitude of governments and other parties to the negotiations. In some areas, governments continue to present significant barriers to the realisation of indigenous peoples' advancement, particularly through the oppositional approach that is taken to the recognition of Indigenous peoples' rights to land through the formal native title system. While States and Territories have started to engage more proactively in their legislative and policy endeavours to improve the current system, there is still room for improvement.

As I have outlined in previous Native Title Reports, in order to achieve successful and sustainable agreements, the process and framework for the negotiation is crucial. For example:

- the necessary resources required to ensure the full and effective participation of native title holders must be made available
- Indigenous decision-making processes must be incorporated into the agreement-making process including whether the agreement is private or available for public access and what benefits are derived from the agreement
- native title holders must have access to information they require to make informed decisions
- a process for short-term and long-term implementation which clearly outlines the roles and responsibilities (including a commitment of resources) of each of the parties must be included in the agreement.

(b) The capacity of the native title system to deliver

The Attorney-General has announced his desire to encourage all governments at the Native Title Ministers Meeting in July, to work together through 'co-operative federalism' to find a new approach to resolving native title and land and water issues.

As is widely recognised, Native Title Representative Bodies and Prescribed Bodies Corporate are severely under-resourced. Increased financial and training support will be required to ensure the effectiveness of the native title system. Effectiveness does not simply refer to the ability to settle outstanding claims but also in the sense of supporting native title holders beyond settlement to implement and grow opportunities.

16 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Promoting Economic and Social Development through Native Title*, Land, Rights, Laws: Issues of Native Title, Vol 2, Issues Paper No. 28, p 7, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, August 2004.

17 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Sydney, pp 233-240. At: http://www.humanrights.gov.au/social_justice/nt_report/ntreport07/chapter11.html (viewed 27 October 2008).

Resources are needed, firstly, to meet the priorities of Indigenous peoples on native title lands to maintain and conserve the biodiversity of their country. And secondly, to build capacity for Native Title Representative Bodies, Land Councils, Indigenous community organisations (eg. PBCs and Land Trusts) and Indigenous businesses to develop economic opportunities (such as carbon credit generation and trade), that meet the needs of their communities.¹⁸

As discussed by the previous Aboriginal and Torres Strait Islander Social Justice Commissioner:

...Native title agreements provide an opportunity for the parties to develop a framework to enable the traditional owner group to build the capacities and the institutions necessary to achieve their development goals.¹⁹

He argued that implementing capacity development through native title agreements requires a significant change of approach to native title agreement making, not just by government but also by traditional owner groups and their representatives. Framework agreements should acknowledge that capacity development is:

- a long-term process requiring the investment of consistent and adequate resources. (The benefit of a financial commitment in capacity development is a community which is ultimately self-supporting and self-governing)
- an ongoing process during which communities can learn from their experiences and build on their changing abilities
- a staged process, determined by the growing capacity and skill base of the group.²⁰

Government departments should consider native title when developing Indigenous focused policies and projects. The native title system and land rights regimes should complement, and be complemented by other relevant areas of policy and legislation to ensure native title rights and interests are fully effective.

A major issue in trying to use native title land as a basis for enterprise is the possible suspension and effective regulation of rights and interests through the future acts regime. This means that even if claimants are successful in a native title claim, their rights and interests can be easily and lawfully impacted upon by activities conducted in accordance with the future act process.

This highlights the need to ensure the inclusion of native title and land rights considerations in the formulation of climate change policy and legislation as a matter of urgency. If clearly foreseeable issues are addressed up front, at the developmental stages, the risk of undermining aspects of climate change policy, emissions trading regulation and other responses where Indigenous engagement will be crucial, may be minimised down the track. Addressing issues in the formation stages also reduces the risk of inadvertently creating unfavourable legal and policy precedents.

18 Australian Labor Party, 'Federal Labor to create up to 300 Rangers as part of Indigenous Economic Development Strategy', (Media Release, 5 October 2007).

19 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Promoting Economic and Social Development through Native Title*, Land, Rights, Laws: Issues of Native Title, Vol 2, Issues Paper No. 28, p 6, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, August 2004.

20 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Promoting Economic and Social Development through Native Title*, Land, Rights, Laws: Issues of Native Title, Vol 2, Issues Paper No. 28, p 6, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, August 2004.

Native title has been considered a hurdle to achieving economic development. However, with the Australian Government encouraging a more flexible approach towards native title,²¹ there is the potential for Indigenous people and governments to develop a climate change policy that achieves real outcomes and provides better protection of (exclusive and non-exclusive) native title rights and interests for Indigenous people and their communities.

Further, in addition to the base level legal requirements under existing legislation, best practice principles of engagement with Indigenous peoples and their communities should be developed to guide information and technology sharing and access to the Indigenous estate for climate change related projects and initiatives. Further discussion of best practice principles is returned to shortly.

2.2 Land Rights

The long struggle for land rights in Australia has meant that Indigenous people now have a degree of ownership, control or management of approximately 20 percent of Australian lands and waters. However, not only are land rights and native title different legal regimes and different in their respective implementation, they can interfere with Indigenous rights and interests in their interaction with one another's areas of policy. In addition, most States and Territories have also developed alternative land regimes, which in some cases are inconsistent with national approaches. For example, those Indigenous groups in more remote regions, such as those in Cape York, Queensland who have had Aboriginal freehold lands returned to them under state land rights regimes may be in a better position to achieve their cultural, social, and economic aspirations than even those who have been successful in a native title process.

As a general principle, of all lands either owned or controlled by Indigenous peoples across Australia, those Indigenous communities who have had inalienable or alienable freehold lands returned to them under the various land rights regimes are best placed to engage in economic ventures linked to carbon and environmental markets. However, the full realisation of potential carbon sequestration (storage or absorption of carbon dioxide in trees, plants, wetlands and soil etc), will depend to some extent on the strength of the Governments commitment to recognise the right of, and to provide economic opportunities for Indigenous people in the carbon market.

For example, land handed back to Aboriginal people under land rights regimes that are National Park lands, has not yet been identified by the Government as an option for carbon offsets. For Indigenous peoples, particularly on those national parks where joint management is in place, this could provide an opportunity for Indigenous people who own or jointly manage country to be recognised for our previous, current and future contributions to conservation on our lands. It may also provide the basis for an additional income stream for all stakeholders involved.

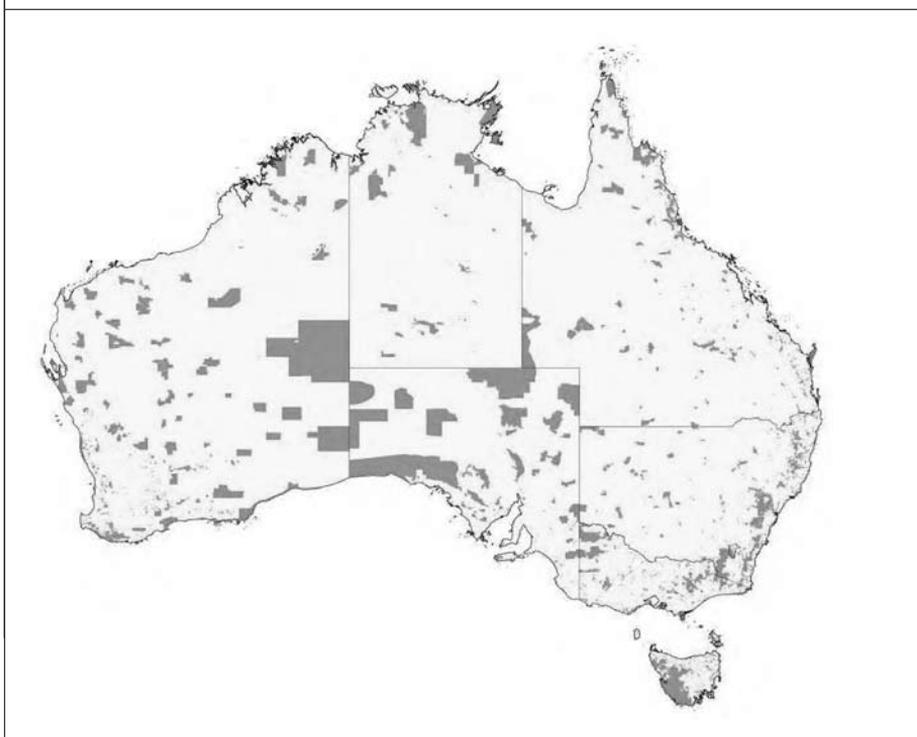
21 Attorney-General's Department, *Annual Report 2007-2008 Overview*. At http://www.ag.gov.au/www/agd/agd.nsf/Page/PublicationsAnnual_ReportsAnnual_Report_2007Overview#review (viewed 1 December 2008).

2.3 The National Reserve System

The National Reserve System is a nation-wide network of approximately 9,000 protected areas, which currently covers more than 88 million hectares (11 percent) of the country. Aimed at conserving Australia's unique landscapes, plants and animals, these areas include:

- National Parks
- Conservation areas on private lands
- Indigenous Protected Areas
- Other reserves.²²

Map 1: Australian National Reserve System accounts for 11.5% of Australian's land area (88,436,811 ha) and has 8667 protected areas²³



22 M Dunlop and P Brown, *Implications of Climate Change for Australia's National Reserve System: A preliminary assessment*, Department of the Environment, Water, Heritage and the Arts Commonwealth of Australia (2008), p 9. At: <http://www.climatechange.gov.au/impacts/publications/nrs-report.html> (viewed 16 December 2008).

23 M Dunlop and P Brown, *Implications of Climate Change for Australia's National Reserve System: A preliminary assessment*, Department of the Environment, Water, Heritage and the Arts Commonwealth of Australia (2008), p 20. At: <http://www.climatechange.gov.au/impacts/publications/nrs-report.html> (viewed 16 December 2008).

Text Box 2: The National Reserve System has its origins in the Rio Earth Summit of 1992

Australia played an active role in developing the Convention on Biological Diversity – the groundbreaking international treaty which links sustainable economic development with the preservation of ecosystems, species and genetic resources. When the Rio Earth summit adopted the Convention in 1992 Australia was one of the first of 167 nations to sign and to ratify.

On signing the Convention, Australia agreed to establish a National Strategy for the Conservation of Australia's Biodiversity and a system of protected areas.

To carry out its promise, the Australian Government began working with the states and territories, who have constitutional responsibility for land management. In a historic step forward, all governments agreed to build a network of land and marine protected areas.

The resulting land-based network of protected areas is called the National Reserve System. A separate program exists for marine protected areas.

By 1996, the National Reserve System consisted of more than 5,600 properties covering almost 60 million hectares.

Recognising that some of Australia's most valuable and rare environments are on land owned by Indigenous communities, the Australian Government also began working on an exciting new concept which would later become Indigenous Protected Areas.²⁴

The Government has identified Australia's Indigenous Protected Areas²⁵ (IPAs) and other Indigenous owned or managed lands and waters as a potential biodiversity conservation and carbon sequestration investment opportunity. Sixteen percent of Australia is identified as important 'biodiversity hotspots' for carbon sequestration and biodiversity protection, with an increasing economic value in environmental and carbon related markets.²⁶

Indigenous peoples are actively engaged in providing environmental management services in coastal management and security, weed management, and feral animal control. Existing programs such as the Caring for Country Initiative, the Working on Country Program,²⁷ and new national park joint management arrangements in Cape York,²⁸ which aim to build on Indigenous knowledge of protecting and managing land and sea country provides funding for Indigenous people to be trained and employed as Rangers to deliver environmental outcomes. There is significant scope to build

24 Department of the Environment, Water, Heritage and the Arts, *History of the National Reserve System*, Information Sheet. At: www.environment.gov.au/parks/nrs/about/history.html.

25 The World Conservation Union (IUCN) defines a protected area as 'an area of land or sea specially dedicated to the protection and maintenance of biodiversity and associated cultural resources and management through legal and/or other effective means'. In Australia, they include areas of land also known as national parks, nature reserves and marine parks and traditional Indigenous owners enter into agreements with the Australian Government to promote biodiversity and cultural resource conservation. Department of the Environment, Water, Heritage and the Arts, *Indigenous Protected Area – Background*. At: <http://www.environment.gov.au/indigenous/ipa/background.html> (viewed 6 September 2008).

26 Australian Labor Party, 'Federal Labor to create up to 300 Rangers as part of Indigenous Economic Development Strategy', (Media Release, 5 October 2007).

27 Working on Country is a government initiated program that contracts Indigenous people to provide environmental services that helps maintain, restore, protect and manage Australia's environment. Department of the Environment, Water, Heritage and the Arts, *Working on Country*. At: <http://www.environment.gov.au/indigenous/workingoncountry/index.html> (viewed 25 November 2008).

28 The *Cape York Peninsula Heritage Act 2007* provides for the joint management of national parks.

and develop these programs further through emerging climate change responses, such as emissions offsetting and carbon trading.²⁹

Activities such as fire and feral animal management regimes, as well as potential for carbon sequestration and offset arrangements may be possible for Indigenous people on their lands under the National Reserve System. However, the ability for Indigenous people to access such opportunities is dependent on Government ensuring that, in developing climate change policy, National Reserve lands (particularly those that are Indigenous owned or co-managed, ie. National Parks) are open to these activities and are included in the National Carbon Pollution Reduction Scheme. The Message Stick Carbon Group stressed that:

Clarity should be provided around the governments stand on avoided deforestation being discussed in the context of the developing countries for the post-Kyoto mechanism. This must also include forested lands owned by Indigenous Australians locked away at present from economic activity in the form of State Forests, National Parks etc.³⁰

The Government has committed to increase funding to a total of \$50 million over five years to improve and expand the Indigenous Protected Areas Program within the national reserve system. As discussed above, these lands have been identified as integral to the development of climate change responses, and opportunities for economic outcomes for Indigenous communities. While \$50 million is a positive start, it will not be sufficient to meet the needs of Indigenous peoples nationally to design, develop and implement long-term sustainable projects.

For example, the West Arnhem Land Fire Abatement project took up to ten years to develop.³¹ If Indigenous involvement in emissions' trading is genuinely intended by governments, then greater assistance will be needed to ensure projects meet the standards prescribed by emissions trading schemes.³² These standards involve intensive verification and registration processes, as well as ongoing reporting obligations. Funding and other resources must enable Indigenous people to meet these and other preliminary market access requirements if meaningful involvement in emerging markets is going to be realised.

2.4 Cultural Heritage

Everything about Aboriginal society is inextricably interwoven with, and connected to the land. None of it is vacant or empty, it is all interconnected. You have to understand this and our place in that land and the places on that land. Culture is the land, the land and spirituality of Aboriginal people, our cultural beliefs and our reason for existence is the land.³³

29 P Garrett, Minister for the Environment, Heritage and the Arts, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, 29 August 2008.

30 Message Stick Carbon Group, *Indigenous Economic Engagement: Response to Emissions Trading Scheme Discussion Paper*, (2008). At: [http://www.garnautreview.org.au/CA25734E0016A131/WebObj/D0852530ETSSubmission-MessageStickCarbonGroup/\\$File/D08%2052530%20%20ETS%20Submission%20-%20Message%20Stick%20Carbon%20Group.pdf](http://www.garnautreview.org.au/CA25734E0016A131/WebObj/D0852530ETSSubmission-MessageStickCarbonGroup/$File/D08%2052530%20%20ETS%20Submission%20-%20Message%20Stick%20Carbon%20Group.pdf) (viewed 16 December 2008).

31 Tropical Savannas Cooperative Research Centre, Eureka win for Arnhem Land Fire Project, *Savanna Links*, Issue 34, 2007. At: http://savanna.cdu.edu.au/publications/savanna_links_issue_34.html.

32 Emissions trading schemes may include Kyoto and Kyoto compliant schemes such as Australia's Carbon Pollution Reduction Scheme.

33 M Dodson, *Indigenous Protected Areas in Australia*, International Expert Group Meeting on Indigenous Peoples and Protection of the Environment, Khabarovsk, Russian Federation, 27-29 August 2007, p 4.

The International Union for Conservation of Nature (IUCN) anticipates that changes to land cover and biodiversity caused by climate change, could force Indigenous people to 'alter their traditional ecosystem management systems' and, in the extreme, 'eventually lead to a loss of their traditional habitats and along with it their cultural heritage'.³⁴

Significant work is required to effectively engage Indigenous people in climate change law and policy in Australia. Through the introduction of legislation such as the *Native Title Act 1993* (Cth), and Cultural Heritage legislation, the Australian Government is achieving a degree of recognition and respect for the unique rights that Indigenous peoples have to our lands. However, these laws provide limited recognition and are not sufficient or effective.

The importance of culture and its relevance to Indigenous people's relationship to our lands [and waters] is something that government and non-Indigenous people have a hard time understanding. This is evidenced by the fact that governments continue to develop Indigenous land policy in isolation to other social and economic areas of policy, including native title and cultural heritage legislation.

For example, Australia has the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, a legislation enacted by the Commonwealth Government. The purpose of this Act is to preserve and protect places and objects of cultural significance to Aboriginal and Torres Strait Islander peoples. Currently the legislation provides this protection at the national level for all states but delegates its powers to the States and Territories.³⁵ Additionally, each State and Territory has their own cultural heritage legislation. I am concerned that this approach leads to inconsistent implementation, and outcomes are dependent on the incumbent state or territory government. For example, monitoring and assessment of the interplay between State and Federal regimes and its delivery of protection for Indigenous cultural heritage is necessary to ensure the outcomes are being achieved.

Additionally, there are significant differences between State and Territory heritage protection laws and there are problems in how well each of them actually protects Indigenous cultural heritage. In particular, there is a stark difference in the treatment of non-Indigenous heritage compared to Indigenous cultural heritage. This includes provisions relating to liability for damage or destruction of Indigenous cultural heritage which must also be consistent with that applied to the protection of non-Indigenous cultural heritage.³⁶

While climate change may provide some opportunities for Indigenous peoples to increase their current land management responsibilities, especially in areas of high cultural heritage and biodiversity value, Indigenous cultural heritage may be threatened in other areas. The forced migration of peoples from their lands may mean fewer people remaining on country to respond to the environmental threats through active land management.

34 M Macchi, *Indigenous and Traditional People and Climate Change*, IUCN Issues Paper, (2008). At: http://cmsdata.iucn.org/downloads/indigenous_peoples_climate_change.pdf as cited by J Altman and K Jordan, *Impacts of Climate Change on Indigenous Australians: Submission to the Garnaut Review* (2008), pp 4-5.

35 *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, part IIA.

36 For example, the *Heritage Act 1995* (Vic) protects non-indigenous cultural heritage – it contains 'strict liability' penalties for persons damaging or despoiling 'cultural heritage'. Further, the *Heritage Act* mandates planning scheme amendments to protect places listed on the Heritage Register. Aboriginal Heritage areas are not necessarily included in planning schemes and it is much more difficult to prove liability for damaging Indigenous heritage. Unlike the provisions for protecting non-Indigenous heritage (under the *Heritage Act 1995*), the *intention* to harm Aboriginal cultural heritage has to be proven under the *Aboriginal Heritage Act 2006*.

Federal policies and programs including the Indigenous Heritage Program and Indigenous Protected Areas³⁷ are contributing to increasing the extent of recognition and land management activity on country. The Working on Country program³⁸ aims to achieve the maintenance, restoration, and protection of Australia's land, sea and heritage environment by contracting Indigenous people to provide the necessary environmental services.

Programs such as this benefit the Australian community, and at the local level, employment opportunities which allow the Indigenous custodians of the land to continue their cultural responsibilities also advance the livelihoods of Indigenous people. These programs may also provide a foundation for the recognition and participation of Indigenous peoples in carbon and environmental markets which benefit the Australian community.

2.5 Diverse Climatic Regions

The diversity of climate across the Indigenous estate will also require diverse approaches to climate change that consider not only the economic opportunities, but a full assessment of the potential impacts and responses required.

For example, the top end and much of the east coast of the country is tropical or subtropical coastal areas, while the majority of the country inland and to the west coast is grassland or desert. These areas provide the homelands of Indigenous peoples. Both regions will require different, but equally important responses to climate change. Indigenous knowledge of the macro and micro diversity in these areas is of important value in formulating solutions and responses to climate change. As stressed by Gerrard:

Indigenous peoples have a 'special interest' in climate change issues, not only because through their physical and spiritual relationships with land, water and associated ecosystems, they are particularly vulnerable to climate change; but also because they have a specialised ecological and traditional knowledge relevant to finding the 'best fit' solutions.³⁹

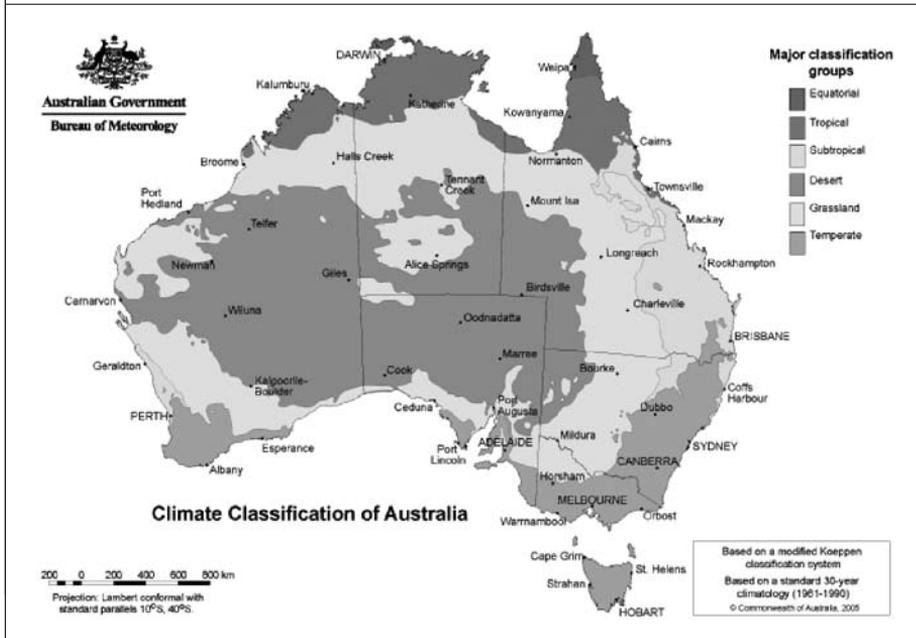
Appendix 6 provides a summary of the projected climatic impacts on various regions, and the potential impacts on Indigenous communities.

37 The Indigenous Protected Areas element of the Caring for our Country initiative is one way Indigenous Australians are being supported to meet their cultural responsibility to care for their country and to pass on their knowledge about the land and its resources to future generations. Through Indigenous Protected Areas, the Government supports Indigenous communities to manage their land for conservation – in line with international guidelines – so its plants, animals and cultural sites are protected for the benefit of all Australians. Department of Environment, Water, Heritage and the Arts, *Indigenous Protected Areas*. At: <http://www.environment.gov.au/indigenous/ipa/index.html> (viewed 2 December 2008).

38 Working on Country is a government initiated program that contracts Indigenous people to provide environmental services that helps maintain, restore, protect and manage Australia's environment. Department of the Environment, Water, Heritage and the Arts, *Working on Country*. At <http://www.environment.gov.au/indigenous/workingoncountry/index.html> (viewed 25 November 2008).

39 E Gerrard, 'Climate Change and Human Rights: Issues and Opportunities for Indigenous Peoples', *University of New South Wales Law Journal Forum*, (2008) 14(2), p 67.

Map 2: Australian climate zones – major classification groups⁴⁰



3. The climate change challenge

A number of challenges arising from climate change are critical to the lives of Indigenous people. These challenges will require specific strategies to reduce the impacts on Indigenous people. These challenges, if given serious consideration, can be addressed. However, in order to turn these challenges into opportunities there first needs to be understanding and recognition of the extent of the possible threats. Some of the challenges presented by climate change include:

- access to information
- pressures on Indigenous lands and waters – environmentally, culturally, socially and economically
- health and well-being of Indigenous people – psychologically, physically
- protection of Indigenous knowledges
- effects of current and future responses to climate change (policy and regulation) on existing legal rights and interests.

3.1 Access to information

With regard to the various reports published on climate change impacts and responses, much of the scientific and economic modelling has been developed by technicians with specific expertise in the area. This is due to the complexity of climate change.

The most important issue for Indigenous people to adequately address the challenges arising from climate change is the need to understand what climate change is and:

⁴⁰ This map was obtained from http://www.bom.gov.au/cgi-bin/climate/cgi_bin_scripts/clim_classification.cgi (viewed 18 September 2008). Identification no. Product ID code : IDCJCM0001.

- how it will affect our access and rights to our lands and waters
- how it will impact our environment
- what is carbon and what are the threats and opportunities for us arising from this new thing everyone is talking about.

We must be fully engaged as equal stakeholders. We must also be fully apprised of the benefits and the costs resulting from legislative and policy developments, or negotiated agreements. This requires adequate and appropriate consultation and access to information and advice that is understandable and accessible for communities and affected peoples.

There is currently no mechanism or communication strategy for this to occur. This is a critical oversight and a major concern for Indigenous peoples.

In my *Native Title Report 2006*,⁴¹ I presented the results of a national survey I conducted on land, sea and economic development. The survey results demonstrated that the majority of traditional owners did not have a sufficient understanding of land agreements. This raises questions about our capacity to effectively participate in negotiations and consequently may limit our ability to leverage opportunities from our lands.

The survey also highlighted the need for an information campaign to improve understanding of land regimes and the funding and support programs available to assist indigenous people in pursuing economic and commercial initiatives. Information is power and information is crucial for Indigenous participation in emerging carbon markets and to ensure that decisions made by Indigenous land holders are made with their free, prior, and *informed* consent. A lack of information will limit our capacity to effectively participate in this important area of policy and opportunity.

An urgent information campaign is required that includes information about:

- Commonwealth and State policies related to climate change and how Indigenous peoples' rights and other fundamental human rights will be affected by those policies
- how climate change policies will interact with and be relevant to native title, land rights, and cultural heritage legislation
- how climate change policies will interact with and be relevant to lands included under the National Reserve System
- how climate change policy will interact with and be relevant to the Indigenous Economic Development Strategy
- what funding and support programs will be available to facilitate Indigenous participation in climate change policy development and opportunities
- what other support (corporate and/or philanthropic) is available.

The importance and urgency of this fundamental step cannot be over emphasised.

In order to ensure that policies are appropriately targeted to achieve the desired outcomes, the Government will require reliable information about traditional owner priorities for land. In the same way, traditional owners require information about the Government's policies before they can make informed decisions about land and future social, cultural, and economic opportunities relevant to climate change. This

41 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2006*, Human Rights and Equal Opportunity Commission, Sydney. At: http://www.humanrights.gov.au/social_justice/nt_report/ntreport06/index.html (viewed 15 October 2008).

will mean the full participation of and effective consultation with Indigenous people on this subject.

3.2 Pressures on Indigenous lands and waters

(a) Interaction between legislation and policy areas

In order to adequately address the impacts of climate change and maximise the opportunities available to Indigenous peoples in Australia, governments will be required to work together to ensure that policy and legislative arrangements are conducive to achieving real outcomes.

A major barrier to successful outcomes for Indigenous peoples has been the inconsistency of approach between federal and state government policy and the lack of cooperation and compatibility between legislative arrangements.

The Declaration on the Rights of Indigenous Peoples' affirms the right of Indigenous people to participate in decision-making in matters that affect their rights. Governments are also urged to consult and cooperate in good faith with Indigenous people to obtain our free, prior and informed consent before adopting and implementing legislative or administrative measures that affect us.⁴²

As a minimum, it will be fundamental for Federal Government Departments including the Department of Environment, Water, Heritage and the Arts, the Department of Climate Change, the Department of Families, Housing, Community Services and Indigenous Affairs, the Attorney-General's Department and others including the Department of Health, to work together with the full engagement and participation of Indigenous people in the development of policies both domestically and internationally, concerning climate change from the outset.

The Department of Families, Housing, Community Services and Indigenous Affairs and the Attorney-General's Department have a significant role to play in facilitating a consistent, innovative approach to Indigenous participation in climate change policy. This is will be particularly important in areas where, for example, tenure reform will be required to achieve key opportunities from carbon markets on Indigenous lands.

(b) International and domestic offset investment from transnational corporations and governments

Australia is at an environmental advantage in our ability to leverage carbon offset opportunities from our extensive forest and natural vegetation cover. It would be in Australia's interest to be able to offset emissions from the stationary energy sector with offsets in the agriculture and forestry land use sectors. While issues of measurement are significant, there is a window of opportunity in the early stages of an Emissions Trading Scheme to allow offsets.⁴³

To not have forestry offsets is to miss the opportunity for massive abatement, while also missing the opportunity for economic opportunities in remote and regional Australia for Indigenous Australians. This would be a sizable missed opportunity.⁴⁴

42 *The Declaration on the Rights of Indigenous Peoples*, Articles 18 & 19.

43 Message Stick Carbon Group, *Indigenous Economic Engagement: Response to Emissions Trading Scheme Discussion Paper* (2008). At: [http://www.garnautreview.org.au/CA25734E0016A131/WebObj/D0852530ETSSubmission-MessageStickCarbonGroup/\\$File/D08%2052530%20%20ETS%20Submission%20-%20Message%20Stick%20Carbon%20Group.pdf](http://www.garnautreview.org.au/CA25734E0016A131/WebObj/D0852530ETSSubmission-MessageStickCarbonGroup/$File/D08%2052530%20%20ETS%20Submission%20-%20Message%20Stick%20Carbon%20Group.pdf) (viewed 16 December 2008).

44 Message Stick Carbon Group, *Indigenous Economic Engagement: Response to Emissions Trading Scheme Discussion Paper* (2008). At: [http://www.garnautreview.org.au/CA25734E0016A131/WebObj/D0852530ETSSubmission-MessageStickCarbonGroup/\\$File/D08%2052530%20%20ETS%20Submission%20-%20Message%20Stick%20Carbon%20Group.pdf](http://www.garnautreview.org.au/CA25734E0016A131/WebObj/D0852530ETSSubmission-MessageStickCarbonGroup/$File/D08%2052530%20%20ETS%20Submission%20-%20Message%20Stick%20Carbon%20Group.pdf) (viewed 16 December 2008).

As discussed in the previous chapter, Australia has responsibilities under the Kyoto Protocol. As a party to the Protocol, the Australian Government are currently developing the national emissions trading scheme, the Carbon Pollution Reduction Scheme,⁴⁵ which regulates the generation and trade of carbon credits.

The Kyoto Protocol includes mechanisms to assist countries to meet their targets and responsibilities. These mechanisms are called ‘flexibility mechanisms’ and they enable parties to the Kyoto Protocol to generate and trade permits or ‘credits’ on emissions trading markets. The flexibility mechanisms are:

- Emissions trading – known as ‘the carbon market’
- The clean development mechanism (“CDM”)
- Joint implementation (JI).⁴⁶

The CDM involves investment in sustainable development projects that reduce emissions in developing countries, while the joint implementation mechanism (JI) enables industrialised countries to carry out emissions reduction or sequestration projects with other developed countries that have ratified the Kyoto Protocol.⁴⁷

It is unfortunate that Australia’s proposed Carbon Pollution Reduction Scheme, does not include a domestic mechanism similar to the CDM. A similar domestic initiative could promote technology and knowledge transfer, with an end goal of sustainability (emissions reduction) and could provide incentives for projects in less developed or low-economic communities, including remote Indigenous communities.

The joint implementation strategy will only be available for developed countries to enter agreements between other developed countries.⁴⁸ As developing countries have not yet been allocated reduction targets under the Kyoto Protocol this mechanism will not be available to developing countries.

Allowing for JI projects in Australia under the Carbon Pollution Reduction Scheme will open opportunities for foreign companies/persons to generate ‘carbon credits’ to be used or traded under the Kyoto Protocol.

Projects initiated under the JI mechanism will have implications for Indigenous peoples in Australia and in other developed nations. This is particularly in relation to the participation of Indigenous peoples in negotiations under this mechanism. The JI mechanism under the Kyoto Protocol provides that projects are only required to have the approval of the host Party, and participants have to be authorised to participate by a Party involved in the project.⁴⁹ In Australia, this would mean that the Federal Government authorises agreements for offset investment opportunities.

As I reported in my *Native Title Report 2007*, traditional owners in western Arnhem Land entered a voluntary agreement with a liquefied gas company in Darwin to offset the company’s greenhouse gas emissions.

Australia is already open to projects or project investment through offsets for voluntary markets.

45 Australian Government, Department of Climate Change, *Carbon Pollution Reduction Scheme, Green Paper, Summary Report*, July 2008. At: <http://www.climatechange.gov.au/greenpaper/summary/summary-report.html> (viewed 29 August 2008).

46 United Nations Framework Convention on Climate Change, *Kyoto Protocol*. At: http://unfccc.int/kyoto_protocol/items/2830.php (viewed 5 August 2008).

47 United Nations Framework Convention on Climate Change, *The Mechanisms under the Kyoto Protocol: Emissions Trading, the Clean Development Mechanism and Joint Implementation*. At: http://unfccc.int/kyoto_protocol/mechanisms/items/1673.php (viewed 5 August 2008).

48 United Nations Framework Convention on Climate Change, *Joint Implementation*. At: http://unfccc.int/kyoto_protocol/mechanisms/joint_implementation/items/1674txt/php (viewed 8 October 2008).

49 United Nations Framework Convention on Climate Change, *Joint Implementation*. At: http://unfccc.int/kyoto_protocol/mechanisms/joint_implementation/items/1674txt/php (viewed 8 October 2008).

However, current legislative arrangements in Australia, including native title, land rights, and cultural heritage, are unlikely to provide adequate protection or provision for Indigenous rights and interests in Kyoto projects or in domestic carbon trading arrangements. In the native title context, projects proposed on native title lands and waters will be considered in light of the future act regime and many projects are unlikely to attract the right to negotiate. Without more direct access points to emerging markets, inadequate mechanisms to bring all parties to the table further undermine our ability to negotiate full and equitable access to new economic opportunities.

Text Box 3: Western Arnhem Land Fire Abatement (WALFA)

The WALFA project mitigates wildfire by reintroducing traditional Indigenous fire management regimes, resulting in reduced greenhouse gas emissions.

The project aims to generate opportunities for Indigenous communities to engage in culture based economies and provides economic, cultural, social, and environmental benefits for Indigenous people and the wider Australian community, and creates an offset for the industry partner. Due to the voluntary nature of this agreement, it did not require the approval of the host party, the Government.⁵⁰

While carbon offset agreements have been negotiated with Indigenous groups in Australia, there is an urgent need for clear principles of best practice and rules to be developed around future negotiations.

The Australian Government has committed to facilitating participation of Indigenous people in carbon markets.⁵¹ A legal framework is needed to create certainty and clarity around this participation. Such a framework should include national principles that provide for:

- the full participation and engagement of Indigenous peoples in negotiations and agreements between parties
- the adoption of and compliance with the principle of free, prior and informed consent
- the protection of Indigenous interests, specifically access to our lands, waters and natural resources and ecological knowledge
- the protection of Indigenous areas of significance, biodiversity, and cultural heritage
- the protection of Indigenous knowledge relevant to climate change adaptation and mitigation strategies
- access and benefit-sharing through partnerships between the private sector and Indigenous communities
- non-discrimination and substantive equality
- access to information and support for localised engagement and consultation.

50 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission, Sydney. At: http://www.humanrights.gov.au/social_justice/nt_report/ntreport05/pdf/NativeTitleReport2007.pdf (viewed 14 October 2008).

51 Australian Government, Department of Climate Change, *Carbon Reduction Scheme Green Paper: Summary of Preferred Positions*. At <http://www.climatechange.gov.au/greenpaper/summary/preferred-positions.html> (viewed 25 November 2008).

In addition, greater involvement of Indigenous peoples in Australia's international negotiations for the "second commitment period" of the Kyoto Protocol, post-2012 is essential and urgent. Particularly in relation to the development of culturally inclusive rules around the operation of a national emissions trading scheme and the potential for international investment.

(c) Dispossession and Migration

Climate change will inevitably result in the migration and dispossession of Indigenous peoples who are displaced from their traditional lands and territories due to coastal and land erosion and rising sea levels. Indigenous island communities and those located along the coastline of Australia will be significantly affected with some people having no other choice than to move to higher lands on their islands, to other islands, or to the mainland. With a history of dispossession of Australia's Indigenous peoples, extensive engagement is needed to ensure that the mistakes of the past are not repeated, and that any cultural tensions that may arise as a result of relocations are minimised or avoided.

The Fourth Assessment Report of the Intergovernmental Panel on Climate Change found that the Torres Strait Islands are particularly vulnerable to the impacts of climate change.⁵² In discussions with a number of Torres Strait Islander people, the impacts are already being felt, with unprecedented flooding from surging king tides and the increasing intensity of extreme weather events:⁵³

Over the past two years, half the populated islands of the Torres Strait have experienced unprecedented flooding from surging king tides. According to the draft of the fourth Intergovernmental Panel on Climate Change report,...the king tides have exposed a need for better coastal protection and long-term planning to potentially relocate half the 4000 people living on the islands.⁵⁴

Case Study 1 in this report provides further discussion on the impacts of climate change in the Torres Strait region.

Indigenous people located in the remote interior will also be affected, particularly by deforestation, restricted access to natural food sources and other resources, and the degradation of lands and waters. This is becoming increasingly evident in the Murray-Darling region where non-Indigenous people are relocating from their farmlands and desert regions into urban centres. This has left Indigenous people to bear the brunt of the impacts of climate change, while also facing risks of involuntary relocation.

The development of well-intentioned mitigation strategies may also result in the dispossession of Indigenous peoples from our lands, through the loss of access to traditional lands, waters, and natural resources. In particular, where Indigenous lands will be in demand by transnational corporations for land to produce biofuels, and to plant monocultures for carbon trading offsets.⁵⁵

52 J Altman & K Jordan, *Impacts of Climate Change on Indigenous Australians: Submission to the Garnaut Review*, April 2008, pp 4-5.

53 D Billy, Kulkalgal (Torres Strait Islanders) Corporation, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 18 September 2008, and J Akee, Mer Gedkem Le (Torres Strait Islanders) Corporation, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 29 September 2008.

54 L Minchin, 'Not waving but drowning at the back door', *The Age*, 12 August 2006.

55 D Martinex, *Land Grab on a Global Scale*, Global Research (2008). At: <http://www.globalresearch.ca/index.php?context=va&aid=8646> (viewed 9 October 2008).

The lack of access to traditional lands, waters and natural resources could diminish our ability to care for country and to maintain culture. Indigenous peoples will no longer be in a position to undertake responsibilities to land and water management, which will result in environmental degradation, and impacts on overall health and well-being. This is not only a concern for Indigenous peoples. This will affect also Australia's biodiversity and ecosystem maintenance.

Additionally, Indigenous peoples from our neighbouring Pacific Islands may also be forced to migrate to Australia as a result of climate change, particularly in the event of sudden climatic events. Again, there are lessons to be learnt from the past in terms of relocating people and communities and the need to engage extensively to ensure that the impact on both the relocated and the host community is as minimal as possible. The Fourth Intergovernmental Panel on Climate Change warns that:

About 60, 000 to 90, 000 people from the Pacific Islands may be exposed to flooding from sea-level rise each year by the 2050's.⁵⁶

Further, the United Nations University estimates that by 2050 up to 200 million people globally will be displaced by environmental problems. They argue that the issue of migration represents the most profound expression of the inter-linkage between the environment and human security.⁵⁷

The future security of the Australian coastline will pose a significant challenge to governments and to the Indigenous peoples as many communities are located along the northern and western Australian coastline.

This will not only place extra pressure on Indigenous lands in Australia, and potentially dispossess those Indigenous peoples from their lands, but accommodating climate refugees will have a significant impact on the Australian economy.

(d) Deforestation and monocropping – deforestation vs reforestation

In Australia, industrial-plantation forestry has increased by 6,000km² in the past decade.⁵⁸ As a proportion of the total area of agricultural land, this may be regarded as a small change. However, in south-western regions of Victoria and the Riverina in the Murray-Darling Basin, new plantation forestry represents a significant change in land management. Problems that arise from this change in land use and land management includes:

- significant native vegetation removal and concomitant native animal removal
- monocrops are feral animal havens
- many of these crops experience herbicide application
- young tree growth in areas where they are not grown naturally has significance adverse affects on water supplies and ground water levels.⁵⁹

56 L Minchin, 'Not waving but drowning at the back door', *The Age*, 12 August 2006.

57 Australian Customs Service, *Annual Report 2006-07 – A Focus on Customs 2006-07 Corporate Priority, maintaining the community's confidence in the way we go about performing our role* (2007). At: <http://www.customs.gov.au/webdata/minisites/annualReport0607/pages/page36.html> (viewed 17 October 2008).

58 R Benyon, S Theiveyanathan & M Doody, 'Impacts of tree plantations on groundwater in south-eastern Australia', 54(2) *Australian Journal of Botany* 181, p 181. As cited by Indigenous Peoples Organisations Network, *Oil Palm and Other Commercial Tree Plantations, Monocropping: Impacts on Indigenous Peoples' Land Tenure and Resource Management Systems and Livelihoods – Indigenous Peoples Organisation of Australia Response*, Response to Item 4 of the Seventh Session of the United Nations Permanent Forum New York 21 April – 2 May 2008.

59 Indigenous Peoples Organisations Network, *Oil Palm and Other Commercial Tree Plantations, Monocropping: Impacts on Indigenous Peoples' Land Tenure and Resource Management Systems and Livelihoods – Indigenous Peoples Organisation of Australia Response*, Response to Item 4 of the Seventh Session of the United Nations Permanent Forum New York 21 April – 2 May 2008.

I am concerned about the impacts of current and historic land clearance and deforestation on Indigenous lands which has and will make way for the creation of large scale plantations in order to benefit from the carbon trading industry. In particular, opportunities under the new Carbon Pollution Reduction Scheme, mainly for people who created the problem by clearing our lands in the first place. The World Rainforest Movement is particularly concerned about these negative social and environmental impacts:

When natural ecosystems are substituted by large-scale tree plantations they usually result in negative environmental and social impacts: decrease in water production, modifications in the structure and composition of soils, alteration in the abundance and richness of flora and fauna, encroachment on indigenous peoples' forests, eviction of peasants and indigenous peoples from their lands, loss of livelihoods.⁶⁰

The Australian Government are of the opinion that the inclusion of forestry on an opt-in basis will provide an incentive for forest landholders, including indigenous land managers, to establish additional forests, or carbon sinks (forests planted for the purpose of permanently storing carbon). In particular, they argue that the incentive will be greatest for carbon sinks that are planted with no intention of cutting the trees down.⁶¹

While some indigenous people will be able to access economic opportunities from commercial tree plantations, others will not and may not see this option as appropriate. [Even where it is considered appropriate, the proposal for only landowners, long-term leaseholders and carbon rights holders to participate in the scheme has the potential to further limit Indigenous involvement. In many cases the consent of a Minister is needed to grant leases or create third party interests in Indigenous land. I believe these issues have not been sufficiently evaluated in terms of their potential to restrict Indigenous participation in emerging opportunities.]

For example, up to 75 percent of south eastern Australia has been cleared with only a few remnant River Redgum and other forests remaining.

Further north, the Indigenous lands of Melville and Bathurst Islands in northern Australia, have been devastated by the clearing and destruction of eucalypt forests. A Perth-based company, Great Southern Limited, has reportedly destroyed large tracts of native eucalypt forest which is being chained and burned and replaced with monoculture plantations to be wood chipped and exported to Asia.⁶² Upon investigation, the Federal Government recently found Great Southern Limited breached environmental conditions by clearing into a buffer zone that protects rainforests and wetlands. This project was approved under the condition that there would be no clearing within buffer zones designed to protect important rainforest and wetland habitats. The Company have been ordered to pay up to \$3 million to conduct remediation work.⁶³

60 World Rainforest Movement, *Tree Plantations: Impacts and Struggles*. At: <http://www.wrm.org.uy/plantations/material/impacts1.html> (viewed, 15 December 2008).

61 Australian Government, Department of Climate Change, *Carbon Pollution Reduction Scheme, Green Paper, July 2008 Summary Report*, pp 17-18. At: <http://www.climatechange.gov.au/greenpaper/summary/summary-report.html> (viewed 29 August 2008).

62 ABC News, 'Tiwi forestry company to payout millions after clearing protected area', *ABC NEWS*, 16 October 2008. At: www.abc.net.au/news/stories/2008/10/16/2392799.htm (viewed 17 October 2008).

63 ABC News, 'Tiwi forestry company to payout millions after clearing protected area', *ABC NEWS*, 16 October 2008. At: www.abc.net.au/news/stories/2008/10/16/2392799.htm (viewed 17 October 2008).

As stressed by the Australian Indigenous Peoples Organisation (IPO) Network:

New laws and policies addressing climate change and other environmental issues such as deforestation are being progressively introduced, which have the potential to erode Indigenous rights and interests. This is done both directly by overriding rights through legislation, or indirectly by promoting and prioritising commercial and non-Indigenous interests with little space and support for Indigenous peoples to meaningfully engage and access new opportunities.⁶⁴

Deforestation and changes in land use contribute significantly to global climate change due to the release of carbon dioxide when forests and forest products are burned. If the forest is converted to other uses such as agriculture, future carbon sequestration is also lost.⁶⁵

For every 25,000 hectares cleared, at least 4.7 million tonnes of greenhouse gas will be produced. The short rotation plantations will never have the capacity to absorb enough carbon to abate the emissions.⁶⁶

Additionally, Indigenous peoples' right to development is denied where deforestation and land clearing has provided a lucrative industry. As with many other examples Indigenous peoples are not employed or engaged in the timber or logging industry in any significant or meaningful way.⁶⁷

However, Indigenous lands offer mature established native forests (natural carbon sinks) that have a significant capacity for carbon abatement, and would benefit from carbon certificates in recognition of this, rather than being forced into plantations.

Natural carbon sinks are a key feature and economic option on Indigenous lands. The challenge for the Australian Government will be in providing leadership in its climate change policies and international negotiations to include native forests and national parks as options for Indigenous sustainable development and carbon sequestration in Australia.

While international programs such as the Reduced Emissions from Deforestation and Degradation in Developing Countries (REDD) exclude native forests as carbon sinks, the Voluntary Carbon Standard has released guidelines for avoided deforestation projects which accredit carbon credits through REDD.⁶⁸ Parties to the Kyoto Protocol also resolved to further consider ways in which benefits for avoiding deforestation can be included in current and future mechanisms at the UNFCCC COP13 in Bali as part of the Bali 'road map'. The Conference of the Parties noted:

64 Indigenous Peoples Organisations Network, *Oil Palm and Other Commercial Tree Plantations, Monocropping: Impacts on Indigenous Peoples' Land Tenure and Resource Management Systems and Livelihoods – Indigenous Peoples Organisation of Australia Response*, Response to Item 4 of the Seventh Session of the United Nations Permanent Forum, New York 21 April – 2 May 2008.

65 Forests Forever, *Forests and Climate Change*. At: www.forestsforever.org/climate2/html (viewed 3 September 2008).

66 The Wilderness Society, *Trashing the Tiwi's: The clearfelling of the Tiwi Islands' native forests*, August 2007.

67 R Benyon, S Theiveyanathan & M Doody, 'Impacts of tree plantations on groundwater in south-eastern Australia', 54(2) *Australian Journal of Botany* 181, p 181. As cited by Indigenous Peoples Organisations Network, *Oil Palm and Other Commercial Tree Plantations, Monocropping: Impacts on Indigenous Peoples' Land Tenure and Resource Management Systems and Livelihoods – Indigenous Peoples Organisation of Australia Response*, Response to Item 4 of the Seventh Session of the United Nations Permanent Forum New York 21 April – 2 May 2008.

68 World-wide Fund for Nature, *WWF guidelines on the key principles required for robust voluntary carbon offset project standards- A paper to accompany the report "Making Sense of the Voluntary Carbon Market – A Comparison of Carbon Offset Standards"*, March 2008. At: www.wwf.de/fileadmin/fm-wwf/pdf_neu/WWF_guidelines_for_voluntary_carbon_offset_project_standards.pdf (viewed 12 January 2008).

the further consideration, under decision 1/CP.13, of policy approaches and positive incentives on issues relating to reducing emissions from deforestation and forest degradation in developing countries; and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries.⁶⁹

A key issue in relation to avoided deforestation is the distribution of benefits. In developing countries Indigenous groups have raised concerns that REDD will mean that governments and industry get paid to stop activities that they should not have been conducting in the first place, such as extensive land clearing. They are particularly concerned that communities on the ground will not see any of the economic benefits derived from activities conducted on their lands, and that they will potentially be locked out of areas used for REDD projects.⁷⁰

The issues discussed above will be a significant barrier to sustainable development for Indigenous populations in developing countries. However developed countries with Indigenous populations, such as Australia should consider the impacts and opportunities arising from programs that relate directly to developing countries to ensure that policies regarding climate change and in particular land clearing and deforestation do not continue to disadvantage Indigenous peoples.

(e) Conservation and Heritage Listing

Conservationists and environmental groups have been working with and lobbying governments to increase the conservation on land with high biodiversity, particularly in light of the threats posed to Australia's biodiversity from the impacts of climate change.

Indigenous people are fully supportive of land and biodiversity conservation and this is evidenced by the constant efforts of Indigenous people to engage in land management and caring for country initiatives. However, what was a positive working relationship between the conservation and environmental groups has become disjointed due to the pressure on Indigenous peoples to develop sustainable communities by maximising the economic opportunities available to them on their lands and waters. From an Indigenous perspective, conservation and economic development are not necessarily mutually exclusive.

I am concerned however, that negotiations with governments are occurring without the participation of Indigenous people, and legislation is being developed and implemented without consultation or the consent of Indigenous communities. The *Wild Rivers Act 2005 (QLD)* is an example of where this has occurred. While this legislation gives the rivers protected status, Indigenous peoples are concerned that it also has the potential to limit rights to use the waterways for traditional activities such as hunting, and future economic development.⁷¹

69 United Nations Framework on Climate Change, *Report of the Conference of the Parties*, thirteenth session, held in Bali from 3 to 15 December 2007, Addendum, Part Two: Action taken by the Conference of the Parties at its thirteenth session, Decisions adopted by the Conference of the Parties, p 3. At: <http://unfccc.int/resource/docs/2007/cop13/eng/06a01.pdf#page=3> (viewed 15 December 2008).

70 Conservation International, *Backgrounder: REDD Policies and Indigenous Peoples*, November 7, 2007. At: http://portal.conservation.org/portal/server.pt/gateway/PTARGS_0_2_143329_0_0_18/REDD%20and%20Indigenous%20Peoples%20ver%204.doc (viewed 15 December 2008).

71 R Sullivan, 'A new voice for the Cape', June/July 2008, *ECOS Magazine* 143, p 13... At: www.publish.csiro.au/?act=view_file&file_id=EC143p11.pdf (viewed 15 October 2008).

Indigenous lands are also high on the conservation agenda for World Heritage Listing. Indigenous peoples have voiced their concerns that their lands are being 'locked up'.⁷² While some Indigenous peoples have advised that they support the need to protect their lands from high impact development, such as the Burrup Peninsula, the nomination and declaration of lands for World Heritage Listing must happen only with the free, prior and informed consent of Indigenous landholders.

These arrangements must also protect the rights of Indigenous people to development, and not restrict or exclude them from pursuing their aspirations on their lands.

Indigenous peoples have a right to development, including a right to the conservation and protection of our environment and the productive capacity of our lands and resources. We also have the right to utilise our lands, waters and resources in order to fulfil those rights. Additionally, Indigenous peoples have the right to determine and develop priorities and strategies for exercising our right to development.⁷³

3.3 Health and well-being of Indigenous people

Climate change is a significant and emerging threat to human health. However this threat is even more prevalent for vulnerable populations including Indigenous peoples.

Indigenous peoples in Australia do not enjoy the same opportunities to be as healthy as the non-Indigenous population particularly in relation to access to primary health care, medicines and health infrastructure. Achieving the right to health in Indigenous communities will be made harder as a result of climate change.

The right to health,⁷⁴ obliges a state to ensure that everyone – regardless of race – has an equal opportunity to be healthy.

Fulfilling a right to health mean that communities across Australia (whether Indigenous or non-Indigenous) should enjoy a similarly healthy standard of drinking water, be able to access roughly the same standard of fresh vegetables, fruits and meat, and have their sewerage and garbage removed. It also means that they should be able to enjoy, from a health perspective, the same standard of housing that is in good repair with functioning sanitation and is not overcrowded.

Recent developments in Indigenous health are aimed at reducing the current disparities between the health of Indigenous and non-Indigenous Australians. As a result of a two year campaign led by my Office, in March 2008, the Prime Minister and every major indigenous and non-indigenous organisation from the health, human rights, reconciliation and NGO sectors committed to a new relationship with the express purpose of eliminating the 17 year life expectancy gap between Indigenous and non-Indigenous Australians by the year 2030. These bodies also committed to halving Indigenous infant mortality rates within 10 years, consistent with the Millennium Development Goals. Those in the health sector must also be mindful of, and adapt strategies to accommodate, the effects of climate change on health outcomes in order to achieve these targets.

72 R Sullivan, 'A new voice for the Cape', June/July 2008, *ECOS Magazine* 143, p 13. At: www.publish.csiro.au/?act=view_file&file_id=EC143p11.pdf (viewed 15 October 2008).

73 *Declaration on the Rights of Indigenous Peoples*, Articles 23, 26 & 29.

74 *International Covenant on Economic, Social and Cultural Rights*, Article 12.

(a) General health and well-being

As discussed earlier in this chapter, the impacts of climate change on the natural environment have the potential to disturb Indigenous people's connection to country and their land and water management responsibilities. For Indigenous peoples whose land is life, there could be a range of direct and indirect health impacts including mental and physical impacts.⁷⁵ Green suggests:

When considering the likely health impacts from climate change on Indigenous Australians living in remote communities it is crucial to explicitly address the interconnections between the health of 'country', culture and mental and physical well-being.

For example, environmental change could affect traditional activities including ceremonial practices, hunting and bush tucker collection – impacts that have implications for mental health as well as nutritional intake.⁷⁶ Preexisting physical and psychological diseases caused by dispossession and poverty further challenge the ability of Indigenous communities to cope with the health impacts of climate change.⁷⁷

Recent assessments conducted on the impacts of climate change on health in Australia, highlight the potential for the onset of and increases in vector-borne, water-borne and food-borne diseases such as: malaria, dengue fever, Murray Valley encephalitis, Japanese encephalitis, melioidosis, leptospirosis and scrub typhus.⁷⁸

(b) Food security for remote Indigenous communities

The IPO Network in their submission to the United Nations Permanent Forum voiced their concerns that changing climatic patterns will affect the viability of food and water sources which impact directly on the life and health of Indigenous people:

The dietary health of Aboriginal communities is predicted to suffer as the plants and animals that make up our traditional diets could be at risk of extinction through climate change.⁷⁹

Access to fresh food and vegetables will be further limited by the increasing costs of transportation from major centres and storage where many communities run their electricity supplies off diesel run generators. Not only will the use of diesel generators continue to emit high levels of greenhouse gases but the supply of fuel is also becoming more expensive and less environmentally viable particularly for remote Indigenous communities.

75 D Green, *Climate Change and Health: Impacts on Remote Indigenous Communities in Northern Australia*, CSIRO Marine and Atmospheric Research Paper 012, Commonwealth Scientific and Industrial Research Organisation (2006), p 3. At: http://www.cmar.csiro.au/e-print/open/greendl_2006.pdf (viewed 16 December 2006).

76 D Rose, *Nourishing terrains: Australian Aboriginal views of landscape and wilderness*, Australian Heritage Commission (1996). As cited by D Green, *Climate Change and Health: Impacts on Remote Indigenous Communities in Northern Australia*, CSIRO Marine and Atmospheric Research Paper 012, Commonwealth Scientific and Industrial Research Organisation (2006), p 3. At: http://www.cmar.csiro.au/e-print/open/greendl_2006.pdf (viewed 16 December 2006).

77 D Green, *Climate Change and Health: Impacts on Remote Indigenous Communities in Northern Australia*, CSIRO Marine and Atmospheric Research Paper 012, Commonwealth Scientific and Industrial Research Organisation (2006), p 3. At: http://www.cmar.csiro.au/e-print/open/greendl_2006.pdf (viewed 16 December 2006).

78 D Green, *Climate Change and Health: Impacts on Remote Indigenous Communities in Northern Australia*, CSIRO Marine and Atmospheric Research Paper 012, Commonwealth Scientific and Industrial Research Organisation (2006), p 6. At: http://www.cmar.csiro.au/e-print/open/greendl_2006.pdf (viewed 16 December 2006).

79 Indigenous Peoples Organisations Network, *Response to Agenda Item 3: Climate Change Biological Diversity and Livelihoods: The Stewardship Role of Indigenous People's and New Challenges*, Seventh Session of the United Nations Permanent Forum, New York 21 April – 2 May 2008.

Salt water inundation of fresh water supplies will also impact on the capacity of Indigenous communities to grow fresh fruit and vegetables, and access fresh drinking water. The lack of fresh water will also have considerable impacts for those communities servicing Indigenous people suffering from chronic illnesses such as diabetes and renal disease, and requiring dialysis treatment. Some of these communities have fought tirelessly to obtain these services in their regions, and while few communities are equipped with the infrastructure to provide these crucial primary health services, those that do may again be required to travel to urban centres for treatment as a result of climate change.

Urgent research and assessment is required to determine the impacts on Indigenous people's health in remote and regional communities to ensure that residents on these communities have access to basic services including primary health care and the health services they require. Further, it is necessary to ensure that adaptive measures are preemptive rather than reactionary and that communities are in a position to respond from the outset.

In developing climate change responses to health for all Australians, governments will also need to ensure that provisions made for the assurance of health services are also available to and accessible by Indigenous peoples living in urban centres.

(c) Caring for Country

Reduced access to traditional lands can act as a determinant of health status, particularly where that land is culturally significant and provides sources of food, water and shelter.

A recent study conducted by the Menzies School of Health Research in collaboration with the traditional owners from Western and Central Arnhem Land, assessed the health outcomes of Indigenous people in relation to their involvement in natural and cultural resource management. Statistics confirm that the health outcomes in rural and remote areas of Australia are adversely affected by poor health among Aboriginal and Torres Strait Islander peoples who make up a greater proportion of residents in those areas.⁸⁰

The Healthy Country: Healthy People Study⁸¹ found that removing Indigenous peoples from their homelands had a negative effect on the health of both the tropical landscapes and those people removed, demonstrating a direct association between Indigenous 'caring for country' practices and a healthier, happier life.

The study also confirmed that Indigenous participation in both customary and contemporary land and sea management practices, particularly by those people living on homelands, are much healthier, with significant reductions in the rates of diabetes and cardiovascular disease.

For Wattaru in the Anangu Pitjantjatjara Lands, South Australia, the health outcomes have also improved, and this is in part credited to the Ku-ku Kan yini Project initiated in 2003. This local community has been successful in combining traditional and contemporary land management techniques resulting in increased employment

80 Charles Darwin University, 'Healthy Country Healthy People', *Origins magazine*, Edition 2 (2007). At: <http://www.cdu.edu.au/newsroom/origins/edition2-2007/origins-2-07-13-14.pdf> (viewed 16 December 2008).

81 Charles Darwin University, 'Healthy Country Healthy People', *Origins magazine*, Edition 2 (2007), pp 13-14. At: <http://www.cdu.edu.au/newsroom/origins/edition2-2007/origins-2-07-13-14.pdf> (viewed 16 December 2008).

outcomes and self esteem in the community, and has assisted in the control of illnesses such as diabetes.⁸²

If we are serious about closing the gap for Indigenous people, particularly those living in remote communities, then we must start with what we know. That is that, employment and economic development opportunities that are built on caring for country, and caring for culture, improve the lives of Indigenous people. Issues such as these must be considered in the development of climate change policy relevant to Indigenous peoples.

3.4 Protection of Indigenous knowledge's

Despite the existing evidence base in this area, mechanisms that protect and maintain Indigenous knowledge remain inadequate at both the international and the domestic level in Australia.

The protection of Indigenous knowledge's will be a specific challenge for Indigenous peoples and governments around the world in their attempts to respond to the impacts of climate change. Particularly environmental responses that rely on Indigenous peoples knowledge of biodiversity and ecosystem management. As this is a significant issue for Indigenous people and climate change, this issue is further considered at chapter 7.

4. Opportunities from climate change

The realisation of the challenges discussed above can be minimised if policy is developed that considers the contributions that Indigenous people can make to mitigate and adapt to the impacts of climate change.

To date, the Australian Government has predominantly focused on the economic potential of carbon markets through the development of an emissions trading scheme. While Indigenous people are seeking to be included in this emerging market, the opportunities for Indigenous peoples are much broader than this including:

- engagement and participation facilitated by the Indigenous Economic Development Strategy
- contributions to mitigation and adaptation measures
- The provision of environmental services
- Building sustainable Indigenous communities
- The inclusion of climate change outcomes in agreement-making

4.1 The Indigenous Economic Development Strategy

Minister Macklin in her Mabo Lecture in May 2008 announced that in order to progress the new approach to Indigenous affairs, the Australian government will be developing an Indigenous Economic Development Strategy (the Strategy).⁸³ If the Government are serious about building sustainable communities, the Strategy should have the potential to facilitate the engagement and full participation of Indigenous people in climate change related markets and opportunities.

82 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2005*, Human Rights and Equal Opportunity Commission (2005), pp 26-27. At: http://www.hreoc.gov.au/social_justice/sj_report/sjreport05/pdf/sjr-chapter02.pdf, (viewed 30 June 2008).

83 Minister for Families, Housing, Community Services and Indigenous Affairs, the Hon J Macklin, *Beyond Mabo: Native title and closing the gap*, (Speech delivered at the 2008 Mabo Lecture, Townsville, 21 May 2008). At: http://www.fahcsia.gov.au/Internet/jennymacklin.nsf/content/beyond_mabo_21may08.htm (viewed 1 July 2008).

Text Box 4: Indigenous Economic Development Strategy (IEDS)

The Labor Party committed to improving the lives of Indigenous Australians through economic development as part of its 2007 election campaign.⁸⁴ While this strategy has not yet been finalised, the Indigenous Economic Development Strategy must be developed to enable economic development for as many Indigenous groups as possible, and be linked to streamlining and improving Indigenous rights under legislative arrangements such as native title and land rights, cultural heritage and under various environment protection and conservation legislation, carbon sequestration and climate change, industry development regulation,⁸⁵ and water legislation.

In particular, the discussion regarding the development of the IEDS draws attention to opportunities arising from water resources for local enterprise and local jobs. For example, the Australian Government has identified that in central Australia there are 'substantial ground water resources that have not been developed outside the town areas of Alice Springs and Tennant Creek'. Working with the Centrefarm Aboriginal Corporation set up by the Central Land Council, horticulture projects are able to be established with funding from the Aboriginal Benefits Account.⁸⁶ This development must take place in partnership with the traditional owners for those lands and waters. This is to ensure that:

- Indigenous priorities are addressed and not compromised
- the process is assured integrity by ensuring the full and effective participation and engagement of the traditional owners in decision-making
- traditional owner free, prior, and informed consent is obtained for development on their lands and waters.

The IEDS should provide a further mechanism by which Indigenous water rights are recognised and secured.

A commitment to an Indigenous Economic Development Strategy provides growing evidence that Government are slowly realising the important contribution Indigenous people can make in mitigating the impacts of climate change. Minister Macklin identified the need to maximise opportunities for economic development through native title and land based outcomes.⁸⁷ The success of the Strategy can be maximised by linking it to climate change policy and the opportunities it brings and by affording appropriate consultation and collaboration in setting priority directions and proposed outcomes.

84 Australian Labor Party, *Indigenous economic development*. At: http://www.alp.org.au/download/now/indig_econ_dev_statement.pdf (viewed 8 October 2008).

85 Industry development regulation may include industry activities such as mining, tourism, agriculture, forestry, pastoral, infrastructure, and fishing, for example, the Australian Government has also committed to ensure that Indigenous commercial fishing opportunities are included in local coastal fishing management plans.

86 Australian Labor Party, *Indigenous economic development*. At: http://www.alp.org.au/download/now/indig_econ_dev_statement.pdf (viewed 8 October 2008).

87 Minister for Families, Housing, Community Services and Indigenous Affairs, the Hon J Macklin, *Beyond Mabo: Native title and closing the gap*, (Speech delivered at the 2008 Mabo Lecture, Townsville, 21 May 2008). At: http://www.fahcsia.gov.au/Internet/jennymacklin.nsf/content/beyond_mabo_21may08.htm (viewed 1 July 2008).

To further support the importance of the Governments Strategy, a recent report published by Access Economics and Reconciliation Australia,⁸⁸ establishes a clear link between economic development and closing the life expectancy gap between Indigenous and non-Indigenous people. The report concludes there is a 'clear economic justification for government action to reduce Indigenous disadvantage' based on a reduction in the burden of disease and an improvement in the ability of Indigenous Australians to contribute to and share economic prosperity. A challenge for Government in considering the Strategy will be to ensure that the current barriers to achieving economic development in Indigenous communities are removed.

For example, as noted in my *Native Title Report 2005*,⁸⁹ 'rights to carbon credits in any trading are currently presumed to accrue to the nation state, not individuals or communities. Without a change to the laws and subsidisation by government to address these issues, the legal landscape will continue to hinder economic development more than the physical landscape'. While the Carbon Pollution Reduction Scheme proposes that individuals and companies will be able to acquire reduction permits, many Indigenous rights and interests (including on the Indigenous estate) are still limited by land tenure such as native title and national parks. This means that in some instances the ownership of carbon rights and the potential for benefits to accrue to Indigenous communities may only be on the basis of negotiated outcomes.

In seeking the views of Indigenous stakeholders on what they require to effectively engage in climate change economies, the North Queensland Land Council (NQLC) suggested that:

A co-ordinated national strategy about Aboriginal participation in economic development in sunrise industries arising from climate change needs to be developed and resourced to raise awareness and the capacity for Aboriginal people to participate in those industries.⁹⁰

The NQLC has recently employed an Economic Development Officer with special funding to assist in the development of enterprises associated with development or projects on lands subject to native title. Part of that officer's brief is to examine niche business opportunities associated with climate change, including alternative energies and reforestation.

It will be necessary for all relevant government departments to engage with Indigenous people and their organisations to ensure the success of the Indigenous Economic Development Strategy. The Australian Government Indigenous Coordination Centres (ICCs) have a particular responsibility for brokering capacity development and employment, participation, training and enterprise opportunities for Indigenous Australians in their region.

88 Australian Policy Online, *An overview of the economic impact of Indigenous disadvantage*, Report by Access Economics Pty Limited for Reconciliation Australia. At: http://www.apo.org.au/linkboard/results.chtml?filename_num=233195 (viewed 10 October 2008).

89 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2005*, Human Rights and Equal Opportunity Commission, Sydney, p136. At: http://www.humanrights.gov.au/social_justice/nt_report/ntreport05/pdf/NativeTitleReport2005.pdf (viewed 14 October 2008).

90 I Kuch, Transition Manager, North Queensland Land Council, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, 25 August 2008.

As discussed above, in relation to opportunities arising from climate change, a legislative framework outlining basic principles for engagement such as ‘good faith’, ‘free, prior, and informed consent’, and ‘authorisation’ will be required to support the Indigenous Economic Development Strategy. This framework should be incorporated into or reflected in emissions trading and associated legislation and should be developed with the full participation of Indigenous people, and may be similar to agreement-making processes that occur in native title negotiations. Legislation should ensure that parties seeking to engage with Indigenous people comply with the principles included in the framework and that Indigenous people are not further disadvantaged by negotiations.

4.2 Indigenous contributions to mitigate and adapt to climate change

Traditionally, Indigenous peoples around the world have been responding to climatic and atmospheric changes for thousands of years. Phenomena such as the ice ages and cyclones provide evidence of adaptation to these natural changes in our environments. However, the magnitude, accelerated pace and compound effects of climate change today are unprecedented, and present a major challenge to indigenous peoples’ capacity to adapt. Additionally, due to the forced removals and relocations of Indigenous peoples onto government controlled communities, traditional responses (such as moving to a less vulnerable part of their country) are not as effective, requiring more resources, and in some cases emergency service support, which is often hampered by the remoteness of these communities.

At the recent United Nations Permanent Forum, the Members concluded that:

Strategies for mitigation and adaptation must be holistic, taking into account not only the ecological dimensions of climate change, but also the social impacts, human rights, equity and environmental justice. Indigenous peoples, who have smallest ecological footprints, should not be asked to carry the heavier burden of adjusting to climate change.⁹¹

(a) Mitigation

The IPCC argue that climate change mitigation should be treated as an integral element of sustainable development policies. In particular, policies must be sensitive to the importance of the relationship between economic development and climate change to vulnerable communities.

Making development more sustainable recognises that there are many ways in which societies balance the economic, social, and environmental (including climate change) dimensions of sustainable development.

As discussed in the previous chapter, mitigation in the context of climate change means to intervene in order to reduce the sources of, or enhance the sinks, for greenhouse gases. However, some mitigation measures may have undesirable direct and indirect consequences for Indigenous communities. For example, biofuel initiatives aimed at reducing greenhouse gas emissions may lead to an increase in monoculture crops and plantations, resulting in a decline in biodiversity and food security.

91 United Nations Permanent Forum on Indigenous Issues, *Report on the seventh session (21 April – 2 May 2008, Economic and Social Council Official Records Supplement No. 23, E/2008/43, E/C.19/2008/13.*

The UNDP argue that while no amount of mitigation will protect people from climate change that is already inevitable, urgent action on mitigation is vital. They argue that no amount of adaptation planning will protect the world's poor from business-as-usual climate change. This means that if the industrial world continues to emit greenhouse gases at current levels adaptation measures will be inconsequential.

Effective mitigation measures will require a move towards low-carbon communities. Behavioural change and people's right to take responsibility will be crucial to the success of any mitigation measures.

Governments have a critical role to play in encouraging behavioural change to support the transition to a low-carbon economy. Setting standards, providing information, encouraging research and development, and – where necessary – restricting choices that compromise efforts to tackle climate change are all key parts of a regulatory toolkit.

The full and effective participation of Indigenous communities is crucial to the elaboration of state-developed mitigation measures to ensure that such schemes do not negatively affect vulnerable communities.

(b) Adaptation

Indigenous peoples will require support in adapting to the impacts of climate change on their lands, waters and their communities. Indigenous peoples may also be able to contribute to the development of broader adaptation strategies.

As Indigenous people are expected to be disproportionately affected by climate change, our adaptive capacity will be further limited by our dependency on natural resources and limited access to information. However, our customary practices including sustainable water use, traditional coastal management and erosion control all offer opportunities for Indigenous people to contribute to the development of adaptation measures. The Intergovernmental Panel on Climate Change argue, and I agree, that such practices should be promoted.⁹²

With regard to the adaptive capacity of Indigenous people to climate change, the Australian Government Department of Climate Change advised:

Our current understanding of the extent of this vulnerability and the resilience of Indigenous communities in the tropical north is limited. Analysis is required to ensure appropriate responses are taken to increase the adaptive capacity of these communities.⁹³

It is expected that the Australian Government's understanding of the vulnerability and resilience of Indigenous communities elsewhere in Australia, including arid and semi arid country, and the riverina, is equally lacking.

There is currently a high level focus on the impacts for those Indigenous communities in northern Australia where intact ecosystems and valuable biodiversity is a priority. However the impacts will be just as serious for those living in the southern regions of Australia, particularly where exposure to drought, and stress on wetlands are immediate concerns:

92 The Intergovernmental Panel on Climate Change, *Climate Change 2007: Impacts, Adaptation and Vulnerability*. The Working Group II Contribution to the Intergovernmental Panel on Climate Change Fourth Assessment Report, Part II, Cambridge University Press, Cambridge.

93 H Grinbergs (Assistant Secretary), Australian Government Department of Climate Change, *Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner*, Letter, 29 September 2008.

Climate change is very likely to threaten natural ecosystems, with extinction in some species. ...The resilience of many ecosystems can be enhanced by reducing non-climatic stresses such as water pollution, habitat fragmentation and invasive species. In river catchments, where increasing urban and rural water demand has already exceeded sustainable levels of supply, ongoing and proposed adaptation strategies are likely to buy some time.⁹⁴

Adaptation measures will be required and Indigenous communities will require significant support and capacity development in our efforts to adapt. With an intimate knowledge of the environments in which we live, it is expected that we will also be required in some instances to contribute to the adaptation effort. An example of where Indigenous peoples will be able to contribute to adaptation efforts will be in the conservation and maintenance of vulnerable ecosystems and biodiversity. Indigenous knowledge in this area will be particularly important. Protection of this knowledge will also be required to avoid misappropriation and exploitation.

Adaptation to new environmental conditions requires additional financial resources and technological capacity that most Indigenous communities do not have and are not able to access easily. While short-term adaptation activities are underway, resource and capacity constraints are limiting the implementation of long-term adaptive strategies.⁹⁵

In addition, any long-term plan to adapt to the impacts of climate change should:

- recognise the spiritual, economic, social and cultural significance that land plays in the lives of indigenous people
- recognise the contribution that traditional owners can make to custody and management of land and seas
- provide for the equal participation of Indigenous Australians in developing future strategies
- include funding and technical or skill transfer initiatives to ensure capacity for adaptation in Indigenous communities.

Enhancing and supporting the adaptive capacity of Indigenous peoples' will only be successful if it is integrated with other strategies such as disaster preparation, land-use planning, environmental conservation, and national plans for sustainable development. Further new regulation and laws relating to climate change and emissions trading will also require provisions that address the unique and specialised needs and interests of Indigenous peoples. This will mean that relevant government departments at both the national and state levels will be required to work closely together with Indigenous communities to define the priorities and develop adaptation measures. This co-operation has not happened as yet.

The Australian Government has confirmed its commitment to developing policies to adapt to and mitigate the impacts of climate change, with a strong emphasis on consultation and partnership with Indigenous Australians.⁹⁶

94 The Intergovernmental Panel on Climate Change, *Climate Change 2007: Impacts, Adaptation and Vulnerability*. The Working Group II Contribution to the Intergovernmental Panel on Climate Change Fourth Assessment Report, Part II, Cambridge University Press, Cambridge.

95 United Nations Permanent Forum on Indigenous Issues, *Climate Change and Indigenous peoples*. At: www.un.org/esa/socdev/unpfii/en/climate_change.html (viewed on 21 July 2008).

96 P Garrett, Minister for the Environment, Heritage and the Arts, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, 29 August 2008.

Further, Von Doussa urges governments to ensure that ‘Indigenous peoples custodial role over traditional lands, flow on impacts for environmental protection and caring for country, are fully taken into account when developing strategies for mitigation and adaptation’.⁹⁷

However, Indigenous people must be adequately resourced and remunerated for any climate change mitigation or adaptation activities undertaken, just as their non-Indigenous counterparts would be.

While our elders and ancestors could not have foreseen the devastation on our lands and waters, through thousands of years of conservation, land management and caring for country, Indigenous lands and waters continue to provide an important backstop to governments and industry now desperate to undo the damage caused by rapid industrial growth and consumption. Indigenous peoples have a real opportunity for economic development if governments are willing to recognise the important role we play in climate change mitigation.

A number of Indigenous groups around the country have formed working groups and are working together and with industry groups on climate change impacts and opportunities relevant to them and their regions, including:

- the National Indigenous Climate Change (NICC) Working Group
- the Indigenous Water Policy Group (IWPG)
- the Indigenous Community Water Facilitator Network (ICWFN)
- the Murray Lower Darling Rivers Indigenous Nations (MLDRIN)
- Message Stick Carbon Group

These groups are doing considerable work at the local, regional and national level, including working with their communities to develop an ‘Opportunities Framework’ for addressing climate change and a ‘National Indigenous Water Policy’.

Text Box 5: The National Indigenous Climate Change (NICC) Research Project

The NICC research Project is a national dialogue with representatives of corporate Australia to identify ways in which partnerships and synergies can be realised in an emerging carbon economy.

The NICC Project is currently working in partnership with the Commonwealth Scientific and Industrial Research Organisation (CSIRO), Monash University, the Australian Human Rights Commission (AHRC), corporate and industry partners, and various Indigenous communities to develop an opportunities framework to assist Indigenous Communities in Australia respond to climate change. It is anticipated that this Framework will identify:

- opportunities associated with the impacts of climate change
- opportunities associated with government, business and community responses to climate change

⁹⁷ J von Doussa (President of the Australian Human Rights Commission), *Climate change and human rights: a tragedy in the making*, Australian Human Rights Commission, Human Rights Law Seminar, Sydney, 20 August 2008. At: <http://www.humanrights.gov.au/legal/seminars/index.html>, (viewed 26 August 2008).

- how the Indigenous Community can best respond to these opportunities
- key regulatory issues or limitation in relation to adaptation responses and economic development opportunities
- a prioritisation of opportunities, including developing a method for prioritisation in consultation with the national Indigenous Climate change project group with a practical focus on four key regions across Australia (the Identified Project Sites).

The Opportunities Framework seeks to form part of the overall effort to engage the Indigenous community on climate change. A key aim of the Framework is embed a collaborative and joint-policy between all participants, in particular Indigenous and Corporate representatives, for future partnerships and local development across Australia. The Framework specific parameters and aims including:

- considering and evaluating possible opportunities at the Identified Project Sites
- identifying and estimating the costs associated with key threats from climate change for Indigenous communities at Identified Project Sites, along with any key financial impediments to participating in opportunities
- considering and suggesting design options to partner with business and governments in taking opportunities forward
- recognising this is an essential assessment intended to identify promising opportunities the Indigenous community can pursue in the near term – is not intended to be exhaustive
- making broader policy recommendations in relation to national opportunities.

More broadly, an ‘Australian Dialogue and National Framework’ co-convened by Patrick Dodson and Lt General John Sanderson may provide the framework for Indigenous participation and engagement in policy and program development including those addressing climate change.

Text Box 6: Australian Dialogue and National Framework

As articulated by Patrick Dodson on views about a national dialogue, fundamental principles could include:

- mutual respect for our different views and political positions
- search for common ground in pursuit of a nation that is seen as upholding the highest standards of international human rights
- desire to enhance and sustain cultural and social values as important components of Australian nation building open to the need for change where change will contribute to a better sense of Australian nationhood.⁹⁸

98 North Australian Indigenous Land and Sea Management Alliance (NAILSMA), *NAILSMA Discussion Paper, to support the NAILSMA delegates attending the 2020 Summit – Canberra, 19-20 April 2008*. At: http://www.nailsma.org.au/nailsma/downloads/NAILSMA_2020_0408.pdf (viewed 14 October 2008).

Some of the innovative work being done by Indigenous communities is currently independent of government involvement. Governments will need to respect the independence of these community devised and driven activities and allow Indigenous peoples to exercise self determination. However, these activities may still require some institutional support, such as funding, legislative or policy reforms and incentives. It will be important for government to be aware of the work that Indigenous communities are doing in this area to ensure that their policies and programs are consistent in their approach and reflect the work being done on the ground.

Non-Indigenous stakeholders such as CSIRO also acknowledge the important contribution of Indigenous people in addressing the impacts of climate change, and have developed a National Indigenous Engagement Strategy to facilitate their engagement and improve their relationships with Indigenous communities.

Indigenous engagement with various stakeholders in the non-Indigenous sector has also resulted in the participation of industry and corporate partners in projects regarding climate change and water issues on a number of Indigenous communities around the country.

4.3 The provision of environmental services – ‘culture based economies’

Indigenous people in areas of Australia have been perpetuating the concept of provision of environmental services for many years. However, Indigenous peoples around the world and in other parts of Australia, have been systematically excluded in the stewardship of their land, territories and waters. This has resulted in the exploitation of lands and resources and significant disruptions to our way of life, and the maintenance of our cultures and languages.

While the impacts of climate change for Indigenous peoples are potentially devastating, we must also be open to opportunities for Indigenous communities to engage in culture based economies. The culture based economy concept first and foremost supports Indigenous people’s choices around economic development. It fosters an approach around the provision of environmental services, as a fee for service, to support livelihoods and an economic approach that works primarily through Indigenous people living on country. Culture based economies’ have demonstrated their benefits for Indigenous people who remain on country, while also serving the broader public interest.⁹⁹

(a) Land and Water Management

There is significant scope for Indigenous people to provide necessary environmental services in areas of biodiversity conservation, land and water management, and carbon sequestration. In Northern Australia, culture based economies are already operating, providing important environmental services, such as the maintenance of biodiversity, that meet not only Indigenous aspirations but are in the national interest. For example, the WALFA Project in Western Arnhem Land, where savanna burning is mitigating wild fire, has resulted in economic, cultural, social, and environmental benefits for Indigenous people and the wider Australian community.

99 Indigenous Peoples Organisations Network, *Response to Agenda Item 8: Ongoing Priorities and Themes and Followup*, Seventh Session of the United Nations Permanent Forum, New York 21 April – 2 May 2008.

Governments also recognise the potential importance of environmental service provision by Indigenous peoples. In May 2007, the previous Australian Government launched the 'Working on Country Program'. This program established a precedent whereby the Australian Government purchases environmental services from Indigenous people, resulting in real employment opportunities for people on country. This approach is moving away from the long held approach that Aboriginal environmental service provision, was in the public interest of the nation, and therefore should be based on volunteerism. Programs such as this also recognise that these services are of such broader public interest, providing environmental, social and cultural benefits for all Australians, that they require more adequate support and remuneration. In this context expanding financial support for these programs is in our national interest.

While the Working on Country Program is limited to those who have already secured rights to their lands, environmental outcomes such as the maintenance, restoration, and protection of Australia's land, sea and heritage environment can be achieved by contracting Indigenous people to provide the necessary environmental services. This model is also being considered as a result of the *Cape York Peninsula Heritage Act 2007*, whereby joint management on National Parks is being facilitated through Indigenous Management Agreements which include Indigenous Ranger positions, and the first right of refusal for service contracts is to the Indigenous landowners.

The Australian Government has recently committed to providing \$90 million over five years nationally to train and employ up to 300 additional Indigenous rangers on Indigenous lands and waters to undertake environmental services. It is anticipated that these Rangers will specialise in:

- noxious weed and feral pest eradication
- fire management
- fencing and vegetation restoration
- the protection of endangered species.

Under this program, training will also be provided for these rangers using a nationally accredited land management qualification, supported by local knowledge.¹⁰⁰

While this is a positive contribution by the government bipartisan support for such projects is required to ensure funding and program sustainability into the future. In order to optimise benefits for Indigenous peoples support must extend beyond contract services. The next step is to ensure that funding and support not only provides employment opportunities, but also ownership and management responsibilities and benefits to achieve self sufficiency and flexibility to move between roles, whether it is as a contractor, a manager or an owner.

Additionally, with migration of peoples from other countries a looming challenge for Australia, Indigenous communities located along the north and western Australian coastline are well placed to contribute to Australia's border control by providing services that support our Customs Department in fulfilling their role. The Australian Government, in cooperation with the Western Australian, Northern Territory and Queensland Governments, piloted three Indigenous coastal surveillance programs over 12 months during 2006-07. The three participating communities: the Bardi Jawi people in the Kimberley region; the Maningrida community in the Northern Territory; and the Aurukun community on the western coast of Cape York in Queensland; engaged in activities including:

100 Australian Labor Party, 'Federal Labor to create up to 300 Rangers as part of Indigenous Economic Development Strategy', (Media Release, 5 October 2007).

- regular patrols of remote beaches to assist in the detection of unauthorised landings by foreign fishing vessels
- undertaking small scale patrols of remote islands, bays and creeks to look for evidence of illegal landings or fishing vessels
- reporting all evidence of landings and sightings of illegal activity to Customs for enforcement action.¹⁰¹

Concepts around stewardship and market based incentives have further supported an Indigenous approach to caring for country and Ranger programs. The Indigenous Ranger model is an excellent fit with the new globally emerging opportunities around the provision of environmental services, carbon and water trading and bio-security. This has been further strengthened by the scientific and political acceptance of climate change which includes mitigation and adaptation options that are opening up further opportunities for Indigenous peoples to assert their custodial obligations to care for and manage country.

(b) Biodiversity and Ecosystem management and maintenance

In many parts of Australia, Indigenous lands are adjoining pristine national parks that host many of our intact valuable ecosystems. Federal Minister for the Environment Peter Garrett acknowledges that:

A huge proportion of Australia's habitat is on Indigenous owned land and much of it is incredibly remote, so we rely on the dedication and skills of indigenous people to conserve it for all Australians.¹⁰²

Land management and maintenance of the biodiversity and ecosystems through programs including *Working on Country* and the development of Indigenous Management Agreements, as well as carbon abatement through fire management, and carbon sequestration may all be opportunities available to Indigenous land owners.

The introduction of joint management of national parks in Queensland under the *Cape York Peninsula Heritage Act 2007* may mean that Indigenous land owners can be formally recognised for sequestration provided through the management and maintenance of ecosystems, national parks and other reserve lands including intact forests on our lands. This may also be an opportunity for other Indigenous groups around the country where joint management on National Parks is occurring.

The Garnaut Review suggests that:

the removal of carbon dioxide from the atmosphere could be a substantial new source of revenue for managers of national parks and forests set aside for conservation.¹⁰³

The review indicates that for example the intact forests located in south-eastern Australia have the potential to remove around 136 Mt of carbon dioxide equivalent (CO₂-e) per year (on average) for the next 100 years.¹⁰⁴

101 Australian Customs Service, *Annual Report 2006-07 – A Focus on Customs 2006-07 Corporate Priority, maintaining the community's confidence in the way we go about performing our role*. At: www.customs.gov.au/webdata/minisites/annualReport0607/pages/page36.html (viewed 17 October 2008).

102 P Garrett, Minister for the Environment, Heritage and the Arts., 'Millions for ranger work', *Koori Mail*, Wednesday 22 October 2008, p 3.

103 R Garnaut, *The Garnaut Climate Change Review, Final Report*, Cambridge University Press, Commonwealth of Australia (2008), p 556. At: <http://www.garnautreview.org.au/chp22.htm> (viewed 17 October 2008).

104 R Garnaut, *The Garnaut Climate Change Review, Final Report*, Cambridge University Press, Commonwealth of Australia (2008), p 543. At: <http://www.garnautreview.org.au/chp22.htm> (viewed 17 October 2008).

However, the design of the final Carbon Pollution Reduction Scheme (CPRS) (and its complementary mechanisms) must be sensitive to and accommodate emerging land management arrangements. The realisation of opportunities such as these, will be dependent on the support of the Government to include national parks and other reserve lands as an option for carbon offset and sequestration. Recognition of land management and caring for country undertaken by Indigenous people on national parks (including the time prior to declaring the park) is also required to secure meaningful participation in the developing Carbon Pollution Reduction Scheme.

Garnaut has also confirmed the reduction capacity from savanna burning. He argues that although the principal source of greenhouse gas emissions in the Northern Territory is the result of savanna fires, wild fire management programs such as the Western Arnhem Land Fire Abatement Project reduces savanna fires through fire management, and significantly increases biosequestration¹⁰⁵ and protects carbon stored in vegetation sinks.¹⁰⁶ These and other examples of Indigenous land management must not be limited under the CPRS.

(c) Rehabilitation and restoration

Land management has been a recognised priority for Indigenous people and has been facilitated to a certain degree through government programs and land tenure mechanisms. However, the capacity for rehabilitation of lands and waters is very often considered only in the context of ILUAs and on lands waters where there has been mining activity. While it is important to continue this important work on land degraded by mining, as climate change priorities develop rehabilitation of country degraded by other activities such as agriculture, pastoral, land clearing, waste dumps, access development including roads and water, and tourism will become equally important. This issue will not be isolated to rural and remote communities.

Urban centres will also require rehabilitation services, particularly those located on waterways, and beaches where erosion is of growing concern. For example, rehabilitation activities are already being undertaken on lands in major cities such as Sydney where revegetation of native plants is happening on coastal areas. Indigenous people must be given opportunities to provide these services.

All levels of government, local, State or Territory and Federal have an opportunity to examine and promote the involvement of Indigenous communities in these ways. Urban Centres with major mining operations will also provide opportunities for Indigenous people to provide environmental rehabilitation services. For example, the Alumina plant in Gladstone Central Queensland, impacts not only the lands on which the alumina is mined, but the wharves and shipping used to transport the products also impact on the coastal environment including the Great Barrier Reef.

Rehabilitation and remediation of the environment will offer economic opportunities to Indigenous peoples on our lands, but will also contribute significantly to climate change mitigation efforts increasing the capacity for carbon sequestration and the effectiveness of natural systems to adjust to a changing environment.

105 Biosequestration is the removal of atmospheric carbon dioxide through biological processes, for example, photosynthesis in plants and trees, as defined in Australian Government, Department of Climate Change, *Carbon Pollution Reduction Scheme, Green Paper, July 2008 Summary Report* (2008), p 56. At: <http://www.climatechange.gov.au/greenpaper/summary/summary-report.html> (viewed 29 August 2008).

106 R Garnaut, *The Garnaut Climate Change Review, Final Report*, Cambridge University Press, Commonwealth of Australia (2008), p 556. At: <http://www.garnautreview.org.au/chp22.htm> (viewed 17 October 2008).

For example, the Garnaut Review has identified the potential for biosequestration in arid Australia, in particular the potential of Mulga lands to provide a carbon emission reductions with significant sequestration capability:

Arid and semi-arid rangelands currently make up about 70 per cent of Australia's land mass, or around 5.5 million km². Eighteen per cent of this area consists of chenopod shrublands, native tussock grasslands, and woodlands and shrublands that are dominated by mulga (*Acacia aneura*) in eastern Australia, within the 200 to 500 mm annual rainfall zone.

It is estimated that these rangelands could absorb at least half of Australia's current annual emissions or some 250 Mt for several decades. A carbon price of \$20 per tonne would provide up to a tenfold increase in income for property holders in this region if current practices were replaced by land restoration through a strategic property management program. The mitigation gains are potentially so large that it is important for Australia to commence work on program design and implementation even before the issues of coverage, national and international, are fully resolved.¹⁰⁷

The New South Wales Aboriginal Land Council (NSWALC) and Riverina Financial and Rural Management (FARM) have entered a partnership to maximise the benefits from carbon trading, through the development of Mallee tree plantations.

A property owned by the NSWALC, Baogga Karrai, approximately 60 kilometres west of Condoblin, has hundreds of hectares of oil mallee trees for carbon sequestration. The Mallee trees are planted in belts through cropping paddocks. The NSWALC owns a number of properties with similar potential to increase and trade soil carbon.

Soil carbon sequestration is seen as a promising new enterprise for NSWALC. Riverina Farm are researching and developing techniques and farming practices which may increase the accumulation of soil carbon on NSWALC land. If successful, this venture has the potential to create for the NSWALC one of the biggest soil carbon banks for future carbon trading on voluntary markets both nationally and internationally.¹⁰⁸

4.4 Sustainable Indigenous communities

As identified by the Minister for Families, Housing, Community Services, and Indigenous Affairs:

Finding ways to create and sustain socially and economically viable communities across regional and remote Australia is a major challenge for the nation. It is even more challenging when most of the people in these communities are Indigenous.

It is a challenge that has bedevilled governments for the last fifty years.

The reason is that we are dealing with a complex social and economic reality involving competing cultural perspectives, poorly defined institutional structures, extremes of poverty and dysfunctional communities, and long-standing failure of government.

New approaches must be developed and tried. But we must also be prepared to assess and evaluate what we do, and where the evidence points to failure or limited success, to change direction.¹⁰⁹

107 R Garnaut, *The Garnaut Climate Change Review, Final Report*, Cambridge University Press, Commonwealth of Australia (2008), p 543 & 557. At: <http://www.garnautreview.org.au/chp22.htm> (viewed 17 October 2008).

108 National Indigenous Times, *NSWALC embracing Carbon trading*. Article, p 24, Issue 167, Vol 7, 27 November 2008.

109 Minister for Families, Housing, Community Services and Indigenous Affairs, the Hon J Macklin, *Sustainable Indigenous Communities Forum Minerals Council of Australia*, (Speech delivered at the Sustainable Indigenous Communities Forum Minerals Council of Australia, 27 May 2008). At: http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/sustainable_indig_comm_27may08.htm (viewed 25 October 2008).

Supporting community development opportunities will be crucial in increasing the capacity for Indigenous communities to respond to the impacts of climate change. Financial assistance, innovative investment strategies and/or business incubation models may all assist the development of appropriate, sustainable and responsible development projects with Indigenous communities.

(a) Alternative Energies

While climate change in and of itself is a diabolical challenge for governments around the world, the Australia environment provides the government with a number of options which contribute to increasing the sustainability of Indigenous communities. These options include all those mentioned above, but also include alternative sustainable energies. The introduction of low emissions energy supply technology such as solar and wind energy are opportunities that should be given serious consideration in the development of climate change responses, particularly in the context of achieving sustainable Indigenous communities.

The Garnaut review noted that the Government have to date:

committed low levels of government expenditure on research and development in key areas like energy supply, juxtaposed with the rising importance of low-emissions energy technologies for Australia's mitigation effort, suggest that current funding levels do not reflect the priority required to meet the rapidly changing pattern of demand established by an emissions trading scheme.¹¹⁰

Indigenous communities are a prime example of where these technologies could make a remarkable difference to the lives of their Indigenous residents and also contribute to meeting Australia's carbon reduction targets. The Bushlight Project is one such example.

Text Box 7: The Bushlight Project – Centre for Appropriate Technology¹¹¹

Bushlight is an innovative renewable energy project which aims to increase access to sustainable energy services within remote Indigenous communities across Australia through renewable and solar energy systems.

The Centre for Appropriate Technology (CAT) recognise the need for innovative and interactive energy services in remote communities, and are working with Indigenous communities in remote regions of Central and Top End Australia, to design robust, technically advanced renewable energy systems. By July 2007 this program had installed 97 renewable energy systems in 79 discrete communities in Australia.¹¹²

Bushlight strives to:

- improve the reliability of renewable energy systems in remote Indigenous communities
- improve the capacity and confidence of communities to choose and manage renewable energy services

110 R Garnaut, *The Garnaut Climate Change Review – The Innovation Challenge*, Chapter 18, Commonwealth of Australia 2008, At: <http://www.garnautreview.org.au/chp18.htm> (viewed 17 October 2008).

111 Further information about the Bushlight Project is available online at: <http://www.bushlight.org.au/default.asp?home>.

112 The discrepancy in numbers is due to a number of communities receiving multiple systems for a number of reasons.

- establish a technical service network to service and maintain reviewable energy services in remote communities.

This is particularly important in remote communities where often the only source of power for refrigeration of fresh food, heating and other basic essentials that we in the cities take for granted, is through diesel generators. Access is further limited where people are cut off by flood during the wet season, and have no access to town water, or power.

Bushlight focuses on:

- community education and empowerment
- developing and delivering good education and industrial resources
- building technical capacity on remote communities
- industry development

Communities which are considered suitable for a Bushlight renewable energy system must:

- be lived in for at least 36 weeks of the year
- have no access to grid power or be totally reliant on generators
- have secure land tenure or occupation rights
- have at least one permanent building meeting State or Territory construction standards.

There are three main Bushlight systems:

- *BL Household* – Standalone photovoltaic (solar) powered systems, typically designed to meet the electrical energy needs of a single household of 3-12kWh/day
- *BL Community* – Standalone photovoltaic powered systems, typically designed to meet the electrical energy needs of a community of 2-10 households/buildings using up to 50kWh/day
- *BL Hybrid* – Combined photovoltaic/generator powered systems with integrated centralised generators. Typically designed to meet the electrical energy needs of communities with numerous households and other buildings with a daily demand 40kWh or more.

Through a Community Energy Planning Model (CEPM) Bushlight work with homeland communities to plan and manage their energy services. This innovative approach to energy planning is transferable to other cultures and settings and operates through a dynamic partnership with local councils, resource agencies, community members and technical contractors. The process is also supported by a range of culturally appropriate resources designed specifically for local conditions.

Bushlight also support Indigenous communities through the provision of:

- Technical and financial information and advice about Renewable Energy (RE) systems for remote locations
- Demand assessments
- Pre-feasibility studies
- Collaborative project planning
- System design
- Institutional capacity building
- RE education and training-from simple use and maintenance through to high-end technical training
- Turn-key project management
- Project logistics
- Procurement
- Installation and associated capital works

- Culturally appropriate educational resources related to community engagement activities and system maintenance.

A total of 74 communities with Bushlight Renewable Energy systems have access to a service network comprised of Resource Agency or Community Council technical staff, qualified technical service providers under maintenance contracts, and Bushlight regional staff.

Not only does this project contribute to better access to infrastructure in the community and has the potential to provide jobs for community people, it also contributes to climate change mitigation and adaptation measures by reducing the amount of greenhouse gas that was previously being emitted by the fuel generators.

A project site for the Bushlight Project, Corkwood Bore is the relocation site for the Arrernte families of Harry's Creek East Outstation in the Northern Territory. The community was relocated in early 2004 due to the building of the "Alice to Darwin" railway line. Situated some 50kms north east of Alice Springs, this community comprises seven houses and has a permanent population of approximately 30 family members with a large extended family from both Arrernte and Warlpiri language groups. Bushlight was asked to assist by assessing and providing energy services to the new houses at the new site before the community moved in. Laurel Palmer, a resident at Corkwood Bore described her experience with Bushlight as follows:

At Harry's Creek the community only had candles, fire, wood water heater and a solar panel for lights which didn't really work. It was a bit hard back there. It was hard! The generator pumped water, when that ran out we had to collect water in jerry cans. We had to drive to the generator. We bought more tin food at Harry. Now we notice the differences – we now we have more money from not buying diesel. This means we can buy more food. Now we can eat more fresh meat and vegetables. We can keep them in the fridge. We shop fortnightly now and so don't go to town so often. We had no washing machine before. Now we have one and I only run that at lunch time, as I was advised by Bushlight to help the system run well.¹¹³

North Queensland Land Council have also advised that traditional owner groups within their representative region are considering the need and usefulness of alternative energies in their communities.

The serviced region includes some locations with high sunlight and wind generation potential as well as some well watered areas suitable for carbon sequestration schemes. As the number of Native Title determinations increase in the NQLC region and with larger amounts of land under Aboriginal control, traditional owner PBCs are in need of sustainable, environmentally friendly business opportunities. Some preliminary investigation of the industry has been made by the NNTC [National Native Title Council] and the larger communities of Yarrabah and Palm Island are looking at some options with the alternative power industry.¹¹⁴

Wind farms also provide an option for Indigenous involvement in renewable energy projects. The Cathedral Rocks Wind Farm for example will contribute directly to Australia's greenhouse gas reduction targets by supplying green energy to 25,000 homes on the Eyre Peninsula in South Australia each year. This project has been

113 Centre for Appropriate Technology, *Light and life in the bush – Bushlight*, Laurel Palmer, response to the CEP Review of the Bushlight Program in April 2005. At: <http://www.bushlight.org.au/media/case%20study/case%20study%20-%20-%20corkwood%20bore.pdf> (viewed 14 October 2008).

114 I Kuch, Transition Manager, North Queensland Land Council, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, 25 August 2008.

facilitated through the Federal Government's legislated Mandatory Renewable Energy Target, enhancing the viability of developing commercial wind farms.

This project is a joint venture between Hydro Tasmania and Spanish renewable energy company EHN.¹¹⁵

While the Indigenous peoples of this region are not partners in this project, the Industry partners have been working with the Port Lincoln Aboriginal Community Council to ensure the interests of the Indigenous communities are considered and respected. Similar projects may be an option for Indigenous communities located on appropriate lands.¹¹⁶

In some regions across Australia, Indigenous people have not been able to leverage economic opportunities from their lands. However, with the opportunities arising from climate change, relatively marginal land may now be in a position to be catapulted into becoming equal participants in emerging carbon markets',¹¹⁷ including bio-sequestration, renewable energy – be it wind, solar or other, waste to energy conversion opportunities and bio-char are all possible options.

For opportunities such as these to be successfully realised by Indigenous people, an assessment of the current land tenure arrangements is required. New policies and laws relating to land use and development (including housing and associated infrastructure) require an examination of how new interests and imperatives will impact upon (positively or negatively) Indigenous land, cultural, human and native title rights and interests.

4.5 Inclusion of climate change outcomes in agreement making

Indigenous Land Use Agreements and comprehensive settlement agreements provide opportunities for Indigenous people to leverage social, cultural, environmental and economic development through climate change mitigation projects such as the Bushlight Project.

Agreement making may also provide opportunities for Indigenous people to partner with industry and government and generate investment in offsets arising from land management, caring for country and wildfire management such as the Western Arnhem Land Fire Abatement Project.

In New South Wales, Indigenous groups have an opportunity to be involved in a biodiversity conservation program that operates in a similar way to the creation of carbon offsets. The NSW government is seeking to access land rights land for a "biobanking" scheme, which is a means of providing commercially based offsets for environmental damage caused through development activities.

115 Hydro Tasmania is a renewable energy business that has a history of almost 100 years of designing, constructing and operation hydro-electric power schemes and more recently, wind farms. It produces around 60 percent of Australia's renewable energy. EHN is the largest developer, owner and operator of wind farms in the world. EHN has installed over 2,200 megawatts of capacity in 80 wind farms in Spain, France, Germany, the USA, Canada and Ireland. At: <http://www.hydro.com.au/home/Corporate/Publications/Media+Releases/Cathedral+Rocks+Wind+Farm+generating+into+the+SA+grid.htm>.

116 Further information about the Cathedral Rocks Wind Farm is available online at: <http://www.hydro.com.au/Documents/Renewables%20Development/Cathedral%20Rocks%20fact%20sheet.pdf> (viewed 28 October 2008).

117 Message Stick Carbon Group, *Indigenous Economic Engagement: Response to Emissions Trading Scheme Discussion Paper*, (2008). At: [http://www.garnautreview.org.au/CA25734E0016A131/WebObj/D0852530ETSSubmission-MessageStickCarbonGroup/\\$File/D08%2052530%20%20ETS%20Submission%20-%20Message%20Stick%20Carbon%20Group.pdf](http://www.garnautreview.org.au/CA25734E0016A131/WebObj/D0852530ETSSubmission-MessageStickCarbonGroup/$File/D08%2052530%20%20ETS%20Submission%20-%20Message%20Stick%20Carbon%20Group.pdf) (viewed 16 December 2008).

BioBanking enables 'biodiversity credits' to be generated by landowners who commit to enhance and protect biodiversity values on their land through a biobanking agreement. These credits can then be sold, generating funds for the management of the site. Credits can be used to counterbalance (or offset) the impacts on biodiversity values that are likely to occur as a result of development. The credits can also be sold to those seeking to invest in conservation outcomes, including philanthropic organisations and government.¹¹⁸

Text Box 8: NSW BioBanking Scheme

The four main key elements of the BioBanking Scheme are:

- Establishing biobank sites on land through biobanking agreements between the Minister for Climate Change and the Environment and the landowners.
- Creating biodiversity credits for management actions that are carried out, or proposed to be carried out, to improve or maintain biodiversity values on biobank sites. The biobanking assessment methodology will be the tool used to determine the number of biodiversity credits that may be created for these management actions.
- The trading of credits, once they are created and registered.
- Enabling the credits to be used to offset the impact of development on biodiversity values. The methodology will be the tool that is used to determine the number and class of credits that must be retired to offset the impact of a development and ensure that the development improves or maintains biodiversity values.¹¹⁹

A Ministerial Reference Group was established to assist in finalising the BioBanking Assessment Methodology and the regulation. The group also:

- reviewed the results of the three-month pilot program to test the BioBanking Assessment Methodology
- will oversee implementation during the two-year trial of the scheme
- assists in the review of the scheme.

Membership of the Ministerial Reference Group does not include Indigenous representation. However, the Government has also developed a program that is specific to Indigenous engagement in BioBanking.

Indigenous engagement in the BioBanking scheme is being facilitated through the Land Alive Project. BioBanking, including Land Alive is a voluntary scheme.

This *Land Alive* project is all about building the skills and capacity of Aboriginal landowners so they can be among the early leaders in the BioBanking market.¹²⁰

Under this scheme, Indigenous landowners have an opportunity to enter into biobanking agreements, whereby they set aside some of their lands and agree to manage and conserve the natural values on that land forever.

118 New South Wales Department of Environment and Climate Change, *BioBanking*. At: <http://www.environment.nsw.gov.au/biobanking/index.htm> (viewed 15 December 2008).

119 New South Wales Department of Environment and Climate Change, *The BioBanking Framework*. At: <http://www.environment.nsw.gov.au/biobanking/biobankframework.htm> (viewed 15 December 2008).

120 Minister for Climate Change and the Environment, *Land Alive, Aboriginal management for biodiversity*. At: <http://www.environment.nsw.gov.au/resources/LandAlive/LandAliveWeb.pdf> (viewed 15 December 2008).

The agreement is added to the land title and outlines what owners must do to protect the site and improve its natural values. As part of the agreement, a management plan is developed which highlights the natural and cultural values worth preserving on the site, includes ideas for managing the land, and identifies opportunities for funding.

This project aims to provide Indigenous people with the acquisition of real skills, creating opportunities for long-term jobs. Participants will also gain practical experience, learning about the BioBanking Scheme and its benefits.

However, the biobanking scheme is based on the principle that it equates a loss of biodiversity in one area with a commitment to retain it in another. For example if a project developer was to clear an area of bushland it could offset the destruction of that land with another area of land that has been managed and conserved. The developer would buy 'biodiversity credits' from the landowners, The Department of Environment and Conservation would decide how much environmental damage the proposed development would cause, and how many credits the developer must buy to offset it. The compromise is that the biodiversity contained in the destroyed lands is lost for ever.¹²¹ One issue that is unclear in the first instance is whether there is a correlation between biodiversity credits and the systems/biodiversity damaged or destroyed. Under such arrangements, developers need to show how the impacts on biodiversity will be avoided, minimised or offset, and offsets need to match the nature of the biodiversity destroyed/impacted.

Land Alive is also an opportunity for Aboriginal ecological knowledge to be recognised alongside scientific approaches to land management. Aboriginal landowners can generate an income from land management while enhancing their role as land stewards with unique Aboriginal cultural knowledge. Provisions for the protection of this knowledge will also need to be included in the agreement.¹²²

A key question for Indigenous and non-Indigenous landholders will be the extent (if any) to which the same land, vegetation or trees can be used for the generation of biodiversity and carbon credits.

5. Indigenous Engagement with Policy Formulation

While it is clear from the discussion above that Indigenous peoples are currently participating in some areas climate change responses and opportunities, there remains an urgent need to ensure the full participation of Indigenous peoples in emerging opportunities and policy making processes. Effective Indigenous participation in decision making is essential to ensuring non-discriminatory treatment and equality before the law, and recognises the cultural distinctiveness and diversity of Indigenous peoples.

Appendix 5 provides an overview of the current State and Territory government climate change policies and the actions they have taken to ensure the engagement of Indigenous stakeholders in the development of these strategies.

121 Environmental Defenders Office (ACT), *Biobank sounds a lot like bunk*, Sydney Morning Herald Editorial, August 10, 2006. At: http://www.edo.org.au/edoact/newsletters/aug_06/biobanking.htm (viewed 15 December 2008).

122 Department of Environment and Climate Change NSW, *Land Alive, Aboriginal management for biodiversity*, (2008). At: <http://www.environment.nsw.gov.au/resources/LandAlive/LandAliveWeb.pdf> (viewed 15 December 2008).

To date, Indigenous engagement has proven to be a significant challenge for governments across all areas of policy. In October 2007, the Australian National Audit Office released the findings of a performance audit into whole of government Indigenous service delivery arrangements. They found that the transfer of ATSIC/ ATSI administrative responsibilities and funding to 'mainstream' Australian Government departments provided opportunities to develop more integrated solutions to entrenched Indigenous disadvantage.¹²³

While the report found that implementation of the Government's policy objective was progressing, it is also noted that a stronger collective focus by departments is required to meet their priorities, and to inform decisions relating to the effectiveness of ongoing administrative arrangements.¹²⁴

The current Indigenous policy platform remains isolated, disconnected and disjointed. If there is to be real change in Indigenous peoples lives, governments must work collaboratively and develop policy that deals with Indigenous disadvantage from a holistic perspective.

This means that:

- all relevant government departments must undertake a needs assessment to: examine legislation, policy, programs, funding and other support available; identify what mechanisms exist; and where the gaps lie that create barriers to achieving the aspirations of Indigenous communities
- governments must support policy development which firmly situates Indigenous people as the primary drivers of this new and emerging economic approach, particularly on Indigenous lands and waters. This includes national policy development and engagement with communities both within and beyond capital cities.

In the words of the Minister for Families, Housing, Community Services and Indigenous Affairs, it must be fully accepted that Indigenous stakeholders are 'substantive players and stakeholders in the future development of the nation'.¹²⁵ While there has been a commitment from Government to improve this standpoint, I am concerned that the bargaining position of Indigenous people remains unbalanced.

For example, at the national level here in Australia, the government have established an Indigenous Advisory Committee (IAC) under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). The IAC Committee provides advice to Government on issues relevant to Indigenous peoples, our lands and waters. However, Indigenous engagement is often limited to the terms of reference developed by the government and provides only a platform to inform the government, rather than to have a direct role in decisions which affect us.

123 Australian National Audit Office, *Whole of Government Indigenous Service Delivery Arrangements*, Audit Report No.10 2007-08. At: http://www.anao.gov.au/uploads/documents/2007-08_Audit_Report_101.pdf (viewed 26 November 2008).

124 Australian Government, Australian Public Service Commission, *State of the Service Report: Whole of Government, APS developments*, (2008). At: <http://www.apsc.gov.au/stateoftheservice/0607/partten/developments.htm> (viewed 26 June 2008).

125 Minister for Families, Housing, Community Services and Indigenous Affairs, J Macklin, *Beyond Mabo: Native title and closing the gap*, 2008 Mabo Lecture, James Cook University, Townsville, 21 May 2008. At: http://www.fahcsia.gov.au/Internet/jennymacklin.nsf/content/beyond_mabo_21may08.htm (viewed 1 July 2008).

There is considerable frustration that the IAC is effectively excluded from the workings of the EPBC Act. This is evidenced by the efforts of the IAC for example, to argue the significance of the Burrup Peninsula on the Dampier Archipelago in Western Australia, and their advice has been largely ignored.

Additionally, there should be input through the IAC at the international level on issues that are relevant to Australia, the Asia Pacific region, and the wider international community, including those matters protected under the EPBC Act (nationally threatened species and ecological communities; migratory species; Commonwealth marine areas; nuclear actions including uranium mining; Ramsar wetlands; World Heritage Listed places and places on the National Heritage List).

While it is recognised that the ability of the IAC to give advice in the past has been a direct result of the government of the day, the current Government must undertake to seriously consider the scope of this committee.

Additionally, in the absence of a national Indigenous representative body, mechanisms such as the IAC provide an avenue for Indigenous people to convey relevant policy advice on climate change issues. However, in light of the extremely rapid development of climate change policy, including an emissions trading framework, mechanisms that enable the effective engagement and participation of Indigenous peoples, including access to information and advice both nationally and internationally are urgently required.

In the immediate sense, this will require:

- Government to provide committed support to Indigenous driven peak forums such as NAILSMA, MLDRIN and the NICC Project, as well as to other representative organisations such as the National Native Title Council and other peak land and sea representative Committee's.
- Committed support for the development of a new National Indigenous Representative Body (depending on its final structure and mandate).¹²⁶

5.1 Climate Change Litigation

With the Australian Government encouraging a more flexible approach to native title that avoids litigation, climate change poses a new challenge to Indigenous peoples' rights and interests that has the potential to result in litigation. Particularly where Indigenous peoples lands and waters are being targeted for climate change related market opportunities, and Indigenous cultural heritage and identity are at risk of being affected or damaged.

In Australia, climate change litigation is part of a growing body of jurisprudence. Climate-related legal action has focused on administrative action in planning and environment decisions, with varying degrees of success.¹²⁷

However, internationally there are a number of examples where Indigenous peoples and communities have taken legal action regarding climate change issues.

126 The Australian Government, Department of Families, Housing, Community Services and Indigenous Affairs is currently conducting national consultations on the development of a National Indigenous Representative Body. For further information about the proposed representative body see www.humanrights.gov.au.

127 R Ghanem, K Ruddock and J Walker, 'Are our Laws Responding to the Challenges Posed to our Coasts by Climate Change?', *University of New South Wales Law Journal*, (2008) 31 (3), as cited by E Gerrard, 'Climate Change and Human Rights: Issues and Opportunities for Indigenous Peoples', *University of New South Wales Law Journal Forum*, (2008) 14(2), p 71.

Gerrard highlights three examples:

- the Arctic Inuit people petitioned the American Government at the Inter-American Human Rights Commission in December 2005 to establish mandatory limits on greenhouse gas emissions and help Arctic Inuit people adapt to the unavoidable impacts of climate change. The key argument of the was that the impacts in the Arctic of human-induced climate change infringe upon the environment, subsistence, and other human rights of the Inuit people
- the Alaskan native village of Kivalina is currently pursuing a lawsuit against a number of oil, coal and power companies for their contributions to global warming and the impact on homes and country disappearing into the Chukchi Sea.¹²⁸ The village is facing relocation due to sea erosion and deteriorating coast. The Kivalina are seeking monetary damages for the defendants' past and ongoing contributions to global warming, public nuisance and damages caused by certain defendants' acts in conspiring to suppress the awareness of the link between their emissions and global warming¹²⁹
- legal action taken by communities in Nigeria against Shell and other oil companies in relation to gas flaring, which was also successful on environmental and human rights grounds.¹³⁰

In the development of climate change law and policy in Australia, consideration of the above case law may provide further guidance for appropriate protection for Indigenous peoples human rights regarding climate change.

6. Close the Gap – Join the Dots

In order to close the gap on Indigenous disadvantage, we must actively work together to join the dots between different policy areas. It is particularly important to make the linkages between policies and laws that deal with land, water, natural resources and the environment, and other areas such as health, education, social and economic development and human rights.

Much of the failure of service delivery to Indigenous people and communities, and the lack of sustainable outcomes, is a direct result of the failure to engage appropriately with Indigenous people and of the failure to invest in building the capacity of Indigenous communities. This includes the lack of support for Indigenous staff, and

128 *Native Village of Kivalina and City of Kivalina v Exxon Mobil Corporation and others*, Complaint for Damages and Demand for Jury Trial (US District Court, Northern District of California, 28 USC 1331, 2201). The complaint was lodged in February 2008. A motion to dismiss was recently filed by defendants and a hearing date has been scheduled for December 2008. As cited by E Gerrard, 'Climate Change and Human Rights: Issues and Opportunities for Indigenous Peoples', *University of New South Wales Law Journal Forum*, (2008) 14(2), p 71.

129 *Native Village of Kivalina and City of Kivalina v Exxon Mobil Corporation and others*, Complaint for Damages and Demand for Jury Trial (US District Court, Northern District of California, 28 USC 1331, 2201). As cited by E Gerrard, 'Climate Change and Human Rights: Issues and Opportunities for Indigenous Peoples', *University of New South Wales Law Journal Forum*, (2008) 14(2), p 71.

130 The plaintiffs in this case argued that gas flaring produced air pollution and constant heat, light and noise. In November 2005, the Federal Court of Nigeria determined that actions of the oil companies constituted a gross violation of community members' fundamental human right to life (including healthy environment) and was a violation of human rights protected by the Constitution of the Federal Republic of Nigeria. *Gbmre v Shell Petroleum Development Company Nigeria Ltd and others* (Suit No. FHC/B/C/53/05, Federal Court of Nigeria, 14 November 2005). As cited by E Gerrard, 'Climate Change and Human Rights: Issues and Opportunities for Indigenous Peoples', *University of New South Wales Law Journal Forum*, (2008) 14(2), p 71.

the lack of appreciation of the skills that we bring, in particular to land and sea management on our country.

There is an urgent need for Government to develop mechanisms which ensure that rights are expressed, applied and exercised equally and consistently across the country. Legislative arrangements are required which, while recognising the cultural diversity of Indigenous nations, provide a minimum standard across all levels and jurisdictions of government to:

- ensure the effective participation of Indigenous peoples in the development of policies which directly affect our lands and waters
- consult with Indigenous peoples to get our free, prior and informed consent for any proposals on our lands and waters
- emphasise policy approaches which are evidence based, supported by trialled processes and ongoing evaluations that involve indigenous peoples
- ensure that legislative developments do not remove or restrict any existing rights; legislative or otherwise.

While the government purports a changing attitude towards improving the lives of Indigenous people, achieving actual change will involve a number of critical steps that have been discussed throughout this chapter.

These steps include:

1. A full understanding, recognition and respect for Indigenous peoples rights to our culture and our country.
2. Developing policy that deals with Indigenous disadvantage from a holistic perspective.
3. Engaging Indigenous people as major stakeholders in the development and implementation of policies and programs that affect us.
4. Increasing the cross cultural competence of bureaucracy to ensure policies and programs support the sustainability and self determination of Indigenous communities.

These steps are very broad and apply to all areas of Indigenous policy including climate change, land management, cultural heritage and native title.

Text Box 9: Attitudinal change requires:

Step 1: A full understanding, recognition and respect for the rights and responsibilities of Indigenous peoples to our cultural and our country by the Australian community and all levels of Government.

To fully understand this, it must be accepted and acknowledged that culture is the key to caring for country, and caring for country is in turn the key to the maintenance and strengthening of our culture and well-being.

International law, including the Declaration on the Rights of Indigenous Peoples, also provides for the protection of Indigenous peoples rights to care for our country, and rights to care for our culture. In particular the Declaration affirms and recognises Indigenous peoples rights to maintain and strengthen our relationships with our lands, territories, waters and resources and to ensure their viability for future generations.

This is reinforced by the right to practice and revitalise our cultural traditions and customs including our dances, songs, and stories which also contribute to the broader Australian communities visual and performing arts and literature.

Step 2: A holistic approach to overcoming Indigenous disadvantage.

This can only be achieved through Government and Indigenous people working in partnership and utilising best practice models to realise outcomes. However, the support we require from government is not in the form of mainstreaming, or complete regulation of our affairs. Collaborative partnerships in which both Indigenous people and governments work together as equal partners, will achieve sustainable outcomes that address the development aspirations of Indigenous peoples.

Further, legislative or constitutional amendments may be required. We will require heads of government to work together collaboratively to improve the lives of Indigenous peoples. This will require the full participation and engagement of Indigenous peoples in decision-making at all levels, from the local level to providing ministerial advice, and it will require governments to change their attitudes towards Indigenous peoples as stakeholders in the nation.

Step 3: The full acceptance and treatment of Indigenous people as major stakeholders in the development of all policy in Australia.

This will particularly important where policies such as those addressing climate change, will directly or indirectly affect our lives and the exercise and enjoyment of our human rights. In order for Indigenous people to effectively engage as major stakeholders, we must be afforded the right to free, prior, and informed consent. This principle applies not only to administrative acts and decisions about land use, but also to the legislative process itself.

Free, prior, and informed consent recognises Indigenous peoples inherent and prior rights to our lands and resources and respects our legitimate authority to require that non-Indigenous stakeholders enter into an equal and respectful relationship with us, based on the principle of informed consent. This means that we must also be fully apprised of the benefits and costs resulting from legislative and policy developments, or negotiated agreements.

Step 4: A change in approach by the bureaucracy.

A shift is required from a system that predominantly meets the policy aspirations of government, to a system that is accountable to the achievement of healthy Indigenous communities through sustainable development and self-determination.

In conclusion, the contribution of Indigenous people in tackling climate change has not been recognised sufficiently by governments. Nor have governments effectively engaged with our peoples in developing climate change policies across the full spectrum of issues to be faced.

This applies not only to exploiting economic opportunities on Indigenous land for mitigation strategies, but also to the need for proper understanding of the custodial role and responsibility we have over our traditional lands. Indigenous peoples must be engaged and included in developing strategies for mitigation and adaptation.

Only once we have successfully implemented these steps can we pride ourselves as a mature nation, one that embraces Indigenous peoples, our unique culture and traditions and recognises and respects us as the first peoples of Australia.

Recommendations

- 5.1 That the Australian Government's focus on the economic aspects of Indigenous inclusion in climate change policy is extended to include social, cultural and environmental policy considerations.
- 5.2 That the Australian Government consider the particular impact of climate change on Indigenous peoples' human rights and ensure these are addressed when developing responses.
- 5.3 That in developing and implementing climate change policy, the Australian Government ensure that Indigenous communities are not further disadvantaged. The Australian Government should ensure that:
 - Indigenous peoples do not bear an inequitable proportion of the cost of climate change
 - Indigenous peoples existing rights and interests are not jeopardised
 - Indigenous peoples rights to lands and water, access to carbon resources, and other rights and interests are enhanced and fully protected.
- 5.4 That government departments which have specific responsibilities for Indigenous affairs (for example, FaHCSIA and Attorney-General's Department), work closely with departments responsible for climate change policy to ensure that the social, cultural, environmental and economic impacts of climate change on Indigenous peoples are identified and addressed. For example, how native title and land rights can help facilitate opportunities arising from climate change and carbon markets.
- 5.5 That the Australian Government fulfil its commitment to develop a legislative framework that provides for Indigenous participation in carbon markets that includes national principles for engagement with Indigenous peoples, including:
 - the full participation and engagement of Indigenous peoples in negotiations and agreements between parties
 - the adoption of, and compliance with, the principle of free, prior and informed consent
 - the protection of Indigenous interests, specifically access to our lands, waters and natural resources and ecological knowledge
 - the protection of Indigenous areas of significance, biodiversity, and cultural heritage
 - the protection of Indigenous knowledge relevant to climate change adaptation and mitigation strategies
 - access and benefit-sharing through partnerships between the private sector and Indigenous communities
 - non-discrimination and substantive equality
 - access to information and support for localised engagement and consultation.
- 5.6 That the Australian Government ensure an ongoing commitment to these recommendations by seeking bipartisan support for Indigenous participation and engagement in climate change policy.

Chapter 6

Indigenous Peoples and Water

.....

1. Introduction

Water is vital to life, essential to agriculture and a valuable energy source which may be utilised in the mitigation of climate change impacts. Water is extremely valuable globally to both Indigenous and non-Indigenous peoples and is used for many different purposes. Water is also important to both for different reasons.

For example, non-Indigenous Australians consider water as a spiritual, natural resource and a commodity that is not only essential to livelihood, but has significant economic contemporary value. However, Indigenous groups in many of these ecologically rich and often remote environments Indigenous peoples regard the inland waters, rivers, wetlands, sea, islands, reefs, sandbars and sea grass beds as an inseparable part of their estates. As well as underpinning social and economic well-being, Indigenous people's relationship with waters, lands and its resources is crucial to cultural vitality and resilience.¹

Australia, and in particular the Indigenous estate, includes some of the most biodiverse terrestrial and aquatic environments, including many intact and nationally important wetlands, riparian zones, forests, reefs, rivers and waterways. Australia also has some of the most diverse, unique and spectacular marine life in the world.²

Indigenous rights in water are not adequately recognised by Australian law and policy. This is largely because Indigenous and non-Indigenous perspectives of water and its management differ greatly. This creates difficulties as non-Indigenous laws and management plans separate land from water and generally regard water as a resource available for economic gain. As water is predominantly considered only for its consumptive value, its use and regulation is limited and restricted by governments to industries or individuals willing to pay the highest price. This affects Indigenous access and usage.

1 J Altman & S Jackson, 'Indigenous Land Management', in D Lindenmayer, S Dovers, M Harris Olson, and S Morton (eds), *Commitments: Reshaping the Lucky Country's Environment* (2008), pp 207-214.

2 J Altman & S Jackson, 'Indigenous Land Management', in D Lindenmayer, S Dovers, M Harris Olson, and S Morton (eds), *Commitments: Reshaping the Lucky Country's Environment* (2008), pp 207-214.

Historically Indigenous peoples have been excluded from water management in Australia. The lack of engagement is compounded by the fact that Indigenous peoples have low levels of awareness of water institutions, technical information and regulation.³ This has resulted in little to no involvement by Indigenous people in state, territory and national consultation processes, and the development of water policy. This means that Indigenous peoples are not well positioned to negotiate enforceable water rights or purchase highly priced water licences.⁴

Text Box 1: What are water rights?

The Productivity Commission has defined water rights as:

A legal authority to take water from a water body and to retain the benefits of its use.⁵

Water rights can come in the form of: licences, concessions, permits, access and allocations.

As well as the right to take water, other related rights include: access, exclusion, alienation, and management of the resource.⁶

As identified in the previous chapters on climate change, the focus of law and policy has become highly influenced by the domestic and international economy. As a result, Indigenous rights to water, and the importance of water to the maintenance of Indigenous society, have not been given any priority in the fight for water resources.

2. Key Issues for Indigenous peoples

Indigenous peoples have suffered as a consequence of non-Indigenous priorities in water resources in Australia. In one region alone, the Daly River region in the Northern Territory, the Indigenous peoples identified significant and long lasting impacts on their societies and communities, including:

- the reduction of land over which Indigenous peoples have control
- depopulation of some areas as a result of massacres (Woolwonga and Malak Malak)
- succession of one Indigenous group by another because of depopulation
- reduction and displacement of populations
- displacement of one Indigenous group by another

3 S Jackson, *Indigenous Interests and the National Water Initiative Water Management, Reform and Implementation Background Paper and Literature Review*, CSIRO (2007), pp 65-6. At: http://www.nailsma.org.au/nailsma/publications/downloads/NAILSMA_NWI_Review_UPDATEDec07.pdf, (viewed 26 July 2008).

4 M Durette, *Indigenous Legal Rights to Freshwater: Australia in the International Context*, Centre for Aboriginal Economic Policy Research Working Paper No. 42/2008 (2008), p vii. At: <http://www.anu.edu.au/caepr/Publications/WP/CAEPRWP42.pdf>, (viewed 28 August 2008).

5 Productivity Commission, *Water Rights Arrangements in Australia and Overseas*, Commission Research Paper, Productivity Commission, Melbourne (2003), as cited by M Durette, *Indigenous Legal Rights to Freshwater: Australia in the International Context*, CAEPR Working Paper No. 42/2008, Australian National University, Canberra, p 4. At: <http://www.anu.edu.au/caepr/Publications/WP/CAEPRWP42.pdf> (viewed 28 August 2008).

6 M Durette, *Indigenous Legal Rights to Freshwater: Australia in the International Context*, CAEPR Working Paper No. 42/2008, Australian National University (2008), p 4. At: <http://www.anu.edu.au/caepr/Publications/WP/CAEPRWP42.pdf> (viewed 28 August 2008).

- changes in settlement patterns and organisation
- instability.⁷

I am concerned that as Australia becomes increasingly scarce of water due to climate change, long periods of drought, over-allocation to industry and agricultural stakeholders, and population growth and migration, the capacity for the recognition and security of Indigenous rights to water will become increasingly important and highly competitive.

A number of issues arise as a result of the current policy debate around water allocation and the rights of Indigenous peoples to their lands and waters. In particular:

- Indigenous peoples have had little to no involvement in the water reform and policy process and water management committee's
- the cultural significance of water to Indigenous peoples is not understood and remains unrecognised in the development and implementation of water law and policy
- the status of Indigenous water rights, particularly native title water rights, remains unresolved and limits Indigenous peoples access and allocation to water resources
- in many instances, the allocation of water rights to Indigenous peoples has been for specific purposes, i.e. cultural, environmental, and sustainable communal usage and often considered only in the context of cultural or social rights
- rights to water for economic development or commercial use have been scarce, or non-existent to date, and are at the whim of government
- many water systems are already over allocated and competition for water is high, especially in the Murray-Darling River Basin and in the agricultural development of northern Australia
- engagement in water markets is restricted due to the price of water being extremely high based on 'supply and demand' and out of reach of most Indigenous communities.

These issues will be discussed further below.

3. The Cultural Value of Water

'Water is the life for us all. It's the main part. If we are gonna loose that I don't know where we gonna stand. If that water go away, everything will die. That's the power of water. He connect with the land. *Pukarrikarra* (the dreaming) put 'em all together. One life.'⁸

Indigenous peoples are connected to and responsible for our lands and waters and in turn, Indigenous peoples obtain and maintain our spiritual and cultural identity, life and livelihoods from our lands, waters and resources. These cultural and customary rights and responsibilities include:

- a spiritual connection to lands, waters and natural resources associated with water places

7 CSIRO, *Recognising and protecting Indigenous values in water resource management*. (Report from a workshop held at CSIRO, Darwin, Northern Territory, 5-6 April 2008).

8 John 'Dudu' Nangkiriyn, Bidyadanga in S Yu, *Ngapa Kunangkul: Living Water, Report on the Aboriginal Cultural Values of Groundwater in the La Grange Sub-Basin*, (1999). At: <http://portal.water.wa.gov.au/portal/page/portal/PlanningWaterFuture/AllocationPlanning/LaGrange>, (viewed 10 September 2008).

- management of significant sites located along river banks, on and in the river beds, and sites and stories associated with the water and natural resources located in the rivers and their tributaries, and the sea
- protection of Indigenous cultural heritage and knowledge associated with water and water places
- access to cultural activities such as hunting and fishing, and ceremony.

While it is not possible to homogenise all Indigenous cultural water values into one perspective, as Indigenous values are regionally diverse and complex, there are some commonalities and distinctions from non-Indigenous laws that are important to recognise and understand.⁹ Indigenous relationships with water are holistic; combining land, water, culture, society and economy. Consequently water and land rights, the management of resources and native title are inseparable.

In a study undertaken in Anmatyerre country, in the Northern Territory, the Anmatyerre (people) identified that:

Our cultural values of water are part of our law, our traditional owner responsibilities, our history and our everyday lives. Everyone and everything is related.¹⁰

Our law has always provided for the values we place on water. It is the rules for men, women and country. Anmatyerre Law is strong today, but it is invisible to other people. Australian law should respect Anmatyerre Law so we can share responsibility for looking after water.¹¹

Indigenous barrister Anthony McAvoy argues that to date 'there is no place in modern river management systems for the protection of Indigenous spiritual values.' In most expressions of Aboriginal religion in Australia there are creation stories detailing the creation of waterways, often by a spirit being in the form of a serpent.¹² In the Gunanurung, Ord River, Western Australia, the traditional owners believe their rights and interests in land and waters were created in the *Ngarangani* or Dreaming. The dreaming is a continuing force providing for a complex of cultural values.¹³ According to Indigenous law, water places have special spiritual significance and accompanying cultural responsibilities.

The Maar peoples in South-west Victoria identify that this special ancient and ongoing spiritual and cultural connection to water has in most cases been ignored by non-Indigenous water laws.¹⁴ Cultural water use is part of Indigenous law and there are potential risks to Indigenous cultural and spiritual values when water is used for non-Indigenous economic, development, recreational or domestic purposes.

9 J Altman and V Branchut, *Fresh Water in the Maningrida Region's Hybrid Economy: Intercultural Contestation over Values and Property Rights*, (2008) p 24. At: <http://www.anu.edu.au/caepr/Publications/WP/CAEPRWP46.pdf> (viewed 10 September 2008).

10 Dr N Rea & Anmatyerr Water Project Team, *Provision for Cultural Values in Water Management: The Anmatyerr Story*, Land & Water Australia Final Report (2008), p 18. At: <http://products.lwa.gov.au/products/PR081464> (viewed 10 September 2008).

11 Dr N Rea & Anmatyerr Water Project Team, *Provision for Cultural Values in Water Management: The Anmatyerr Story*, Land & Water Australia Final Report, (2008), p vi. At: <http://products.lwa.gov.au/products/PR081464> (viewed 10 September 2008).

12 T McAvoy, 'Water – Fluid Perceptions', (2006) 1(2) *Transforming Cultures eJournal* 97. At: <http://epress.lib.uts.edu.au/ojs/index.php/TfC/article/viewFile/262/253> (viewed 28 August 2008).

13 K Barber and H Rumley, *Gunanurung: (Kununurra) Big River: Aboriginal Cultural Values of the Ord River and Wetlands*, A study and report prepared for the Waters and Rivers Commission WA, (2003) p14. At: http://portal.water.wa.gov.au/portal/page/portal/WaterManagement/Groundwater/Ord/Content/ABORIGINAL_VALUES.pdf (viewed 10 September 2008).

14 Framlingham Aboriginal Trust and Winda Mara Aboriginal Corporation, *Kooyang Sea Country Plan*, (2004), p 4. At: <http://www.environment.gov.au/coasts/mbp/publications/south-east/pubs/kooyang-plan05.pdf> (viewed 9 October 2008).

Additionally, Indigenous peoples draw a distinction between freshwater and salt water peoples and country. The management of sea country is as equally important as freshwater to Indigenous peoples, with the sea seen as an extension of the land incorporating rights and cultural responsibilities. Indigenous peoples in the Torres Strait and those along the coastline of Australia, have a special cultural connection to sea country. For example, the Miriam people of Mer (Murray) Island have relationships with sea country that extends over 100km south to Raine Island off the east coast of Cape York Peninsula.¹⁵

3.1 Cultural vs economic vs environmental rights

Not only is water significant to the spiritual values of Indigenous peoples, water is vital for cultural and economic development.¹⁶ In general, Indigenous water rights have been allocated through a narrow cultural and social lens, with other rights such as economic and environmental water rights being excluded.

Altman and Jackson assert that:

Current environmental policy tends to promote recognition and protection of Indigenous cultural values. However, a narrow view of heritage management has often resulted in the exclusion of Indigenous people from conservation and natural resource management activities. The most direct and enduring means of embracing, protecting and, in some cases, enhancing cultural values is through ensuring access to country and the equitable participation of Indigenous people in a suite of management activities.¹⁷

However, cultural allocations should be separate from environmental allocations. For example, the Nari Nari Tribal Council, discussed further below, in an attempt to rehabilitate their wetlands, have used their purchased cultural water allocation, for environmental purposes. To enable Indigenous people to protect and manage their lands, the provision for environmental water should be included in separate allocations by the State Government.

Distinct water rights should be provided for both environmental and economic purposes. At a minimum, Indigenous water rights in “reserved water rights” should include and account for separate cultural, and economic water allocations, and where water management is being conducted by Indigenous peoples on behalf of the government, in distinct environmental water allocations.

4. Protection of Indigenous Peoples Rights to Water

The Australian Government has ratified a number of international human rights instruments, including the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Convention of the Elimination of all forms of Racial Discrimination (CERD). As a result, the Australian Government has an obligation to its citizens, including Indigenous Australians, to respect, protect and fulfil the rights contained within them.

15 D Smyth, *Australia's Ocean Policy: Saltwater Country Aboriginal and Torres Strait Islander Interest in Ocean Policy Development and Implementation*. Socio-cultural Considerations – Issues Paper 6 (1997), p 7. At: <http://www.environment.gov.au/coasts/oceans-policy/publications/pubs/issues-6.pdf> (viewed 13 October 2008).

16 As identified in Agenda 21 access to and supply of water is vital to economic development *Agenda 21*, Chapter 18.6. At: <http://www.un.org/esa/sustdev/documents/agenda21/index.htm> (viewed 8 October 2008).

17 J Altman & S Jackson, 'Indigenous Land Management', in D Lindenmayer, S Dovers, M Harris Olson, and S Morton (eds), *Commitments: Reshaping the Lucky Country's Environment* (2008), pp 207-214.

Indigenous peoples have a right to the equal exercise and enjoyment of their human rights, including water. As articulated by AIATSIS:

Clean water access is critical for health in all communities. In Indigenous communities' lack of supply of clean water is linked to high morbidity and mortality rates. Unlike the broad rural demographic trends of rural to urban migrations and an ageing population, Indigenous Nations are staying on their lands and Indigenous communities have growing, young populations. Supporting these Indigenous communities is integral to the support of the socio-economic viability of rural Australia. The provision of services and infrastructure and the future development of growing Indigenous communities and Nations should be incorporated into planning objectives.¹⁸

Indigenous peoples' special connection to land and waters is protected under international law which provides for the right to practice, revitalise, teach and develop culture, customs and spiritual practices and to utilise natural resources.¹⁹

4.1 The International Framework

The most relevant international instruments for Indigenous water rights are set out in the table below.

Table 1: International Instruments	
International Instrument	Protection of Indigenous peoples rights to Water
International Covenant on Economic, Social and Cultural Rights (ICESR)	The right to water is implicit in the ICESCR, protected through: <ul style="list-style-type: none"> ▪ the right to an adequate standard of living ▪ the right to enjoyment of the highest attainable standard of physical and mental health²⁰ ▪ peoples' right to freely dispose of their own natural resources (wherein no case can 'a people be deprived of its own means of subsistence).²¹
International Covenant on Civil and Political Rights (ICCPR)	<ul style="list-style-type: none"> ▪ the right to freely dispose of natural resources ▪ the particular rights of 'ethnic, religious or linguistic minorities' to not be denied 'the right, in community with the other members of their group, to enjoy their own culture.'²²

18 M Morgan, L Strelein & J Weir, *Indigenous Rights to Water in the Murray-Darling Basin: In support of the Indigenous final report to the Living Murray Initiative*, Research Discussion Paper Number 14, Australian Institute for Aboriginal and Torres Strait Islander Studies (2004), p 9. At: http://www.aiatsis.gov.au/_data/assets/pdf_file/4728/DP14.pdf (viewed 18 December 2008).

19 See International Covenant on Civil and Political Rights, arts. 1, 27; International Covenant on Economic, Social and Cultural Rights, arts 1,15; Declaration on the Rights of Indigenous Peoples, arts 11-13.

20 Office of the United Nations High Commissioner for Human Rights, *Right to Water*. At: <http://www.unhchr.ch/html/menu2/6/water/index.htm> (viewed 3 October 2008).

21 International Covenant on Economic, Social and Cultural Rights, arts 11-12. See General Comment 4, at: [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CESCR+General+comment+4.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CESCR+General+comment+4.En?OpenDocument) and General Comment 14 at: [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/E.C.12.2000.4.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/E.C.12.2000.4.En?OpenDocument) (viewed 3 October 2008).

22 International Covenant on Civil and Political Rights, arts1, 27.

International Instrument	Protection of Indigenous peoples rights to Water
United Nations Declaration on the Rights of Indigenous Peoples	<ul style="list-style-type: none"> ▪ Indigenous access, conservation and economic development of water ▪ a right to maintain and strengthen the distinctive Indigenous spiritual relationship with 'traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas' ▪ the right to conservation and protection of Indigenous lands and resources with state assistance ▪ the right to development for all Indigenous lands and resources including water.²³
Convention on Biological Diversity	<ul style="list-style-type: none"> ▪ objective is to sustain all life on earth, including aquatic ecosystems, with the global goal to reverse and stop the loss of biodiversity ▪ provides for the respect, preservation and maintenance of knowledge, innovations and practices of indigenous and local communities relevant for the conservation and sustainable use of biological diversity²⁴ ▪ many of the decisions of the COP call for the full and effective participation of indigenous communities in order to achieve the global goal.²⁵
Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention)	<ul style="list-style-type: none"> ▪ the conservation and wise use of all wetlands and their resources 'through local, regional and national actions and international cooperation, as a contribution towards achieving sustainable development throughout the world'²⁶ ▪ provides guidelines for establishing and strengthening local communities' and indigenous people's participation in the management of wetlands focusing on the need for Indigenous engagement and participation, trust and capacity building, knowledge exchange, flexibility and continuity.²⁷

23 *United Nations Declaration on the Rights of Indigenous Peoples*, Arts 25, 29, 32.

24 *Convention on Biological Diversity*, Art 8(j).

25 See for example Conference of the Parties to the Biodiversity Convention, *Marine and coastal biological diversity*, COP 9 Decision IX/20, Bonn, 19-30 May 2008. At: <http://www.cbd.int/decisions/?m=COP-09&id=11663&lg=0> (viewed 1 September 2008).

26 *Convention of the Parties 2002, Convention on Wetlands of International Importance especially as Waterfowl Habitat*, Ramsar, 1971. At: <http://www.ramsar.org> (viewed 3 October 2008).

27 Guidelines for establishing and strengthening local communities' and indigenous people's participation in the management of wetlands, adopted as an annex to Resolution VII.8 (1999). At: http://www.ramsar.org/key_guide_indigenous.htm (viewed 3 October 2008).

International Instrument	Protection of Indigenous peoples rights to Water
Agenda 21	<ul style="list-style-type: none"> ▪ a comprehensive plan of action to be taken globally, nationally and locally by organisations of the UN, governments, and major groups in every area where there are human impacts on the environment²⁸ ▪ provides for the protection and management of freshwater resources recognising the effects that climate change will have on water and indigenous peoples.²⁹ <p>Identifies the need to:</p> <ul style="list-style-type: none"> ▪ engage indigenous people in water management policy-making and decision-making ▪ improve indigenous technologies to fully utilise limited water resources and to safeguard those resources against pollution ▪ recognise the interconnection between economic development and access and supply of water.³⁰
Rio Declaration	<ul style="list-style-type: none"> ▪ recognises the vital role of indigenous communities knowledge and traditional practices in environmental management.

(a) The human right to water

The right to water is a human right that is protected in a wide range of international instruments, including the ICESCR, ICCPR and the Declaration on the Rights of Indigenous Peoples.³¹

‘The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.’³² There is a fundamental link between accessing water and living in dignity which means that the human right to water is receiving increased attention and recognition both in

28 It was adopted by more than 178 Governments, including Australia, at the UN Conference on Environment and Development in 1992.

29 *Agenda 21*, ch18, 26. Chapter 26 specifically relates to recognising and strengthening the role of Indigenous People and their Communities.

30 *Agenda 21*, ch 18.

31 Office of the United Nations High Commissioner for Human Rights, *Right to Water*. At: <http://www.unhchr.ch/html/menu2/6/water/index.htm> (viewed 3 October 2008).

32 Committee on Economic, Social and Cultural Rights, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights*, General Comment No. 15 (2002), The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights) (2002). At: <http://daccessdds.un.org/doc/UNDOC/GEN/G03/402/29/PDF/G0340229.pdf?OpenElement> (9 October 2008). See also Committee on Economic, Social and Cultural Rights, *Substantive Issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights*, General Comment No. 14 (2000) The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights). At: [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/E.C.12.2000.4.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/E.C.12.2000.4.En?OpenDocument) (viewed 9 October 2008).

Australia and worldwide.³³ The right to water is linked to many other rights including the right to food, the right to health and the right to take part in cultural life.³⁴

The Committee on Economic, Social and Cultural Rights has stated that the right to water ‘contains both freedoms and entitlements.’ The freedoms include the right to maintain access to existing water supplies necessary for the right to water, and the right to be free from interference, such as the right to be free from arbitrary disconnections or contamination of water supplies. By contrast, the entitlements include the right to a system of water supply and management that provides equality of opportunity for people to enjoy the right to water.³⁵

With water becoming the most significant global commodity, the rights for Indigenous peoples to access and use ours lands, waters and natural resources for economic development and to build sustainable communities is also provided for under the ICESCR and the Declaration on the Rights of Indigenous Peoples.

(b) The right to a healthy environment

In order to provide for water rights, the right to a healthy environment must be assured.

Environmental rights include the rights of access to the unspoiled natural resources that enable survival such as land, shelter, food, water and air; the right to refuse development; and specific environment-related rights of Indigenous peoples.

Environmental rights are provided for by international instruments including the Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention), the Convention on Biological Diversity, the Rio Declaration and Agenda 21.

Text Box 2: The Ramsar Convention

Australia was one of the first countries to sign the Ramsar Convention, and Australia designated the world’s first Wetland of International Importance: Cobourg Peninsula Aboriginal Land and Wildlife Sanctuary in the Northern Territory in 1974.

The Ramsar Convention is directly linked to the Convention on Biological Diversity and Ramsar wetlands are recognised as a matter of national environmental significance under the *Environment Protection and Biodiversity Conservation Act 1999*.

Australia currently has 64 Ramsar listed icon sites, including the Murray-Darling Rivers.

33 Office of the United Nations High Commissioner for Human Rights, *Right to Water*. At: <http://www.unhcr.ch/html/menu2/6/water/index.htm> (viewed 3 October 2008). See also Gray J & Nolan J, Editorial, (2008) 17(1) *Human Rights Defender*, 1, p 1.

34 Office of the United Nations High Commissioner for Human Rights, *Right to Water*. At: <http://www.unhcr.ch/html/menu2/6/water/index.htm> (viewed 3 October 2008).

35 Committee on Economic, Social and Cultural Rights, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights*, General Comment No. 15 (2002) The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights) (2002). At: <http://daccessdds.un.org/doc/UNDOC/GEN/G03/402/29/PDF/G0340229.pdf?OpenElement> (9 October 2008).

The Australian Government has a number of obligations under these instruments. For example, Australia currently has 64 Ramsar sites listed under the Ramsar Convention, and the Government is responsible for the management and conservation of these sites. These responsibilities are directly linked to obligations arising from the Convention on Biological Diversity through the Conference of the Parties (COP), as the two conventions deal with similar subject matter.³⁶ Many decisions of the COP have called for the full and effective participation of Indigenous communities in order to achieve the global goal.

Some countries are further progressed than others in developing the recognition of environmental rights as a human right. For example, the African Charter on Human and Peoples' Rights provides that 'all peoples shall have the right to a general satisfactory environment favourable to their development.'³⁷ In South Africa, environmental rights are protected in the constitution which grants people the right to have the environment protected, and the right to live in an environment that is not harmful to human health or well-being.³⁸

(c) The World Water Forum

The World Water Forum, an initiative of the World Water Council, is the principal water-related event in the world. The aim is to raise awareness on water issues by putting water firmly on the international agenda. The World Water Forum encourages dialogue and participation from many organisations to influence water policy making at a global level and to improve living conditions and sustainable development. The fifth World Water Forum is due to take place in March 2009 in Turkey.³⁹

At the Third World Water Forum in Kyoto 2003, an Indigenous Declaration on Water was adopted by Indigenous peoples recognising the special spiritual and cultural relationship that Indigenous peoples have with water. The declaration focuses on three areas: Indigenous water rights, Indigenous water values and Indigenous water management.⁴⁰

A declaration on Indigenous water knowledge and interests that builds on the Indigenous Peoples Kyoto Water Declaration will be presented in Turkey on behalf of Indigenous peoples across the world. The declaration will be completed with the assistance of the international delegates at the Forum. Currently there is no specific session at the World Water Forum on water and Indigenous peoples, although there will be one on 'water and culture'. Indigenous peoples will be calling for a specific forum regarding their rights to water to ensure that Indigenous participation is not restricted to the water and culture session. This will be important as Indigenous people's rights to water are about sustaining our livelihoods, of which culture is one part.

36 See, for example, the Conference of the Parties to the Biodiversity Convention, *Biological diversity of inland water ecosystems*, COP 9 Decision IX/19, Bonn, 19-30 May 2008. At: <http://www.cbd.int/decisions/?m=COP-09&id=11662&lg=0> (viewed 1 September 2008).

37 *African Charter on Human and Peoples' Rights*, art 24.

38 *Constitution of the Republic of South Africa*, s 24.

39 Fifth World Water Forum. At: <http://www.worldwaterforum5.org/> (viewed 3 October 2008).

40 Indigenous Declaration on Water, Third World Water Forum, Kyoto, March 2003. At: <http://www.indigenouswater.org/IndigenousDeclarationonWater.html> (9 October 2003)

4.2 The Domestic Framework

Despite our international obligations to protect the distinct human rights of Indigenous peoples to land, territories, water and natural resources, the human right to water is often poorly implemented at a domestic level.⁴¹ Indigenous expectations of the extent to which they can participate in water management are not being met.⁴² Compared to other colonised countries, including the United States of America, Canada and New Zealand, Australia has the least formal recognition of Indigenous water rights.⁴³

At the national level, intergovernmental agreements and initiatives are the main policy instruments. Australian law and policy has identified water as a finite resource that needs to be regulated. Additionally, there are different legislative frameworks for freshwater and saltwater.

Water management and regulation in Australia is extremely complicated. Water resources are regulated by water or natural resources management legislation, at national, state, regional and local levels with states and territories as the primary water law and policy makers. Every state and territory has its own complex water regime. Most include specific legislative provisions covering their rights and property in water.⁴⁴ Legislation is often silent in provisions for Indigenous expressed water rights, access to water as entitlements and water allocations.⁴⁵

Appendix 7 provides a summary of water law and policy developed by each state and territory government.

The notion of 'water rights' encompasses a wide class of rights under the law.⁴⁶

While some types of water are the subject of private property rights, the state is assumed to hold property rights for the majority of water, including flowing water.

Water rights are considered a legal right to water use such as native title, harvestable right or for stock and domestic purposes, or other licence holder. Water access entitlements are generally granted in the form of permits or licences by the states and territories to industry, irrigation, or local government authorities for town water supplies. A water allocation means the water that a licence holder of an access licence is entitled to take and may be attached to a water access entitlement.

41 Office of the United Nations High Commissioner for Human Rights, *Right to Water*. At: <http://www.unhcr.ch/html/menu2/6/water/index.htm> (viewed 3 October 2008).

42 S Jackson, *Indigenous Interests and the National Water Initiative Water Management, Reform and Implementation Background Paper and Literature Review*, CSIRO (2007), p 93. At: http://www.nailsma.org.au/nailsma/publications/downloads/NAISMA_NWI_Review_UPDATEDec07.pdf, (viewed 26 July 2008).

43 M Durette, *Indigenous Legal Rights to Freshwater: Australia in the International Context*, CAEPR Working Paper No. 42/2008, Centre for Aboriginal Economic Policy Research, Australian National University (2008), p vii. At: <http://www.anu.edu.au/caepr/Publications/WP/CAEPRWP42.pdf> (viewed 28 August 2008).

44 See *Water Management Act 2000* (NSW) s 392; *Water Resources Act 2007* (ACT) s 7; *Water Act 2000* (Qld) s 19; *Water Act 2000* (NT) s 9; *Water Management Act 1999* (Tas) s 7; *Water Act 1989* (Vic) s 7.

45 V Falk, Interview with the Native Title Unit at the Australian Human Rights Commission for the Native Title Report 2008, 16 December 2008.

46 M Durette, *Indigenous Legal Rights to Freshwater: Australia in the International Context*, CAEPR Working Paper No. 42/2008, Centre for Aboriginal Economic Policy Research, Australian National University (2008), p 4. At: <http://www.anu.edu.au/caepr/Publications/WP/CAEPRWP42.pdf> (viewed 28 August 2008).

With significant pressures on water resources in Australia, particularly in the Murray-Darling River Basin, the federal government is increasingly becoming involved in water policy and reform.⁴⁷ Water reform has been a slow process as it involves many stakeholders. However, this will be important in responding to climate change, and the urgency needed to develop a consistent approach to cross jurisdictional management of water resources.

As identified by Collings and Falk:

The core of the recent national water reforms is that water is part of Australia's 'natural capital', where new regimes include, in most jurisdictions, the *separation* of water access entitlements from land titles, separating water delivery from regulation, implementing revised water management policy and legislation and environmental benefit.⁴⁸ The objectives of the Intergovernmental Agreement are the uniform management of water.⁴⁹ A clear statement of commitment to Indigenous Australians is absent.⁵⁰

(a) Water Policy, Legislation and Regulation

Australia provides for the management and regulation of its water resources, including inland and coastal freshwater rivers, saltwater rivers and seas, and surface and groundwater, through a significant body of water policy, legislation and regulation. Some of Australia's waterways are nationally and internationally significant and Australia has particular obligations to protect and conserve these sites.

(i) *The Environmental Protection and Biodiversity Conservation Act 1999 (EPBC Act)*

The EPBC Act, passed in response to the international Convention on Biodiversity, provides a legal framework to protect and manage matters of national and international environmental significance including:

- world heritage sites
- wetlands of international importance (RAMSAR icon sites)
- Commonwealth marine areas
- national heritage places
- nationally threatened species and ecological communities
- migratory species.

47 With regard to the federal government's role in the application of water law, section 100 of the Constitution provides that: 'The Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation.' Historically, this provision is said to be the reason why the federal government did not become involved in water law. However, the federal government has more recently been engaging in water policy development and the constitutional validity of its engagement has not recently been challenged. Arguably, section 100 of the Constitution only relates to trade and commerce, and any action taken by the federal government to regulate water may not be seen to conflict with the reasonable use of waters by states or their residents. Due to constitutional limitations many of the federal government's powers in environmental and water law have come from international instruments as incorporated under the external affairs power, Section 51 (xxix) of the Constitution.

48 Intergovernmental Agreement on a National Water Initiative between the Commonwealth of Australia and the Governments of New South Wales, Victoria, Queensland, South Australia, the Australian Capital Territory and the Northern Territory, in the preamble at p 1.

49 Intergovernmental Agreement on a National Water Initiative between the Commonwealth of Australia and the Governments of New South Wales, Victoria, Queensland, South Australia, the Australian Capital Territory and the Northern Territory, in the Objectives 23(i).

50 N Collings and V Falk, 'Water, Aboriginal peoples in Australia and their spiritual relationship with waterscapes', in E Johnston, M Hinton and D Rigney, (eds) *Indigenous Australians and the Law* (2008) 131, p 132.

As discussed in the previous chapter, Indigenous interests and issues are represented through the Indigenous Advisory Committee established by the EPBC Act.

(ii) *The National Water Initiative (NWI)*

The NWI is the national water plan. National water reform began in 1994 with the Council of Australian Governments (COAG) Water Reform Framework. This was renewed in 2004 with New South Wales, Victoria, Queensland, South Australia, the Australian Capital Territory and the Northern Territory governments signing a ten year National Water Initiative. Tasmania signed in June 2005 and Western Australia in April 2006.

The major elements of the NWI are to improve:

- water security
- environmental factors
- efficiency in all areas including water trading.

Parties to the NWI are the COAG members.⁵¹ Each state and territory is required to produce a plan detailing the implementation of the NWI and to implement actions in the NWI Agreement.⁵²

The National Water Commission (NWC) is the Australian Government agency responsible for the implementation of water reform in line with the NWI. The NWC focuses on sustainable management of water and oversees many developments such as water for the environment, water markets and pricing. The NWC does not have an Indigenous Commissioner sitting on the NWC.

The NWI provides for water trading, which is the buying and selling of water access entitlements (and water rights). Whilst water trading is not new there have been significant recent reforms which will allow water trading to continue in the future. Water trading can either be temporary or permanent, depending on what is agreed between the buyer and the seller.

The NWI remains the basis for the water trade in Australia setting out the objectives and rules for water trading, aiming to make trade efficient.⁵³ States and territories also have different trading regimes. Due to many restrictions on the granting of new water licences, water trading is often the only way that water rights can be obtained.

Access to, and management of water by Indigenous people is provided for under the NWI. However, while the NWI ensures that native title rights will be accounted for, the recognition and provision of other Indigenous water rights and priorities is discretionary. This is highlighted below. The (major) specific Indigenous provisions provide:

- a commitment to recognise Indigenous needs in relation to water access and management in the Water Access Entitlements and Planning Frameworks

51 Comprising the Prime Minister, State Premiers, Territory Chief Ministers and the President of the Australian Local Government Association.

52 National Water Commission, *Implementing water reform*. At: <http://www.nwc.gov.au/www/html/143-implementation.asp> (viewed 8 October 2008).

53 National Water Commission, *National Water Initiative*, paras 58-63. At: <http://www.nwc.gov.au/www/html/117-national-water-initiative.asp> (viewed 28 August 2008).

- Indigenous access to water resources, in accordance with relevant Commonwealth, State and Territory legislation, through planning processes that ensure:
 - inclusion of Indigenous representation in water planning *wherever possible (italics as made to highlight for reader)*
 - water plans will incorporate Indigenous social, spiritual and customary objectives and strategies for achieving these objectives *wherever they can be developed*
- that water planning processes *will take account of* the possible existence of native title rights to water in the catchment or aquifer area⁵⁴
- that water allocated to native title holders for traditional cultural purposes *will be accounted for*.⁵⁵

The NWI states that the provisions to address Indigenous water issues were to be implemented immediately in all water plans.⁵⁶ However, the NWI does not include specific guidelines on how to implement Indigenous water rights. The provisions related to Indigenous water rights in the NWI are very broad and as mentioned above, are subject to a great deal of government discretion. This is indicated by wording such as ‘wherever possible’ and ‘wherever they can be developed.’ The discretionary nature means that it is difficult to hold states and territories accountable in implementing Indigenous people’s rights to water. This leaves the future of Indigenous water rights at the whim of government.

Additionally, the NWC highlighted in its ‘Water planning in Australia’ position statement, that future water planning should ‘give higher priority to ensuring that the values and interests of Indigenous people are considered.’⁵⁷ However, to date each state and territory has applied Indigenous water rights in different ways, at different speeds and with varying emphases or not at all.

The NWC is planning to hold an Indigenous Water Planning Forum in 2009. The forum aims to recognise the ‘explicit inclusion of Indigenous interests in water plans’. The forum also aims to bring together ‘Indigenous people and jurisdictional water planners to identify and document good examples of Indigenous engagement in water planning processes.’⁵⁸ It is hoped that this forum will result in a formally recognised national Indigenous representative water body⁵⁹ and will include a range of Indigenous groups not limited to those already engaged in water policy.

54 The Parties note that plans may need to allocate water to native title holders following the recognition of native title rights in water under the *Native Title Act 1993* (Cth).

55 National Water Commission, *National Water Initiative, Indigenous Access*, paras 25(ix), 52-54. At: <http://www.nwc.gov.au/www/html/117-national-water-initiative.asp> (viewed 28 August 2008).

56 As of June 2004 as The National Water Initiative was signed 25 June 2004. National Water Commission, *Schedule A: Timeline for Implementation of Key Actions*. At: <http://www.nwc.gov.au/resources/documents/Intergovernmental-Agreement-on-a-national-water-initiative.pdf> (viewed 28 August 2008).

57 National Water Commission, *Water planning in Australia position statement* (2008), At: <http://www.nwc.gov.au/resources/documents/water-allocation-planning-PS-waterlines-0408.pdf> (viewed 28 August 2008).

58 National Water Commission, *Indigenous water management*. At: <http://www.nwc.gov.au/www/html/273-indigenous-water-issues.asp?intSiteID=1> (viewed 28 August 2008).

59 National Water Commission, communication with the Manager for Water Planning, 14 August 2008.

(iii) *Water Act 2007 (Cth) (Water Act)*

The Water Act which commenced on 3 March 2008 was enacted to assist in implementing many of the elements of the NWI, including a water market and trading scheme for the Murray-Darling Basin.⁶⁰ While the Water Act is the national legislative framework for water management, it is primarily focused on the management of the Murray-Darling Basin. One of the objects of the Water Act is to 'give effect to relevant international agreements.'⁶¹ The relevant international agreements include:

- the Ramsar Convention
- the Convention on Biological Diversity
- any other international convention to which Australia is a party. That is:
 - (i) relevant to the use and management of the Basin water resources
 - (ii) prescribed by the regulations of the Water Act.⁶²

International agreements have not yet been prescribed by the regulations.⁶³ In the absence of *water ethics or principles* derived from the various international mechanisms (discussed earlier in this chapter), any negotiations the Australian Government are involved in regarding water, should ensure that as a minimum the rights of Indigenous peoples' enshrined in the Declaration on the Rights of Indigenous Peoples are fully considered. This also applies to the Basin Plan.

While the Water Act does not provide provisions for licensing, approvals or compliance with regulations, it does provide a framework for the establishment of a Basin Plan and a single Murray-Darling Basin Authority (MDBA).⁶⁴ The MDBA is an independent authority, charged with the preparation of the Basin Plan, enforcement powers and engaging the community in the management of resources.

The Basin Plan is not expected to be finalised until 2011. The plan will provide for the integrated and sustainable management of water resources. However, environmental groups have criticised the government, arguing that there is an urgent need to address significant environmental problems, particularly in the Murray-Darling River Basin.

Provisions of the Water Act, requires the Murray-Darling Basin Authority to consult widely when developing, amending and reviewing the Basin Plan, including with Indigenous communities. The Act also provides for the mandatory consideration of the uses of Basin water resources, including by Indigenous peoples. However, the distinct rights and interests of Indigenous peoples to water are not adequately provided for by this legislation.⁶⁵ For example, the Water Act should have a distinct category that provides for 'Indigenous cultural water use' and access entitlements.⁶⁶

60 See *Water Act 2007 (Cth)*, sch 3, for the Basin water market and trading objectives and principles. Currently the water market rules are being developed by the Australian Competition and Consumer Commission (ACCC).

61 To the extent to which those agreements are relevant to the use and management of the Basin water resources). *Water Act 2007 (Cth)*, s 3 (b).

62 *Water Act 2007 (Cth)*, s 4.

63 The *Water Regulations 2008* came into effect 30 June 2008.

64 See *Water Act 2007 (Cth)*, Part 2, Division 1 and Part 9.

65 For further discussion regarding the inadequate recognition and protection of the distinct rights and interests of Indigenous peoples to water, see the Australian Human Rights Commission *Submission to the Senate Rural and Regional Affairs and Transport Standing Committee, Inquiry into the Water Amendment Bill*, November 2008.

66 *Water Act 2007*, s 202(7), should be amended to specifically provide that water for Indigenous cultural purposes is included in the definition of water users. See Australian Human Rights Commission, *Submission to the Senate Rural and Regional Affairs and Transport Standing Committee, Inquiry into the Water Amendment Bill*, November 2008.

The Indigenous peoples whose country lies within the Murray-Darling River Basin, argue that they require specific cultural water allocations, which they refer to as cultural flows, to meet their spiritual, cultural, social, economic and environmental management responsibilities and development aspirations. They further argue that there is a difference between cultural and environmental water:

The difference between environmental and cultural water is that it is the Indigenous peoples themselves deciding where and when water should be delivered based on traditional knowledge and their aspirations. This ensures Indigenous peoples are empowered to fulfil their responsibilities to care for country.⁶⁷

(iv) *Water for the Future*

The *Water for the Future* plan announced by the Minister for Climate Change and Water on 29 April 2008 provides \$12.9 billion funding to support governance and water resource management reforms including:

- establish the Murray-Darling Basin Authority
- improve water information
- sustainable rural water use and infrastructure programs
- purchasing water to improve the health of the rivers and wetlands in the Murray-Darling Basin.

The plan's priorities are climate change, water security, using water wisely and healthy rivers. The NWI is involved in delivering these priorities.⁶⁸ One of the first steps taken to meet these priorities, is a commitment of \$3.1 billion by the Australian Government to purchase water for the environment in the Murray-Darling Basin over a ten year period.⁶⁹

There has been little direct involvement or inclusion of Indigenous peoples in the *Water for the Future* initiative. While remote Indigenous communities are recognised in the plan with the focus on assessing water supply, the issue of full cost recovery and the burden it would place on remote or discrete Indigenous communities is unresolved.⁷⁰

(b) **National Water Programs**

The Australian Government provides and funds several programs for Indigenous engagement and participation in water management.⁷¹ Some of these initiatives are water centered and others relate to Indigenous land management more generally. They are provided for through funding and other agencies, such as Land & Water Australia⁷² and the NWC. Programs include:

67 Murray Lower Darling Rivers Indigenous Nations, *Cultural Flows*, undated.

68 Australian Government, *Water for the Future*. At: <http://www.environment.gov.au/water/index.html> (viewed 1 September 2008).

69 Australian Government, Department of the Environment, Water, Heritage and the Arts, *Overview of the Restoring the Balance in the Murray-Darling Basin Program (water entitlement purchasing)*. At: <http://www.environment.gov.au/water/mdb/entitlement-purchasing/index.html> (viewed 13 October 2008).

70 Australian Government, Department of the Environment, Water, Heritage and the Arts, *Water for the Future priorities*. At: <http://www.environment.gov.au/water/action/priorities.html> (viewed 3 October 2008).

71 For further information on Australian Government programs see Australian Government, *Indigenous Australians Caring for Country*. At: <http://www.environment.gov.au/indigenous/index.html> (viewed 1 September 2008).

72 Land & Water Australia is a statutory research and development corporation within the Australian Government Agriculture, Fisheries and Forestry portfolio. See Land & Water Australia, *About Us*. At: http://www.lwa.gov.au/About_Us/index.aspx (viewed 3 October 2008).

- Caring for Our Country
- Community Water Grants
- Great Artesian Basin initiatives
- Inland waters initiatives
- Lake Eyre initiatives
- Murray-Darling Basin programs.⁷³

Caring for our Country is the Government's new natural resource management initiative and it is an integrated package with one clear goal, a business approach to investment that includes clearly articulated outcomes and priorities, and improved accountability.⁷⁴ Caring for our Country commenced on 1 July 2008 and integrates the Commonwealth's existing natural resource management programs:

- Natural Heritage Trust
- National Action Plan for Salinity and Water Quality
- National Landcare program
- Environmental Stewardship program
- Working on Country program.

In 2007, the previous Australian Government launched the Working on Country Program, an element of the broader Caring for our Country initiative. The Working on Country program aims to build on the Indigenous knowledge of protecting and managing land and sea country, and provides funding for Indigenous peoples to deliver environmental outcomes to the Australian Government.

This program established a precedent where the Australian Government now purchase environmental services from Indigenous peoples, resulting in employment opportunities for people on their country.

Another component of the broader Caring for our Country initiative that recognises the interests of Indigenous Australians is the Indigenous Protected Areas (IPA) Program.⁷⁵ There are currently 25 IPAs in Australia with many including the management of water and sea country.

Text Box 3: Paruku IPA – Western Australia

Paruku IPA in Western Australia covers around 430 000 hectares including many waterways and spectacular wetlands. Paruku (Lake Gregory) is the only reliable source of freshwater for many birds and animals in the area.

73 Australian Government, Land & Water Australia, *The Engagement of Indigenous Australians in Natural Resource Management: Key findings and outcomes from Land & Water Australia funded research and the broader literature* (2007), p 9. At: <http://products.lwa.gov.au/files/PR071332.pdf> (viewed 28 August 2008).

74 P Garrett, Minister for the Environment, Heritage and the Arts, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 29 August 2008.

75 An IPA is an area of Indigenous-owned land and waters where traditional Indigenous owners have entered into an agreement with the Australian Government to promote biodiversity and cultural resource conservation. For further information about IPAs, see Australian Government, Department of the Environment, Water, Heritage and the Arts, *Indigenous Protected Area – Background*. At: <http://www.environment.gov.au/indigenous/ipa/background.html> (viewed 8 October 2008).

Through IPAs, the Government supports Indigenous communities to manage and conserve their lands and waters in line with international guidelines, so that plants, animals and cultural sites are protected for the benefit of all Australians. It also helps Indigenous communities develop a plan to manage their land's and waters natural and cultural values and provides ongoing support for work to control threats such as weeds, feral animals and wildfire. These issues pose significant threats to waterways in particular, and Indigenous peoples interests in these areas.

The Community Water Grants program offered grants to assist communities save, recycle or improve the health of their local water resources.⁷⁶ This program ceased on 30 June 2008. Grants were available for projects related to:

- water saving and efficiency
- water recycling
- water treatment – improving the health of surface and ground water.

During the 2007-08 financial year, the Government provided \$200 million for the Community Water Grants program. Of this, \$775,946 was provided to Indigenous water projects. While there will be no further funding available under the Community Water Grants program, the government have assured that existing projects will be unaffected.⁷⁷

The Nyirripi Aboriginal community utilised the Community Water Grants funding program to protect their water interests and address their water priorities.

Text Box 4: Community Water Grants Program – The Nyirripi Community Council

The Nyirripi Community Council in the Northern Territory received funding under the Community Water Grants program to protect 16 important water places in the Walpiri and Kartangarruru Kurintji Homelands.

Funding these programs provides capacity for elders to fulfil their cultural responsibilities to take children to each water place, share cultural stories and talk about the importance of the protection of sites.

Activities such as these are integral to caring for country, land and water management and the maintenance of culture through the transferral of knowledge. It also provides capacity to contribute to a broader social and environmental agenda enabling Indigenous peoples to monitor and improve water quality.⁷⁸

The management of the Indigenous estate, which includes up to 20 percent of Australian lands and waters, is an identified priority for the Government's developing Indigenous Economic Development Strategy.⁷⁹

76 Australian Government Water Fund, *Community Water Grants*. At: <http://www.communitywatergrants.gov.au/about/index.html> (viewed 14 November 2008).

77 Australian Government Water Fund, *Community Water Grants*. At: <http://www.communitywatergrants.gov.au/about/index.html> (viewed 14 November 2008).

78 Australian Government Water Fund, *Case studies: Water treatment projects*. At: <http://www.communitywatergrants.gov.au/grants/case-studies/treatment.html> (viewed 1 September 2008).

79 Australian Labor Party, *Indigenous economic development*. At: http://www.alp.org.au/download/now/indig_econ_dev_statement.pdf (viewed 8 October 2008).

Text Box 5: Indigenous Economic Development Strategy (IEDS)

The Labor Party committed to improving the lives of Indigenous Australians through economic development as part of its 2007 election campaign.⁸⁰

In particular, the IEDS draws attention to opportunities arising from water resources for local enterprise and local jobs.

For example, the Australian Government has identified that in central Australia there are 'substantial ground water resources that have not been developed outside the town areas of Alice Springs and Tennant Creek'. Working with the Centrefarm Aboriginal Corporation set up by the Central Land Council, horticulture projects are able to be established with funding from the Aboriginal Benefits Account.⁸¹ This development must take place in partnership with the traditional owners for those lands and waters.

This is to ensure that:

- Indigenous priorities are addressed and not compromised
- the process is assured integrity by ensuring the full and effective participation and engagement of the traditional owners in decision-making
- traditional owner free, prior, and informed consent is obtained for development on their lands and waters
- funds secured by Aboriginal people through opportunities arising through climate change or water trading are accessible and directed only to projects that meet the aspirations of those people
- the transparency and efficiency of the ABA to ensure funds are not used to pay for services that would normally be provided by government (civil rights).

The IEDS should provide a further mechanism by which Indigenous water rights are recognised and secured.

The Minister for the Environment, Heritage and the Arts, advised that:

Indigenous cultural and natural resource management on the Indigenous estate more broadly, has great capacity to generate economic opportunity and outcomes for communities and individuals.

Indigenous land and sea management groups are increasingly undertaking commercial contract work for both government agencies and private business. The estimated value of commercial work undertaken by Indigenous land and sea management groups is around \$4-6 million per annum.⁸²

Programs such as these are vital as they provide access to opportunities related to water and carbon trading, and bio-security. However, the Government will be required to support policy development which firmly situates Indigenous people as the primary drivers of this emerging economic approach such as a preferred Indigenous tender in commercial work.

80 Australian Labor Party, *Indigenous economic development*. At: http://www.alp.org.au/download/now/indig_econ_dev_statement.pdf (viewed 8 October 2008).

81 Australian Labor Party, *Indigenous economic development*. At: http://www.alp.org.au/download/now/indig_econ_dev_statement.pdf (viewed 8 October 2008).

82 P Garrett, Minister for the Environment, Heritage and the Arts, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 29 August 2008.

(c) State and Territory Water Programs

Appendix 7 provides a summary of reported progress on implementing Indigenous access provisions of the NWI by each jurisdiction.

While all states and territories are required to produce a plan detailing how they intend to implement the National Water Initiative, only New South Wales provide considerable recognition of Indigenous water rights in its water plan.

Firstly, a Water Sharing Plan (WSP) is developed for each catchment area as subordinate legislation under the *Water Management Act 2000* (NSW).⁸³ In each WSP, any persons with native title to water as determined under the *Native Title Act 1993* (Cth) can access water for personal, domestic and non-commercial purposes. Some WSPs provide for this allocation.

For example, the Apsley water sharing plan on the Mid North Coast of NSW provides 0.01 megalitres (ML) per day for native title purposes to the community for:

personal, domestic and communal purposes including the purposes of drinking, food preparation, washing, manufacturing traditional artefacts, watering domestic gardens, cultural teaching, hunting, fishing, and gathering, and for recreational, cultural and ceremonial purposes.⁸⁴

Secondly, the NSW Government is in the process of developing macro water sharing plans which cover several catchment areas that have low water usage.

The macro water sharing plans will include two new initiatives for Aboriginal water users:

- Aboriginal cultural licences – will have a cap of 10 ML per licence per year
- Aboriginal commercial licences – will have a limit of 500 ML per year depending on river flow.⁸⁵ Allocations are for coastal areas only, non-tradeable and unallocated to date.⁸⁶

(i) Cultural Water Access Licences

Cultural Water Access Licences are provided for in the macro water sharing plans. These plans recognise the importance of rivers and groundwater to Aboriginal culture and will allow Aboriginal communities to apply for a water access licence for cultural purposes such as manufacturing traditional artefacts, hunting, fishing, gathering, recreation, and cultural and ceremonial purposes. An Aboriginal cultural licence can also be used for drinking, food preparation, washing, and watering domestic gardens.

83 The duration of a WSP is ten years.

84 Water Sharing Plan for the Apsley River Water Source (as amended 1 July 2004) cls 27, 32, 67, pp 8, 11, 25. At: http://www.naturalresources.nsw.gov.au/water/pdf/apsleyriver_commenced.pdf (viewed 28 August 2008).

85 NSW Department of Natural Resources, *Water management plans: information for Aboriginal water users*. At: http://www.naturalresources.nsw.gov.au/water/info_aboriginal_water.shtml (viewed 28 August 2008).

86 V Falk, Interview with the Native Title Unit at the Australian Human Rights Commission for the Native Title Report 2008, 16 December 2008.

These licences will be considered in both inland and coastal surface water and groundwater systems and will generally be granted, as long as the water is not used for commercial activities. These cultural licences are capped at up to 10ML per licence per year.⁸⁷

The first and only Aboriginal cultural access licence in NSW, (without a native title determination) was allocated to the Nari Nari Tribal Council in Hay in 2006.

Text Box 6: Aboriginal Cultural Licence – Nari Nari Tribal Council

The Nari Nari Tribal Council is a 'not-for-profit Indigenous organisation, committed to the preservation and protection of Culture and Country'.⁸⁸ The Nari Nari Tribal Council manages 1,300 hectares of riverine land 35km west of Hay. This land was purchased by the Indigenous Land Corporation in 2001 for the Nari Nari Tribal Council. Five thousand hectares of this land was declared an Indigenous Protected Area (IPA) in March 2003 under the Australian Government's Caring for Country program.⁸⁹

The procedure of obtaining a licence was quite complex. During the negotiations for the new water sharing plan for the Murrumbidgee a specific clause was included to provide for a total of up to 2,150 ML for cultural access licences.⁹⁰ The Murrumbidgee Water Management Committee recommended the inclusion of the provision. Indigenous peoples were represented in that Committee by the Murrumbidgee Traditional Owners Reference Group.⁹¹

The Nari Nari Tribal Council obtained their licence by applying to the Traditional Owners Reference Group, who allocate the water to Aboriginal groups or individuals. The licence works similar to an irrigation licence and has been in operation for three years.

In 2008 the Nari Nari Tribal Council received the full allocation of 2,150 ML. Allocations in past years have been 500 ML and 700 ML.

The water is used by the Nari Nari to flood their wetlands at least every 2 years providing for the maintenance and sustainability of the ecosystem, including animal and bird habitats of the wetlands.⁹²

87 New South Wales Department of Natural Resources, *Water Management Plans, Information for Aboriginal Water Users*, Fact Sheet. At: http://www.naturalresources.nsw.gov.au/water/info_aboriginal_water.shtml (viewed 15 December 2008).

88 Nari Nari Tribal Council. At: <http://narinaitc.org/index.htm> (viewed 28 August 2008).

89 The Australian Government's Indigenous Caring for Country program recognises the role that Indigenous peoples have in natural resource management and heritage activities. The program encompasses several projects such as Working on Country and IPAs. IPAs are 'an area of Indigenous-owned land or sea where traditional Indigenous owners have entered into an agreement with the Australian Government to promote biodiversity and cultural resource conservation.' See Australian Government, Department of the Environment, Water, Heritage and the Arts, *Indigenous Australians Caring for Country*. At: <http://www.environment.gov.au/indigenous/index.html> (viewed 1 September 2008).

90 Securing the provision, and securing a licence, are significant as there is a general ban on the granting of new access licences under Clause 30. The licence is issued as a regulated river (high security) (Aboriginal cultural) access licence under Clause 30 of the Water Sharing Plan for the Murrumbidgee Regulated River Water Source (as amended on 1 July 2004). At: http://www.naturalresources.nsw.gov.au/water/pdf/murrumbidgee_reg_river_final.pdf (viewed 28 August 2008).

91 D Jacobs, Department of Natural Resources, Deniliquin, Email to the Native Title Unit at the Australian Human Rights Commission for the Native Title Report 2008, 28 July 2008.

92 Nari Nari Tribal Council, Email to the Native Title Unit at the Australian Human Rights Commission for the Native Title Report 2008, 7 August 2008.

Despite the breakthrough in gaining a water licence, the Nari Nari have identified a number of barriers that limit their capacity to take full advantage of their licence, and for others to access cultural water licences. These barriers include:

- *Process* – The fact that only one licence has been granted, highlights the need for the current water licensing process to be more accessible to Aboriginal peoples.⁹³ Improved education and the identification of clear steps to take in the application process may increase the accessibility for Aboriginal peoples.
- *Definition* – Cultural use (of water) has not been determined and defined appropriately by neither the government nor the community. The only guarantee is that it excludes economic use. The Nari Nari are only able to use their cultural water for environmental purposes.⁹⁴
- *Funding* – The licence is very expensive. Fees are paid both to State Water (NSW) and a lodgement fee to Land and Property Information. Ongoing costs for the licence are \$9,000 per year for 2,150 ML.⁹⁵ This does not include pumping costs per ML of water. Even though a specific water quantity is allocated this does not ensure that the community receives or gains access to the water, as funding for infrastructure, such as pumps, is not provided. Therefore only Indigenous communities or organisations with adequate financial resources and infrastructure can obtain a water access licence.⁹⁶

In addition, the Nari Nari also manage a number of other projects. They have received funding under the Community Water Grants program for several projects but this funding can not be used for obtaining a water licence.⁹⁷

While there are many Indigenous groups in the Murrumbidgee Catchment, the fact that only one group have been successful in gaining a cultural access licence is evidence that there are significant barriers.

The Nari Nari have identified that:

The funding for obtaining water licences could be improved vastly. This could be provided by governments and catchment management authorities.⁹⁸

Not only are the Nari Nari providing a valuable service in the national interest by caring for the ecosystem and rehabilitating the wetlands, they are also conducting management activities which the State Government has a responsibility for.

93 The term Aboriginal people has been used as recognition that the traditional owners applicable are Aboriginal groups of New South Wales.

94 Nari Nari Tribal Council, Email to the Native Title Unit at the Australian Human Rights Commission for the Native Title Report 2008, 7 August 2008.

95 Now the Department of Lands.

96 Nari Nari Tribal Council, Email to the Native Title Unit at the Australian Human Rights Commission for the Native Title Report 2008, 7 August 2008.

97 This is because it does not meet the criteria for funding under the Community Water Grants program which is to save, treat or reuse water. Correspondence, Tony Cory (Acting Director, Australian Government Community Water Grants Team) Email 4 September 2008.

98 Nari Nari Tribal Council, Email to the Native Title Unit at the Australian Human Rights Commission for the Native Title Report 2008, 7 August 2008.

Projects such as these should be supported by governments in a similar way to Caring for Country, where the Australian Government purchases environmental services from Indigenous peoples.⁹⁹ Indigenous peoples providing these necessary services should be acknowledged and adequately funded and resourced rather than self funding or using grant monies on expensive projects and water licences.

(ii) *Aboriginal Commercial Water Licences*

Unlike other specific purpose licences, Aboriginal commercial water licences can be used for commercial enterprises owned by Aboriginal people such as aquaculture or agriculture, and they are tradable. The *Water Management Act 2000* (NSW) states that ‘benefits flow to Aboriginal people for spiritual, social, customary and economic use of land and water.’¹⁰⁰ The creation of Aboriginal Commercial Water Licences fulfils the intent of the Act.

There are limitations on the number of commercial licences available. While they generally will not be available for inland rivers due to the cap on the Murray-Darling, they may be available in certain circumstances for coastal rivers provided the commercial use does not impact on ecological values.¹⁰¹

The *Water Management Act 2000* (NSW) provides for an Aboriginal Water Trust with funds of \$5 million.¹⁰² The original proposal put to the NSW Government by the New South Wales Aboriginal Land Council and the New South Wales Native Title Services, was as a compensation package in \$250 million worth of water entitlements. The establishment of the Trust was in recognition of the intimate cultural and economic relationship that Indigenous peoples have with water, and the historical denial of ownership of the lands necessary to acquire water entitlements.¹⁰³ Further, the Trust envisaged that unallocated water will be distributed for the benefit of Aboriginal people, for example, in some groundwater and coastal surface water systems.¹⁰⁴

The NSW Aboriginal Water Trust’s charter is wide and can also include water trading, leasing of water, ownership of access licences and grants to establish water-related enterprise.¹⁰⁵

The main purpose of the Water Trust is to encourage and assist Aboriginal participation in the commercial water market by funding Aboriginal owned business where water is a core component.¹⁰⁶ Eligible projects may include the purchase of a water licence as a component of a business plan, the preservation of Aboriginal water knowledge through a breadth of culturally appropriate media, and other related

99 This is part of the Working on Country program, see Australian Government, Department of the Environment, Water, Heritage and the Arts, *Working on Country*. At: <http://www.environment.gov.au/indigenous/workingoncountry/index.html> (viewed 10 September 2008).

100 *Water Management Act 2000* (NSW), s 3.

101 NSW Department of Natural Resources, *Water management plans: information for Aboriginal water users*. At: http://www.naturalresources.nsw.gov.au/water/info_aboriginal_water.shtml (viewed 28 August 2008).

102 The Water Trust was effectively commenced in July 2005 with \$5 million over two years and thereafter with proposed enhancements. The allocation for the AWT included grant monies and other administrative costs.

103 T McAvoy, ‘The Human Right to Water and Aboriginal Water Rights in New South Wales’, (2008) 17(1) *Human Rights Defender* 6.

104 V Falk, Interview with the Native Title Unit at the Australian Human Rights Commission for the Native Title Report 2008, 16 December 2008.

105 V Falk, Interview with the Native Title Unit at the Australian Human Rights Commission for the Native Title Report 2008, 16 December 2008.

106 New South Wales Government, *Aboriginal Water Trust*. At: http://www.naturalresources.nsw.gov.au/water/ind_water_trust.shtml (viewed 28 August 2008).

water infrastructure requirements.¹⁰⁷ The Water Trust had secured a further \$300,000 in government funding to conduct workshops and an education kit to increase Aboriginal communities' awareness of the water reforms in relation to Indigenous water rights and interests and simplifying technical jargon.¹⁰⁸

Theoretically, in contrast to the water-sharing plans and other water reform processes, which aim to balance competing interests, the Water Trust is solely concentrated on Aboriginal projects in water and includes an eligibility criteria that incorporates the importance of Aboriginal cultural values in the grants process. This model is overseen by an Aboriginal Advisory Committee, which proposes projects based upon the eligibility criteria, to the Minister of the Department of Environment and Climate Change to be funded.¹⁰⁹

To date, the NSW Aboriginal Water Trust has approved grants in round one, and further grant assistance is underway.¹¹⁰ Additionally, while this funding is encouraged it requires further investment for the long-term viability of the Water Trust and is not adequate to provide for the purchase of commercial water in the competitive market under the NWI reforms.

(d) Other legislative and policy arrangements that affect Indigenous peoples rights to water

As discussed throughout this chapter, there is an obvious gap in water policy as a result of the inconsistency in approach and implementation across the country. As with other areas of Indigenous policy, the development of water policy has been done in complete isolation to other social and economic areas of policy that relate to Indigenous peoples, including native title, land rights, and cultural heritage. This inconsistency and isolation is heightened for Indigenous peoples, whose nation's boundaries do not necessarily correlate with state borders. Additionally, Indigenous peoples are not only forced to try to fit into the state and territory water legislative arrangements and make them relevant to their needs, but we are also forced to navigate and apply a wide range of other legislation and policy to secure our distinct rights to our lands, waters, natural resources and cultural heritage.

(i) Native Title

The application of the Native Title Act extends to each external Territory, the coastal sea of Australia and of each external Territory, and to any waters over which Australia asserts sovereign rights under the *Seas and Submerged Lands Act 1973* (Cth).¹¹¹

The definition of native title rights and interests in the *Native Title Act 1993* (Cth) (Native Title Act) includes rights and interests in relation to waters.¹¹² 'Waters' is defined by reference to both sea and freshwater and includes:

- (a) sea, a river, a lake, a tidal inlet, a bay, an estuary, a harbour or subterranean waters

107 N Collings & V Falk, 'Water, Aboriginal peoples in Australia and their spiritual relationship with waterscapes' in E Johnston, M Hinton and D Rigney (eds), *Indigenous Australians and the Law*, (2008) 131, p 144.

108 V Falk, Interview with the Native Title Unit at the Australian Human Rights Commission for the Native Title Report 2008, 16 December 2008.

109 N Collings & V Falk, 'Water, Aboriginal peoples in Australia and their spiritual relationship with waterscapes' in E Johnston, M Hinton and D Rigney (eds), *Indigenous Australians and the Law* (2008) 131, p 145.

110 V Falk, Interview with the Native Title Unit at the Australian Human Rights Commission for the Native Title Report 2008, 16 December 2008.

111 *Native Title Act 1993* (Cth), s 6.

112 *Native Title Act 1993* (Cth), s 223.

- (b) the bed or subsoil under, or airspace over, any waters (including waters mentioned in paragraph (a))
- (c) the shore, or subsoil under or airspace over the shore, between high water and low water.¹¹³

While s 211 of the Native Title Act preserves the right of native title holders to fish or engage in traditional activities, s 212 confirms the Crown's right to use and control the flow of water.¹¹⁴

The first decision to recognise Indigenous people's native title rights and interests over the sea was *Commonwealth v Yarmirr*, for the Yuwurruma members of the Mandilarri-Ildugij, Mangalara, Murran, Gadura-Minaga, and Ngaynjaharr clans in 2001.¹¹⁵ The Court determined that the native title rights and interests of the Yuwurruma members of the Mandilarri-Ildugij, Mangalara, Murran, Gadura-Minaga, and Ngaynjaharr clans included the non-exclusive right to fish in their sea country. While the law has established that native title rights and interests can include the right to fish or gather marine resources of the sea, rivers, lakes and inter-tidal zones, these rights and interests have generally been interpreted as giving only non exclusive customary native title rights in water.

More recently, in a consent determination, the Federal Court recognised that the Gunditjmarra people in Victoria hold non-exclusive native title rights and interests over 133,000 hectares of vacant crown land, national parks, reserves, rivers, creeks and sea north-west of Warrnambool. The native title rights granted include the use and enjoyment of water and the taking of resources in water.¹¹⁶

Text Box 7: The Return of Lake Condah to the Gunditjmarra

On 30 March 2008, in accordance with the native title consent determination, the Victorian Government returned the heritage-listed Lake Condah to the Gunditjmarra traditional owners.

In 1869, an Aboriginal Reserve was declared over 2,034 acres at Lake Condah. The formal handover is planned for later this year. The lake titles are to be vested with Gunditj Mirring, the registered native title body for the Gunditjmarra people.

Lake Condah is considered to be one of Australia's earliest and largest aquaculture ventures. The Gunditjmarra people's aspirations include the preservation of their culture while engaging in tourism, water restoration and sustainability projects. The Lake Condah Sustainable Development Project will re-flood the lake, restoring the wetland ecology and a constant water supply.¹¹⁷

While the restoration of permanent water to Lake Condah has progressed well,¹¹⁸ the Gunditjmarra are particularly concerned about the 'potential of continuing extinguishment of recognised native title over crown land through public works.'¹¹⁹

113 *Native Title Act 1993* (Cth), s 253.

114 *Native Title Act 1993* (Cth), s 221, s 212.

115 *Commonwealth v Yarmirr* (2001) 208 CLR 1.

116 *Lovett (on behalf of the Gunditjmarra People) v State of Victoria* [2007] FCA 474.

117 Minister for Families, Housing, Community Services and Indigenous Affairs, 'Land Condah transferred to the Gunditjmarra people', (Media Release, 25 November 2008).

118 Gunditj Mirring Aboriginal Corporation, *Annual Report* (2008), p 7.

119 Gunditj Mirring Aboriginal Corporation, *Annual Report* (2008), p 6.

The 1998 amendments to the *Native Title Act 1993*, provides that future acts and licences regulating the management of water, including the granting of access to water or taking water is valid. The amendments resulted in the watering down of Indigenous peoples rights to water (as well as other rights). Originally, native title holders were afforded a procedural 'right to negotiate' particularly concerning future development, and activity on lands and waters including the ownership and use of natural resources.

Under the amendments this was reduced to a 'right to comment'. Other than for a legislative act, notice and the opportunity to comment must be given to the relevant representative body, any prescribed body corporate and registered native title claimants before an act specified is done.¹²⁰ This effectively excluded native title holders from the development of water management plans and from having their cultural rights to water recognised and protected.

Whilst providing some procedural rights to Indigenous peoples regarding leases, licences and permits regulating the management of water, the Native Title Act has been interpreted as not imposing an obligation to comply with the common law rules of procedural fairness. The Native Title Act prescribes a list of procedural rights which are exhaustive, leaving no room for further rights to be imposed.¹²¹ The sole object of the procedural right to notice does not amount to a right to negotiate, but merely ensures that the possible impact on native title rights and interests is not overlooked. Furthermore, failure to comply with the procedural right will not affect the validity of the future act.¹²²

The Native Title Act also provides that a valid lease, licence, permit or authority, and any activity done under it, will prevail over any native title rights and interests and their exercise, with no compensation available.¹²³ This includes water licences. Therefore, if a water licence is granted then it will prevail over native title rights and interests.

The Aboriginal and Torres Strait Islander Social Justice Commissioner commented in this regard:

The grant of future commercial and other interests regarding the use of waters or water resources always take precedence. The effect of these provisions is that governments will be able to grant fishing licences and leases, and permits and authorities in respect of waters without any consideration of the effect that these grants may have on native title interests...

The UN Special Rapporteur on Indigenous Peoples and their Relationship to Land, Ms Erica-Irene Daes has raised concerns about the application of legislation that contravenes the rights of Indigenous peoples in this regard:

Indigenous people may be free to carry out their traditional economic activities such as hunting, fishing, trapping, gathering, or cultivating, but may be unable to control development that may diminish or destroy these activities.¹²⁴

120 *Native Title Act 1993* (Cth), s 24HA.

121 *Harris v Great Barrier Reef Marine Park Authority* (2000) 98 FCR 60.

122 *Lardil Peoples v Queensland* (2001) 108 FCR 453, 30 (Cooper J).

123 *Native Title Act 1993* (Cth), s 44H.

124 Commission on Human Rights, *Prevention of Discrimination and Protection of Indigenous Peoples and Minorities, Indigenous peoples and their relationship to land*, Final working paper prepared by the Special Rapporteur, Mrs Erica-Irene A. Daes, Sub-Commission on the Promotion and Protection of Human Rights, Fifty-third session, E/CN.4/Sub.2/2001/21, 11 June 2001, para 90.

The Special Rapporteur made specific reference to the implications of the 1998 Native Title Act amendments, stating that these amendments can be used to:

Extinguish indigenous or native title and thus practically negate most of the legal rights recognised by the Court¹²⁵...the amendments prefer the rights of non-native title holders over those of native title holders; they fail to provide native title holders with protection of the kind given to other landowners; they allow for discriminatory action by governments; they place barriers to the protection and recognition of native title; and they fail to provide for appropriately different treatment of unique aspects of Aboriginal culture.¹²⁶

A further limitation of native title was confirmed in *Ward*.¹²⁷ The High Court held that any exclusive water rights in the Ord Irrigation District had been extinguished by the *Rights in Water and Irrigation Act 1914 (WA)* which vested water rights in the Crown.¹²⁸

The future act regime in native title applies to acts including activities such as dam construction and public water works. However, with limitations such as those identified above and Court decisions confirming the interaction with State and Territory rights to water, high impact development is validated without any real opportunity for native title holders to challenge these activities.

Internationally, indigenous peoples have argued that:

As the pressures on the Earth's resources intensify, indigenous peoples bear disproportionate costs or resource-intensive and resource-extractive industries and activities such as mining, oil and gas development, large dams and other infrastructure products, logging and plantations, bio-prospecting, industrial fishing and farming, and also eco-tourism and imposed conservation projects.¹²⁹

Particularly related to water and water development programs, the World Commission on Dams found that:

Large dams have had serious impacts on the lives, livelihoods, cultures and spiritual existence of indigenous and tribal peoples. Due to neglect and lack of capacity to secure justice because of structural inequities, cultural dissonance, discrimination and economic and political marginalization, indigenous and tribal peoples have suffered disproportionately from the negative impacts of large dams, while often being excluded from sharing in the benefits.¹³⁰

125 Commission on Human Rights, *Prevention of Discrimination and Protection of Indigenous Peoples and Minorities, Indigenous peoples and their relationship to land*, Final working paper prepared by the Special Rapporteur, Mrs Erica-Irene A. Daes, Sub-Commission on the Promotion and Protection of Human Rights, Fifty-third session, E/CN.4/Sub.2/2001/21, 11 June 2001, para 90.

126 Commission on Human Rights, *Prevention of Discrimination and Protection of Indigenous Peoples and Minorities, Indigenous peoples and their relationship to land*, Final working paper prepared by the Special Rapporteur, Mrs Erica-Irene A. Daes, Sub-Commission on the Promotion and Protection of Human Rights, Fifty-third session, E/CN.4/Sub.2/2001/21, 11 June 2001, para 47.

127 *Western Australia v Ward* (2002) 213 CLR 1.

128 *Western Australia v Ward* (2002) 213 CLR 1.

129 CSD Indigenous Peoples' Caucus, 'Dialogue Paper by Indigenous Peoples', in *Indigenous Affairs 4/01, IWGIA*, p 14. As cited by Commission on Human Rights, *Indigenous Issues, Human Rights and indigenous issues, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2001/65, fifty-ninth session, Item 15 of the provisional agenda, E/CN.4/2003/90, 21 January 2003, p 6.

130 World Commission on Dams, *Dams and Development: A New Framework for Decision-Making*, The report of the World Commission on Dams, 2000. As cited by Commission on Human Rights, *Indigenous Issues, Human Rights and indigenous issues, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2001/65, fifty-ninth session, Item 15 of the provisional agenda, E/CN.4/2003/90, 21 January 2003, p 6.

With these considerations in mind, any future amendments to the Native Title Act and water legislation must consider seriously the impacts on Indigenous peoples and their lands, waters and resources.

The current Australian Government, in contrast to previous governments, has announced that it will take a more 'flexible approach in recognising native title in Australia's territorial waters,' by recognising non-exclusive native title up to 12 nautical miles from the Australian shoreline in territorial waters.¹³¹

The extent of the government's new approach and the application of the new 12 mile policy will be tested in the Torres Strait. The native title holders in the Torres Strait have filed sea claims in the Federal Court. The claim covers approximately 42,000 square kilometres of sea, above the high water mark in the Torres Strait and Coral Sea between Cape York Peninsula and the mainland of Papua New Guinea. The claims are currently being negotiated with the Queensland government, the Australian Government and other parties and are likely to be heard in the Federal Court in early 2009.

Furthermore, in many parts of the country Indigenous peoples continue to struggle to have cultural flow rights or cultural water allocations recognised. Legislative arrangements that have been promoted as providing the basis for economic and sustainable development, including native title, have not played a major role (historically) in considering Indigenous rights and interests in natural resource commodity trading, such as water trading.

I am concerned that even if Indigenous peoples are granted native title water rights and interests, there are many ways for them to be validly overridden and not compensated. Customary water usage is recognised under native title, but can be subject to the doctrine of extinguishment. It is unclear as to the extent these customary water rights will be protected against other water users.

Consequently, the native title system provides limited recognition of native title rights and interests in water and is not adequate for securing or protecting Indigenous people's rights to water or engagement in water markets.

(ii) *Land Rights*

Each state and territory has its own Indigenous land rights regime, which in some cases provide for Indigenous water rights.

For example, Indigenous peoples' rights to exclusive ownership of eighty percent of the Northern Territory coastline, including the inter tidal zone was upheld by the High Court in the recent Blue Mud Bay decision.¹³² This was over land granted under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (Land Rights Act) and effectively means that these lands and waters are now Aboriginal owned and controlled.

The Northern Territory Government, Traditional Owners and other stakeholders with interests in the waters included in this decision, are working together to develop an arrangement where interests granted prior to the High Court decision are able to continue, and the Indigenous groups are able to exercise and enjoy their rights.

131 As opposed to the current 3 nautical miles. See Attorney-General for Australia, 'A More Flexible Approach to Native Title', (Media Release, 17 June 2008). At: http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/MediaReleases_2008_ThirdQuarter_17July2008-AMoreFlexibleApproachtoNativeTitle (viewed 8 October 2008).

132 *Northern Territory of Australia v Arnhem Land Aboriginal Land Trust*, [2008] HCA 29.

Some State Governments are also working with Indigenous peoples in their regions on water issues and some of these are discussed further below.

(iii) *Cultural Heritage*

All states, territories and the Commonwealth have laws protecting Indigenous people's cultural heritage. For example the *Aboriginal and Torres Strait Islander Protection Act 1984* (Cth) gives preservation and protection to areas or objects in Australian waters that are of particular significance to Indigenous peoples. For example the Budj Bim National Heritage Landscape, Victoria, is sacred to the Gunditjmara people and is possibly the world's oldest aquaculture venture.¹³³

However, due to the ownership of water vested with the Crown, Indigenous peoples' engagement in cultural heritage protection of water places, has been a further point of negotiation and compromise. In most instances, water sites with special meaning to Indigenous peoples are considered secondary to the interests of states, territories and industry stakeholders.

(iv) *Wild Rivers Act 2005 (Qld)* and the *Cape York Peninsula Heritage Act 2007*

In response to the Wilderness Societies campaign to protect rivers across northern Australia, the Queensland Parliament introduced the *Wild Rivers Act 2005* (Qld) (The Wild Rivers Act). The purpose of the Act is to preserve the natural value of rivers in Queensland that have all, or almost all, of their natural values intact.¹³⁴ The Act aims to achieve this through the regulation of most future development activities within the declared river and its catchment area. Under the Act, the Minister for Natural Resources and Water can propose a river for declaration, making this Act the first of its type in Australia.

While there are concerns with the intent and implementation of the Wild Rivers Act,¹³⁵ the recent enactment of the *Cape York Peninsula Heritage Act 2007* provides for an Indigenous water reserve or allocation in each proposed declaration under the Wild Rivers Act. This allocation is intended for the purpose of helping Indigenous communities in the area achieve their economic and social aspirations¹³⁶ and maintains to an extent, their capacity to meet their cultural obligations to their waters and lands.

In light of Indigenous peoples' previous attempts to access their rights and interests in lands and waters for commercial use, it will be interesting to monitor and assess how and whether Indigenous peoples are able to utilise these allocations and to what extent this access and utilisation will be regulated. For example, where Indigenous peoples require water resources for commercial ventures, such as tourism or aquaculture, and/or Indigenous engagement in water markets.

133 See Australian Government, Department of the Environment, Water, Heritage and the Arts, *Budj Bim National Heritage Landscape, Victoria*. At: <http://www.environment.gov.au/heritage/places/national/budj-bim/index.html> (viewed 9 October 2008).

134 *Wild Rivers Act 2005*, s 3.

135 Australian Human Rights Commission, *Aboriginal and Torres Strait Islander Social Justice Commissioners Submission to the Minister for Natural Resources and Water, Proposed Wild Rivers Declarations*, November 2008.

136 *Cape York Peninsula Heritage Act 2007*, s 27.

Text Box 8: *Cape York Peninsula Heritage Act 2007*

The *Cape York Peninsula Heritage Act 2007* provides for the joint management of national parks. Joint management arrangements are negotiated through an Indigenous Management Agreement (IMA).

IMAs outline the cultural, social, economic and environmental activities that traditional owners seek to undertake on lands and water that have been declared National Parks. However, there are concerns that some of these activities will be restricted by the proposed declarations under the Wild Rivers Act.

The relationship between the Wild Rivers Act and the Cape York Peninsula Heritage Act is unclear. However, the Queensland Government assert that while a declaration under the Wild Rivers Act may affect the management plan (or IMA) for a national park within the proposed area, it will have no impact on traditional owners' participation in the development of national park management plans.¹³⁷ The Wild Rivers Act provides that a park's management plan must be consistent with the declaration or provide a greater level of protection for the area.

Where joint management applies and IMA's and proposed wild river declarations are being developed:

- an integrated cooperative process must be established to ensure that both the IMA and the river declaration are complimentary, compliant and consistent
- traditional owners whose rights and interests may be affected by a proposed declaration are provided complete and clear information which outlines both the opportunities and the extent to which their rights will be restricted or impacted upon, prior to a declaration being made
- monitoring and assessment processes are built into both the IMA and river declaration to ensure the implementation does not lead to conflict or further disadvantage.

5. Indigenous Water Management

As discussed throughout this chapter, the regulation of resources by the states and territories has significantly marginalised Indigenous peoples from water policy development and implementation. However, as the evidence suggests Indigenous peoples in some areas are asserting rights to their water country by accessing government funding programs and navigating their way through the myriad of legislation and regulation.

Indigenous groups are also developing their own water focused entities to facilitate engagement in water policy and planning. These entities include:

- North Australian Indigenous Land and Sea Management Alliance (NAILSMA)
- Murray Lower Darling Rivers Indigenous Nations (MLDRIN)
- Australian Indigenous Water Focus Group
- South West Aboriginal Land and Sea Council (SWALSC)

¹³⁷ Queensland Government, Department of Natural Resources and Water, *Wild Rivers Draft Indigenous summary guide*, p 4. At: http://www.nrw.qld.gov.au/wildrivers/pdf/wr_indigenous_guide.pdf (viewed 12 November 2008).

(a) North Australian Indigenous Land and Sea Management Alliance (NAILSMA)

NAILSMA is an ‘unincorporated bioregional forum’ that focuses on practical support for Indigenous land and sea management with the emphasis on sustainable Indigenous controlled mechanisms.¹³⁸ NAILSMA works together with many organisations including other Indigenous groups, governments, research groups and commercial and philanthropic organisations.

Text Box 9: International Water Experts Forum, Garma Festival, 2008

In August 2008, NAILSMA worked with the United Nations University Traditional Knowledge Initiative to facilitate an International Water Experts Forum, conducted at the Garma Festival in Arnhem Land.

This forum identified the need for increased access to international mechanisms in order to improve capacity to support Indigenous water rights in Australia and globally.¹³⁹ The Forum also included discussions on the drafting of the declaration on Indigenous Water Knowledge and interests that will be developed at the fifth World Water Forum.

The Forum included both northern and southern Indigenous and non-Indigenous Australians where plans were developed to meet later in 2008 to discuss a national approach to Indigenous water issues and integrated management in Australia.

The success of the various projects being undertaken in northern Australia is greatly dependent on the ‘strong understanding and capacity for local communities to effectively engage in discussions about the future of north Australia’s water resources.’¹⁴⁰

Recently, NAILSMA received an Australian Government grant of almost \$5 million. This funding was provided to establish a community-based network to advance Indigenous engagement in the research and management of tropical rivers, water use and conservation across northern Australia.¹⁴¹

NAILSMA have established a number of working groups who focus on areas of water priority, access, management and research, including:

(i) Indigenous Water Policy Group (IWPG)

The (IWPG) was established by NAILSMA in 2006 to continue the work of the Lingiari Reports, which addressed Indigenous rights, responsibilities and interests in water.¹⁴² This work has continued through participation and engagement in a number

138 Northern Australian Indigenous Land and Sea Management Alliance, *About NAILSMA*. At: http://www.nailsma.org.au/about_nailsma/index.html (viewed 8 October 2008).

139 See Northern Australian Indigenous Land and Sea Management Alliance, *International Water Expert Forum*. At: http://www.nailsma.org.au/forum/international_water_experts_forum/international-water-experts-forum.html (viewed 9 October 2008).

140 Northern Australian Indigenous Land and Sea Management Alliance, *Indigenous Community Water Facilitator Network*. At: http://www.nailsma.org.au/projects/indigenous_community_water_facilitator_network.html (viewed 28 August 2008).

141 Australian Government, Land & Water Australia, *The Engagement of Indigenous Australians in Natural Resource Management: Key findings and outcomes from Land & Water Australia funded research and the broader literature* (2007), p 34. At: <http://products.lwa.gov.au/files/PR071332.pdf> (viewed 28 August 2008).

142 Lingiari Foundation, *Onshore and Offshore Water Rights Discussion Booklets*, Lingiari Foundation, (2002), as cited by the Northern Australian Indigenous Land and Sea Management Alliance and the Indigenous Water Policy Group, *Indigenous Water Policy Group*, Discussion Paper (undated).

of fora where Indigenous peoples rights and interests in water have been advocated, including the Australian Governments 2020 Summit in Canberra in April 2008, the National Water Planners Forum held by the National Water Commission in June 2008, and various Indigenous water forums.

Text Box 10: The Indigenous Water Policy Group

The IWPG was initially funded for one year (2006-07) by Land and Water Australia to increase the capacity of Indigenous organisations and communities to engage with the NWI to achieve improved water planning and management across northern Australia.¹⁴³

The IWPG is currently funded by the National Water Commission (2007-2010) under its *Raising National Water Standards Program*, to examine Indigenous water policy, and coordinating across state and territory jurisdictions.¹⁴⁴

The key stakeholders of the IWPG include:

- north Australian Indigenous communities, organisations and institutions¹⁴⁵
- north Australian water resource managers, research organisations and programs (such as Tropical Rivers and Coastal Knowledge (TRaCK¹⁴⁶)) and policy advisors
- north Australian economic development policy officers
- other government and non-government organisations
- potential investors.¹⁴⁷

The role of the IWPG is to:

- provide policy advice to its members based on research on water reform initiatives as they affect Indigenous communities and land holdings
- provide advice and representation on all matters concerning water resources in terms of the social, economic, environmental and cultural interests of Indigenous people in the north of Australia
- ensure that Indigenous interests are appropriately engaged in all regional water planning in the north of Australia, providing:
 - equitable and secure access to water for domestic and commercial purposes

143 National Water Commission, *Indigenous Water Policy Group*. At: http://www.nwc.gov.au/publications/project_info_indigenous_water_policy_group.cfm (viewed 28 August 2008).

144 Northern Australian Indigenous Land and Sea Management Alliance and the Indigenous Water Policy Group, *Indigenous Water Policy Group*, Discussion Paper (undated).

145 Key Indigenous representatives from major regional organisations across the north that represent a large number of Indigenous communities and traditional owners participate on the IWPG including current core partners: Kimberley Land Council, Northern Land Council, Balkanu Cape York Development Corporation, Cape York Land Council, and Carpentaria Land Council Aboriginal Corporation. Key stakeholders external to the major land councils may be co-opted onto the IWPG.

146 The TRaCK research hub is a consortium of Australia's leading tropical river and coastal researchers established under the Commonwealth Environment Research Facilities Programme. The objectives of the programme are to provide the science and knowledge that governments, communities and industries need for the sustainable use and management of Australia's tropical rivers and estuaries. At: <http://www.track.gov.au/about.html> (viewed 16 December 2008).

147 Northern Australian Indigenous Land and Sea Management Alliance and the Indigenous Water Policy Group, *Indigenous Water Policy Group*, Discussion Paper (undated).

- recognition and protection of the wide range of interests in water by developing collaborative relationships among scientists, natural resources management facilitators and Indigenous interests.

Text Box 11: The two main objectives of the IWPG

The first objective of the IWPG focuses on improving Indigenous peoples' awareness of water reform. Particularly that directed under the NWI, so that informed decisions are made about water planning and management as it affects communities in the north of Australia.

The second objective is to direct research relating to Indigenous rights, responsibilities and interests in water resources in northern Australia so that:

- Indigenous knowledge of customary and traditional water use are identified (such as the high value cultural and ecological water systems and areas)
- Indigenous knowledge, customary practices and intellectual property in water are recognised, valued and protected
- Indigenous people are engaged in consumptive and non-consumptive water planning and policy development
- the economic future of Indigenous people is secured in the development of water reforms (in both the present and emerging industries)
- existing policies on the regulation of tourism, weeds and feral animals, and other impacts on water resources are examined.¹⁴⁸

The IWPG is supported by an Advisory Group and a Policy Engagement Group (PEG). The Advisory Group provides independent strategic advice to the IWPG on matters concerning research and policies as they affect Indigenous communities in the north. The PEG¹⁴⁹ supports the IWPG to engage Indigenous positions on water resources in the north of Australia with development initiatives at the state, territory and national levels. The PEG has a two-fold approach to engagement with the IWPG. Firstly it aims to provide for meaningful Indigenous integrated policy development; and secondly, it provides for a coordinated approach that crosses jurisdictions to the management and security of water resources unique to the north of Australia.¹⁵⁰

The IWPG are currently directing legal research on water rights and research on the potential for Indigenous water markets in northern Australia. The IWPG have identified a number of key priorities for the future including the need to examine:

- Indigenous water allocation
- community consultative process and best practice community engagement
- legal rights and water resource management in terms of interests, issues, access and economic opportunities.

148 Northern Australian Indigenous Land and Sea Management Alliance and the Indigenous Water Policy Group, *Indigenous Water Policy Group*, Discussion Paper (undated).

149 The IWPG Policy Engagement Group is currently made up of representatives from state (WA and Qld), territory (NT) and national (NWC) water agencies, but is not exclusive to other water agencies.

150 Northern Australian Indigenous Land and Sea Management Alliance and the Indigenous Water Policy Group, *Indigenous Water Policy Group*, Discussion Paper (undated).

Indigenous knowledge is also a research priority for the IWPG in the near future.¹⁵¹

While the IWPG has a specific focus on Indigenous rights, responsibilities and interests in water in the north of Australia, they are also engaged in and support the Australian Indigenous Water Focus Group that is being convened by the Murray Lower Darling Rivers Indigenous Nations to consider the strategic development of a representative national Indigenous water group.¹⁵²

(ii) *Indigenous Community Water Facilitator Network (ICWFN)*

The ICWPG is a community based network aimed to advance indigenous engagement in research and management in north Australia. The network includes six regionally based facilitators and a co-ordinator (based in Darwin). The facilitators are based in the:

- Fitzroy and Ord catchments in Western Australia
- Katherine-Daly catchment in the Northern Territory and the southern Gulf
- Mitchell and Wenlock River catchments in north Queensland.¹⁵³

The ICWFN aims to ensure that Indigenous interests are incorporated into water policy decisions, water plans and water allocations to ensure health, economic, cultural, environmental and social benefits among Indigenous participants. Despite the aims of the ICWFN, they are concerned that 'facilitation at the community level to integrate Indigenous interests in water management among the various stakeholders remains deficient.'¹⁵⁴

(b) **Murray Lower Darling Rivers Indigenous Nations (MLDRIN)**

MLDRIN as an organisation (incorporated under the *Corporations Act 2001* (Cth)) was established in response to the High Court's Yorta Yorta judgement, which concluded that the native title rights and interests held by the Yorta Yorta people had not been continuously maintained through the experience of colonisation. The Yorta Yorta native title group were the first in Australia to receive a determination under the substantial continuity test.¹⁵⁵

MLDRIN is a regional confederation of ten traditional owner groups (who identify as Nations) from the Murray-Darling Basin Valleys in the south-east of Australia, including:

- Wiradjuri, Yorta Yorta, Taungurung, Wamba Wamba, Barapa Barapa, Mutti Mutti, Wergaia, Wadi Wadi, Latji Latji, and Ngarrindjeri peoples.¹⁵⁶

151 Northern Australian Indigenous Land and Sea Management Alliance and the Indigenous Water Policy Group, *Indigenous Water Policy Group*, Discussion Paper (undated).

152 Northern Australian Indigenous Land and Sea Management Alliance and the Indigenous Water Policy Group, *Indigenous Water Policy Group*, Discussion Paper (undated).

153 Northern Australian Indigenous Land and Sea Management Alliance and the Indigenous Water Policy Group, *Indigenous Water Policy Group*, Discussion Paper (undated).

154 Northern Australian Indigenous Land and Sea Management Alliance, *Indigenous Community Water Facilitator Network*. At: http://www.nailisma.org.au/projects/indigenous_community_water_facilitator_network.html (viewed 28 August 2008).

155 *Members of the Yorta Yorta Aboriginal Community v The State of Victoria* [1998] 1606 (18 December 1998, para 19. This decision was unsuccessfully appealed to the Full Federal Court, and then to the High Court of Australia: *Members of the Yorta Yorta Aboriginal Community v State of Victoria* [2001] FCA 45 (8 February 2001); and *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (12 December 2002).

156 J Weir and S Ross, 'Beyond Native Title: The Murray Lower Darling Rivers Indigenous Nations' in F Morphy and B Smith (eds), *The Social Effects of Native Title, Recognition, Translation Co-existence* CAEPR Research Monograph No. 27 ANU E-Press (2007), p 187. At: http://epress.anu.edu.au/caepr_series/no_27/pdf/ch10.pdf (viewed 18 December 2008)

Text Box 12: Murray Lower Darling Rivers Indigenous Nations (MLDRIN)

MLDRIN is described as an extension of the traditional decision making frameworks of the traditional owner groups represented and emphasises the distinct responsibilities that traditional owners hold in their traditional country. MLDRIN argue that greater representation and rights are required in order to fulfil their responsibilities to country.¹⁵⁷

The role of MLDRIN is to perform the following functions on behalf of the traditional owners of the Murray-Darling River Valleys, including to:

- facilitate and advocate for the participation of the ten Indigenous Nations within the different levels of government in natural resource management and planning, particularly ecological restoration projects, and lobbying for Indigenous water allocations
- develop responses on cultural, social and economic impacts of development on Indigenous traditional country
- be a collective united voice for the rights and interests of their traditional country and its peoples.¹⁵⁸

In particular, MLDRIN provides strategic advice from traditional owners to natural resource management agencies responsible for water and forestry issues.¹⁵⁹ MLDRIN engage primarily with State Governments and departments, the Murray-Darling Basin Commission, and the Commonwealth Government, and it works closely with environmental groups who are concerned with the health of the rivers and their interconnected waterways.

The significant work done by MLDRIN to develop positive relationships with various governments, including those who opposed the native title claim, has resulted in positive responses to the aspirations of traditional owners. This is reflected in the Memorandum of Understanding signed between MLDRIN and the former New South Wales Department of Land and Water Conservation (in 2001) and the Murray-Darling Basin Commission (2006), and the Yorta Yorta Cooperative Land Management Agreement for the Barmah Millewah forest between MLDRIN and the Victorian Government in 2004. Both of these documents recognise the traditional ownership of the lands related.

Additionally, the Murray-Darling Basin Commission has provided funding to MLDRIN on three yearly funding cycles since 2003 and renewed in 2006. This included funding for meetings and a full-time co-ordinator. MLDRIN have also received support and

157 J Weir and S Ross, 'Beyond Native Title: The Murray Lower Darling Rivers Indigenous Nations' in F Morphy and B Smith (eds), *The Social Effects of Native Title, Recognition, Translation Co-existence* CAEPR Research Monograph No. 27 ANU E-Press (2007), p 189. At: http://epress.anu.edu.au/caepr_series/no_27/pdf/ch10.pdf (viewed 18 December 2008)

158 J Weir and S Ross, 'Beyond Native Title: The Murray Lower Darling Rivers Indigenous Nations' in F Morphy and B Smith (eds), *The Social Effects of Native Title, Recognition, Translation Co-existence* CAEPR Research Monograph No. 27 ANU E-Press (2007), p 187. At: http://epress.anu.edu.au/caepr_series/no_27/pdf/ch10.pdf (viewed 18 December 2008)

159 Murray Lower Darling Rivers Indigenous Nations, Correspondence with T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, 22 October 2008.

formal acknowledgement of their role from other stakeholders in the form of funding, employment positions, and inclusion on boards and in briefings.¹⁶⁰

As discussed above, MLDRIN is also actively engaged in national and international debates and forums to advance Indigenous peoples position concerning water and climate change. The experience of MLDRIN in negotiating with governments about significant degradation of the Murray-Darling River Basin will be crucial to the national dialogue about water and climate change policy development. The engagement of MLDRIN in forums such as the United Nations Permanent Forum on Indigenous Issues and meetings of the International Union of Conservation and Nature will also bring to the debate, an understanding of the human rights based approach to policy development.

Case study two of this report includes a more detailed discussion on the Murray-Darling River Basin.

(c) Australian Indigenous Water Group

The Australian Indigenous Water Group was established as a result of discussions held at the International Water Experts Forum at the Garma Festival in Arnhem Land in August 2008. Attendee's were concerned about the need for a mechanism that provides for an exchange of both international perspectives, but also for northern and southern Australians to come together and discuss a common way forward on what is one of the greatest challenges of this time, water. The meeting clearly identified a need for national Indigenous dialogue on water.

This group will provide the first opportunity for Indigenous peoples from across the whole of Australia to discuss national water reform as it effects their communities aspirations, interests and issues.¹⁶¹

Participants in the Australian Indigenous Water Group include Indigenous representatives with skills and knowledge on specific water related issues. These issues include national Indigenous water management, policy and planning.

Text Box 13: The primary objectives of the Australian Indigenous Water Focus Group

The primary objectives of the Australian Indigenous Water Focus Group are to:

- dialogue and overview specific water issues
- formulate strategic development of a future National Indigenous Water Roundtable dialogue and engagement for the national level
- examine guiding principles for Indigenous water planning that can go toward informing the process for Indigenous Water Planning Forum
- consider the formation of a National Indigenous representative group 'Steering Committee' to assist with directing Indigenous engagement and process in the national arena.

160 J Weir and S Ross, 'Beyond Native Title: The Murray Lower Darling Rivers Indigenous Nations' in F Morphy and B Smith (eds), *The Social Effects of Native Title, Recognition, Translation Co-existence* CAEPR Research Monograph No. 27 ANU E-Press (2007), p 188. At: http://epress.anu.edu.au/caepr_series/no_27/pdf/ch10.pdf (viewed 18 December 2008).

161 Australian Indigenous Water Focus Group, *Delegate Information*, 18 November 2008, South Australian Parliament House, Adelaide, South Australia.

The National Indigenous Water Focus Group is planning a National Indigenous Water Roundtable and a National Indigenous Water Forum in February 2009.

(d) South West Aboriginal Land and Sea Council

The South West Aboriginal Land and Sea Council (SWALSC) is the representative body for the traditional owners of south west of Western Australia, the Nyoongar people. Nyoongar people represent one of the largest groups in Australia with an estimated 30,000 people living in the south west of Western Australia. SWALSC is directed by an elected council to oversee the advancement of Nyoongar culture, language, society and native title rights.

In September 2006 Justice Wilcox heard the Single Noongar native title claim over parts of the Perth Metropolitan area, which included water. It was a significant native title claim as it challenged the extent of extinguishment over a metropolitan area, which included water rights.

Waugal, the Rainbow serpent is significant to Nyoongar peoples as the creator of all waterways, underground and surface water, the billabongs, the streams, the creeks, the lakes and the springs, the wetlands, and the Swan [River].¹⁶² The spiritual, cultural and social values in Nyoongar country is significant to the Yarragadee aquifer, Gngangara Mound, Collie groundwater, the Shannon River that is one of the states few remaining wild rivers and many other water landscapes.

SWALSC is advocating along with other Indigenous groups such as NAILSMA to ensure that Indigenous water rights and interests are fully represented in the proposed Water Resources Bill in Western Australia.

6. Pressures on Indigenous Waters

As climate change, drought, mismanagement and over-allocation of water in Australia has significantly decreased the availability and quality of water resources, these issues impact on Indigenous peoples' ability to fulfil our cultural and customary responsibilities on sea and water country.

There are a wide range of pressures on Indigenous waters. As with climate change, water is not only a concern for Indigenous peoples in Australia but is increasingly becoming a global issue. The competing pressures on water come from areas including:

- personal and domestic use
- recreational uses
- the environment
- climate change
- agriculture and aquaculture
- industry
- energy

As discussed in chapters 4 and 5, the Australian Government has acknowledged that climate change poses the 'greatest long-term threat to important sea [and water] country, including our world heritage listed Great Barrier Reef.'¹⁶³

162 Senior Nyungar Elder (2002) speech in Western Australia. See, 'Aboriginal Cultural Values on the Gngangara Mound' for the Department of Environment WA p 28.

163 Australian Government, Great Barrier Reef Marine Park Authority, *Climate Change and the Great Barrier Reef: A Vulnerability Assessment*. At: http://www.gbrmpa.gov.au/corp_site/info_services/publications/misc_pub/climate_change_vulnerability_assessment/climate_change_vulnerability_assessment (viewed 10 September 2008).

The impacts of climate change will be further compounded by each of the issues listed above. For example the current drought; the over-allocation of water for agricultural, industrial and energy purposes; and the artificial control and management of our waterways, changes the natural flows of waters. These natural flows are relied upon to maintain the health of the waterways, such as ephemeral wetlands which rely on a cycle of both wet and dry periods and uphold Indigenous spiritual, cultural, social and economic values.

Changes to water country as a result of activities such as the building of dams, increasing demands from farming and mining, cattle, feral animals, weeds, run off from pesticides and fertilisers, and changing patterns of burning, have led to significant water degradation. Additionally these activities have significantly reduced the capacity for our rivers and waterways to replenish and keep up with the current levels of supply and demand. This is starkly evident in parts of the Murray-Darling River Basin.

With water yields in the Murray-Darling Basin estimated to decline from between 43 percent to 64 percent depending on the area by 2070,¹⁶⁴ there must be certainty that the water that is available, and investment in infrastructure, is not wasted.¹⁶⁵

Indigenous peoples and their water rights are recognised as being at severe risk from climate change.¹⁶⁶

The impacts of climate change such as a decline in the availability of marine resources through increased bad weather and sea level rise may [also] lead to changes in traditional and Indigenous identity and belonging, loss of culture and traditional knowledge and disruption of customs and practices.¹⁶⁷

For example, rising sea levels in the Torres Strait could see many Indigenous peoples become climate refugees and internally displaced peoples. Some Islanders will be forced to leave their lands and migrate to other islands or the mainland. Erosion of infrastructure and decreased freshwater availability are also of particular concern. Case study one of this report provides a detailed discussion on the Torres Strait Islands and climate change.

Climate change impacts have only just begun to be factored into water planning processes in Australia.¹⁶⁸ The potential impacts of climate change will be different all over Australia. However the impacts on water are much more urgent across the south. In general, large parts of Australia are expected to face increasing freshwater stress, increased drought frequency and increasing temperatures which will result in more evaporation.

The uncertain effects of climate change mean that water law and policy must be adaptive and flexible, and take into account further scientific information as it becomes available. It will also mean that water law and policy will need to interplay

164 J Austin, L Zhang, R Jones, P Durack, W Dawes and P Hairsine *Implications of Climate Change for Natural Resource Management: an assessment of the impact of climate change on catchment salt and water balances in the Murray-Darling Basin*, Report to the Australian Greenhouse Office, Canberra (2006).

165 For a further case study on the Murray-Darling see Case study 2.

166 For more information on climate change see chapters 4 and 5.

167 Australian Government, Great Barrier Reef Marine Park Authority, *Climate Change and the Great Barrier Reef: A Vulnerability Assessment*, p 753. At: http://www.gbrmpa.gov.au/corp_site/info_services/publications/misc_pub/climate_change_vulnerability_assessment/climate_change_vulnerability_assessment (viewed 10 September 2008).

168 Under the National Water Initiative water access entitlement holders bear the risk of any change in water allocation resulting from climate change and drought impacts. Australian Government, National Water Commission, *National Water Initiative*. At: <http://www.nwc.gov.au/www/html/117-national-water-initiative.asp> (viewed 28 August 2008).

and link directly with legislation and policy relating to climate change. This will be particularly important for example where forest plantations are being considered as carbon offset investment opportunities and will require water resources.

Competing pressures for water increases the potential for conflict in the future and violations of human rights, particularly the right to water.¹⁶⁹ With this in mind, it will be crucial for the Government to ensure the full and effective participation and engagement of Indigenous peoples in processes that affect our distinct rights to water and to recognise the importance in Indigenous Traditional Ecological Knowledge and Management that has been exercised by Indigenous peoples for thousands of years. This is not only to ensure that our priorities and needs are considered in the development of water policy, but also to ensure that water policy does not further disadvantage Indigenous peoples and communities.

7. Opportunities for Indigenous peoples to access their right to water

Over the last 20 years, we have witnessed the rapid decline of water quality and quantity in Australian waterways. Indigenous peoples have significant expertise and knowledge of the landscape and waterscape on their sea and water country. Among the Indigenous expertise is to protect Indigenous rights to retain their intellectual property in knowledge sharing.

The beneficiaries of water policy in Australia have predominantly been governments, and those who can afford to engage in industry or agriculture. Since colonisation Indigenous peoples have had very little opportunity to benefit from the waters that Indigenous peoples have secured and managed over thousands of years, for future generations.

The Australian Government are currently revising legislative arrangements that deal with water, the environment, native title and cultural heritage, and they are developing the legislative framework to address climate change. Governments and Indigenous peoples must take advantage of this opportunity to include provisions that provide for, and protect, Indigenous access to water for economic and sustainable development.

Significant research is also underway to examine the future for water in Australia. The CSIRO and other research organisations are working extensively in the Murray-Darling Basin to try to repair some of the damage to the river system, to provide advice on the extent to which the current level of activity (extraction) can continue, and the possibilities for future water trading. Additionally, significant work is taking place in northern Australia, particularly in the Daly River Region in the Northern Territory, with traditional owners to identify their water priorities. While agricultural production is already a feature of this region, there is also the potential for this area to replace the agricultural food production previously provided by the Murray-Darling River Basin, if previous lessons have been learnt about over-allocation in water resources.

As identified by the CSIRO:

In the period 2002-2004, the Daly River region produced over \$340 million in revenue. With the region generating revenue such as this, it is vital that Aboriginal people are invited to participate, not only for the cultural knowledge they possess, but to also

¹⁶⁹ J von Doussa, *Climate change and human rights: a tragedy in the making*, (Human Rights Law Seminar at the Australian Human Rights Commission, Sydney, 20 August 2008). At: <http://www.humanrights.gov.au/legal/seminars/index.html> (viewed 26 August 2008).

become participants in an activity that has a direct impact on their lives and their traditional lands.¹⁷⁰

While Indigenous peoples in different regions will have diverse aspirations and requirements, water legislation and policy should provide as a minimum for:

- the recognition of Indigenous peoples distinct rights to water, the environment, economic development, and participation and engagement in the *Water Act 2007*
- mandatory Indigenous representation on national and state and territory water committees, such as the Murray-Darling Basin Authority and associated advisory committee's, the National Water Commission and the Great Barrier Reef Marine Park Authority
- Indigenous stewardship and joint management of sea and water country, particularly where the waters are significant to Indigenous peoples, and those listed as world or national heritage, or Ramsar sites of significance
- provision of environmental water services by traditional owners
- Indigenous cultural water allocations¹⁷¹ that are separate to environmental, economic and social water allocations
- enterprise development including commercial fishing, aquaculture, and ecotourism
- inclusion in and access to water trading options provided for under the *Water Act 2007*
- the protection and recognition of Indigenous knowledge as a legal right.¹⁷²

8. Conclusion

This chapter has provided a discussion about the overall water environment in Australia, the priorities for water for both non-Indigenous and Indigenous peoples, and the need for serious consideration of participation, engagement, inclusion and outcomes for Indigenous peoples in the area of water policy.

While water resources in northern Australia remain relatively abundant compared to the southern states, northern Australia is not yet faced with the significant environmental problems of the south. However, the north is not immune from the impacts of climate change or human-induced error.¹⁷³

In accordance with human rights principles, Indigenous peoples must be actively engaged in all levels of management and decision-making that directly or indirectly impacts their livelihoods and communities. Effective participation in decision making about water resources is essential to ensuring non-discriminatory treatment and equality before the law.

170 CSIRO, *Recognising and protecting Indigenous values in water resource management*. (Report from a workshop held at CSIRO, Darwin, Northern Territory, 5-6 April 2008).

171 The Indigenous Nations of the Murray-Darling River Nations distinguish between cultural and environmental water. They argue that the difference between environmental and cultural water is that it is the Indigenous peoples themselves deciding where and when water should be delivered based on traditional knowledge and their aspirations. This ensures Indigenous peoples are empowered to fulfil their responsibilities to care for country.

172 See chapter 7 of this Report for further discussion about the protection of Indigenous knowledge.

173 See Hyder Consulting, *Assessment of the Direct and Indirect Risks from Human Induced Climate Change to Key Ecosystems in Northern Australia*, A report prepared for WWF-Australia (2008). At: <http://www.wwf.org.au/publications/climate-change-risk-assessment-northern-australia> (viewed 10 September 2008).

Ongoing government support and resources will be crucial to ensuring that the serious issues being faced in the south, including the exclusion of Indigenous peoples from the debate, are not repeated.

Recommendations

- 6.1 That in accordance with international law and Australia's international obligations, the Australian Government:
- i) protects and promotes Indigenous peoples right to the equal exercise and enjoyment of their human right to water, by ensuring their full and effective participation and engagement in the development and implementation of water policy
 - ii) recognises and respects the importance in Indigenous traditional ecological knowledge and management of biodiversity and conservation, including water
 - iii) give greater consideration to the relevance of international mechanisms such as the Ramsar Convention and the Convention on Biological Diversity in the development of water policy.
- 6.2 That governments fully recognise the significance of water to Indigenous peoples and incorporate their distinct rights, including as water users, to water, the environment, economic development, participation and engagement into the Water Act 2007. In particular, the Water Act should be amended to include a distinct category that provides for "Indigenous cultural water use" and access entitlements.
- 6.3 That the Government amend the Native Title Act to extend the right to negotiate to apply to water resources, including development and extraction applications, and water management planning.
- 6.4 That governments develop and include in the National Water Initiative, specific guidelines on how to implement Indigenous water rights:
- i) that the National Water Commission give higher priority to ensuring that the values and interests of Indigenous peoples are considered, including:
 - the explicit inclusion of Indigenous interests in Water Plans
 - recognition and protection of existing rights and interests held by Indigenous peoples, including native title and cultural heritage rights
 - consistency across jurisdictions in providing for the recognition and protection of Indigenous rights and interests
 - consistency across jurisdiction in implementing Water Plans and National Water Policy.
 - ii) that National Water Policy includes explicit links to climate change policy.

- 6.5 That government departments that have specific responsibilities for Indigenous affairs (for example, the Department of Families, Housing, Community Services and Indigenous Affairs and the Attorney-General's Department) work closely with the Department of Environment, Water, Heritage and the Arts, and the Department of Climate Change, to ensure that the social, cultural, environmental and economic impacts and opportunities for Indigenous peoples arising from water and climate change are identified and addressed.
- 6.6 That Australian governments commit to a framework that provides for Indigenous participation in water policy that includes national principles for engagement with Indigenous peoples, including:
- the adoption of, and compliance with, the principle of free, prior and informed consent
 - the protection of Indigenous interests, specifically access to our lands, waters and natural resources and ecological knowledge
 - the protection of Indigenous areas of significance, biodiversity, and cultural heritage
 - the protection of Indigenous knowledge relevant to climate change adaptation and mitigation strategies
 - access and benefit-sharing through partnerships between the private sector and Indigenous communities
 - non-discrimination and substantive equality
 - access to information and support for localised engagement and consultation.

Chapter 7

The protection of Indigenous knowledge's

.....

1. Overview

Over the millennia, Indigenous peoples have developed a close and unique connection with the lands and environments in which they live. They have established distinct systems of knowledge, innovation and practices relating to the uses and management of biological diversity on these lands and environments.

Much of this knowledge forms an important contribution to research and development, particularly in areas such as pharmaceuticals, and agriculture and cosmetic products. In the context of these uses, Indigenous peoples claim that their rights as traditional holders and custodians of this knowledge are not adequately recognised or protected. They demand not only recognition and protection of this knowledge, but also the right to share equitably in benefits derived from the uses of this knowledge.¹

It comes as no surprise that all societies argue for policies and practices that help sustain their cultures and systems of knowledge. This is because culture is fundamental to identity – it is our past, our present and our future. We need our culture to sustain us and to keep us well. But importantly, we need culture because it provides the fundamental essence of who we are, how we practice our Lore, how we interact with each other, and how we meet our familial and collective obligations and responsibilities. Indigenous peoples have been struggling for many years to sustain our culture, despite a history of policies designed to eradicate or assimilate our languages, our belief systems and our ways of living.

In an interesting reversal of thinking, we are living in times where some core values of Western society are being questioned. Some of the world's best thinkers now argue that aspects of Western culture seriously threaten global ecologies. And we are witnessing global efforts to rethink some of these Western value systems – these very same values that have been imposed on our people to the detriment of our cultures and our systems of knowledge. This is most striking where governments are working to develop responses to climate change. Some of the responses to this will be dependent on Indigenous traditional knowledge.

Indigenous peoples have the ability to interpret and react to the impacts of climate change in creative ways, drawing on our traditional knowledge's and other technologies to develop solutions which may also help the wider society in its attempts to cope with the changing climate. This reinforces the argument that Indigenous peoples are vital to, and active

¹ M Davis, (Science, Technology, Environment and Resources Group), *Biological Diversity and Indigenous Knowledge*, 29 June 1998, Research Paper 17 1997-98, Parliament of Australia. At: www.aph.gov.au/library/Pubs/RP/1997-98/98rp17.htm, (viewed 22 September 2008).

in, the enhancement of the ecosystems that inhabit our lands and are integral to the survival of Australia's uniqueness.² However, the current system does not adequately recognise or protect the role Indigenous peoples play or the knowledge we collectively possess.

According to the United Nations Permanent Forum on Indigenous Issues, there are Indigenous peoples living in approximately 70 countries throughout the world, constituting approximately 350 million people. This includes around 5,000 distinct peoples and over 4,000 languages and cultures, as well as many diverse Indigenous legal systems.

As discussed in chapter 5, Indigenous people's cultural and intellectual knowledge and understanding of our environments will be required to contribute to mitigate and adapt to climate change in the national interest. The reliance on Indigenous traditional knowledge in Australia is already well established, particularly in regions that possess valuable biodiversity. For example, the Federal Government's Green Paper on Climate Change in Australia discusses the need to investigate 'the feasibility of co-operative research centres to *collect* Indigenous knowledge'.³

In the context of the climate change law and policy, and the development of emissions trading schemes, the development of international and domestic mechanisms that adequately protect Indigenous peoples from the misappropriation and misuse of traditional knowledge is urgent.

Text Box 1: What is Indigenous traditional knowledge?

The International Council for Science (ICSU) define traditional knowledge as:

A cumulative body of knowledge, know-how, practices and representations maintained and developed by peoples with extended histories of interaction with the natural environment. These sophisticated sets of understandings, interpretations and means are part and parcel of a cultural complex that encompasses language, naming and classification systems, resource use practices, ritual, spirituality and worldview.⁴

Indigenous traditional knowledge generally means traditional practices and culture and the knowledge of plants and animals and of their methods of propagation. It includes:

- expressions of cultural values
- beliefs
- rituals and community laws
- knowledge regarding land and ecosystem management.⁵

2 United Nations Permanent Forum on Indigenous Issues, *Climate Change and Indigenous peoples*. At: http://www.un.org/esa/socdev/unpfii/en/climate_change.html, (viewed 21 July 2008).

3 The Hon Peter Garrett, Minister for the Environment, Water, Heritage and the Arts, Correspondence with the Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for Information in preparation of the Native Title Report 2008, 29 August 2008.

4 International Council for Science, *Science and Traditional Knowledge, Report from the ICSU Study Group on Science and Traditional Knowledge*, Paper delivered to 27th General Assembly of ICSU, Rio De Janeiro, Brazil, September 2002, p 3.

5 United Nations Permanent Forum on Indigenous Issues, *Report of the Secretariat on Indigenous traditional knowledge*, UN Doc E/C.19/2007/10. At: <http://daccessdds.un.org/doc/UNDOC/GEN/N07/277/15/PDF/N0727715.pdf?OpenElement> (viewed 15 September 2008).

The rights to Indigenous traditional knowledge are generally owned collectively by the Indigenous community (or language group, or tribal group), as distinct from the individual. It may be a section of the community or, in certain circumstances, a particular person sanctioned by the community that is able to speak for or make decisions in relation to a particular instance of traditional knowledge.

It is more often unwritten and handed down orally from generation to generation, and it is transmitted and preserved in that way. Some of the knowledge is of a highly sacred and secret nature and therefore extremely sensitive and culturally significant and not readily publicly available, even to members of the particular group.

The maintenance and protection of Indigenous traditional knowledge is crucial to the maintenance of Indigenous culture. It is also valuable to development policy and operations and the advancement of understandings of sustainability on a global scale.

Collective intellectual property aspects of traditional knowledge

Indigenous traditional knowledge is not simply a different type of intellectual property; it is a completely different entity.⁶

Intellectual Property is a generic term for the various rights or bundles of rights which the law accords for the protection of creative effort, in particular, the economic investment in creative effort. Australian intellectual property regimes are established and governed primarily through Commonwealth legislation.⁷

The World Intellectual Property Organisation (WIPO) Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, argue that the recognition and protection of indigenous traditional knowledge has largely taken place within the parameters of intellectual property law. However, they also recognise that this has been limited due to the western constructs of intellectual property laws failure to be able to accommodate the vastly different requirements for the protection of indigenous traditional knowledge, such as the communal transgenerational concepts of ownership, versus a focus on creativity and individualism.⁸

While the UNPFII, WIPO and other international bodies are involved in raising the importance of this issue and progressing the debate around the development of international mechanisms to protect indigenous traditional knowledge's, it remains unresolved. This is largely due to the diversity of indigenous communities including:

- that indigenous communities are not uniform and reflect various competing and often conflicting values, particularly in relation to the variety and diversity of customary law and indigenous traditional knowledge
- that systems of customary law devised to keep social order and maintain culture are localised, existing in a particular place, in a particular community, and related to particular circumstances of the environment and livelihoods

6 United Nations Permanent Forum on Indigenous Issues, *Report of the Secretariat on Indigenous traditional knowledge*, UN Doc E/C.19/2007/10. At: <http://daccessdds.un.org/doc/UNDOC/GEN/N07/277/15/PDF/N0727715.pdf?OpenElement> (viewed 15 September 2008).

7 Law Reform Commission of Western Australia, *Aboriginal Customary Laws, Final Report – The interaction of Western Australian law with Aboriginal law and culture*, Project 92, September 2006, p 265, Government of Western Australia.

8 United Nations Permanent Forum on Indigenous Issues, *Report of the Secretariat on Indigenous traditional knowledge*, UN Doc E/C.19/2007/10, p8. At: <http://daccessdds.un.org/doc/UNDOC/GEN/N07/277/15/PDF/N0727715.pdf?OpenElement> (viewed 15 September 2008).

- the conflicting world views of intellectual property and ownership and protection
- the variety of terminology used and lack of a clear definition of what indigenous knowledge's are
- the intersection between indigenous traditional knowledge and various areas of the law, such as intellectual property law, environmental law, heritage and sustainable development, and more recently climate change law and policy, at international, national and local levels
- the need for an international standard that is able to be implemented at the national level
- the role of customary law and indigenous communities in providing guidance and protection to Indigenous peoples' traditional knowledge.⁹

2. Classes of threat to Indigenous traditional knowledge

The preservation of Indigenous traditional knowledge is under threat. A report provided by the Australian Institute of Aboriginal and Torres Strait Islander Studies to the Secretariat of the Convention on Biological Diversity identified the following threats to Indigenous traditional knowledge:

- political pressures – the recognition and standing of Indigenous traditional knowledge, including involvement in policy and legislative development
- cultural integrity
- social and economic pressures – assimilation, poverty, education, marginalisation of women, loss of language
- territorial pressures – deforestation, forced displacement and migration
- exploitation of traditional knowledge – bioprospecting, objectification
- development policy – agricultural and industrial development
- globalisation and trade liberalisation.¹⁰

The lack of protection on a national level intensifies these threats. Climate change impacts and responses, particularly those resulting in increased bioprospecting¹¹ of Indigenous knowledge, will also heighten the urgency of the need for a national Indigenous traditional knowledge regime.

9 United Nations Permanent Forum on Indigenous Issues, *Report of the Secretariat on Indigenous traditional knowledge*, UN Doc E/C.19/2007/10. At: <http://daccessdds.un.org/doc/UNDOC/GEN/N07/277/15/PDF/N0727715.pdf?OpenElement> (viewed 15 September 2008).

10 G Kelly (AIATSIS), *Report on Threats to the Practice and Transmission of Traditional Knowledge Regional Report: Asia and Australia*, Phase II of the Composite Report on the Status and Trends Regarding the Knowledge, Innovation and Practices of Indigenous Peoples and Local Communities relevant to the Conservation and Sustainable Use of Biodiversity, 2005, UN Doc: UNEP/CBDWG8J/4/INF/4, p 25.

11 Bioprospecting refers to the exploration of biodiversity (plant-related substances) for commercially valuable generic and biochemical resources. Law Reform Commission of Western Australia, *Aboriginal Customary Laws, Final Report – The interaction of Western Australian law with Aboriginal law and culture*, Project 92, September 2006, p 266, Government of Western Australia.

Within Australia, despite the existing evidence base in this area, mechanisms that protect and maintain Indigenous traditional knowledge remain significantly inadequate at all levels of government. As identified by the Law Reform Commission of Western Australia, as intellectual property laws are the jurisdiction of the Commonwealth Government:

the ability of the Western Australian Government to recognise Aboriginal customary laws in relation to Indigenous cultural and intellectual property rights is limited to the development of protocols and to the support of relevant amendment to Commonwealth legislation.¹²

Additionally, the Land Justice Group specifically asked the Victorian Government in 2006 to amend their Aboriginal Heritage Act to include the protection 'folklore' as defined in Part IIA of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984.¹³

The AHA (s 4) should be amended to ensure the protection of Aboriginal 'folklore' as defined under the Commonwealth *ATS/ Heritage Protection Act 1984* (s 21A) to include 'songs, rituals, ceremonies, dances, art, customs and spiritual beliefs'.¹⁴

This request fell on deaf ears and Part IIA has subsequently been repealed.

3. The existing framework

Indigenous peoples' right to have our traditional knowledges recognised and protected is currently provided for in a number of existing international treaties. In Australia, there are a number of national and regional (State Government) arrangements that attempt to address the lack of protection domestically, including cultural heritage legislation. Additionally, there is an increasing body of research that provides useful principles for inclusion in international and domestic regimes established to protect and maintain Indigenous traditional knowledge.

3.1 International

The table below provides a summary of the major international instruments that recognise the right of Indigenous peoples to protect and enjoy their traditional knowledge. Appendix 4 provides an overview of the international framework for Indigenous engagement in climate change policy. Indigenous traditional knowledge is relevant and should be incorporated into policies developed across each of the areas considered in Appendix 4.

12 Law Reform Commission of Western Australia, *Aboriginal Customary Laws, Final Report – The interaction of Western Australian law with Aboriginal law and culture*, Project 92, September 2006, p 265, Government of Western Australia.

13 *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, s 21A.

14 Victorian Traditional Owner Land Justice Group, *Towards a Framework Agreement between The State of Victoria and the Victorian Traditional Owner Land Justice Group*, Discussion Paper, 26 August 2006, p 5.

Table 1: Summary of major international instruments that recognise Indigenous peoples' right to protect their traditional knowledge	
International Instrument	Provision
The Universal Declaration of Human Rights	Article 27
The International Covenant on Economic, Social and Cultural Rights	Article 15, paragraph 1 (c)
The International Covenant on Civil and Political Rights	Article 27
The Convention on Biological Diversity	Article 8 (j)
The International Labour Organisation Convention No.169 concerning Indigenous and Tribal Peoples in Independent Countries	Articles 13, 15, 23
Agenda 21	Paragraph 26.1
The Rio Declaration on Environment and Development	Principle 22
The Declaration on the Rights of Indigenous Peoples	Articles 11 and 31

The Declaration on the Rights of Indigenous Peoples draws on other major instruments to provide the most explicit recognition internationally of Indigenous people's rights to their traditional knowledge:

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect, and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.¹⁵

The Convention on Biological Diversity provides specific opportunities for introducing measures to recognise and protect Indigenous knowledge. Article 8(j) of the Convention encourages countries to:

...respect, preserve and maintain knowledge, innovations and practices of Indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices.¹⁶

15 The Declaration on the Rights of Indigenous Peoples, Article 31, paragraph 1.

16 Convention on Biological Diversity, Article 8(j).

Article 8(j) specifically gives recognition firstly to the traditional knowledge, innovations and practices of Indigenous people and local communities while also speaking strongly for its protection, preservation and maintenance. Article 8(j) also provides that the use of Indigenous traditional knowledge, innovations and practices should only occur with the approval and involvement of the Indigenous or local community and that any benefits that arise from its use is to be shared with the people or community from which that knowledge originated.¹⁷

The World Summit on Sustainable Development and the Conference of Parties of the Convention on Biological Diversity are currently lobbying internationally for intensified negotiations towards an 'international regime on access and benefit-sharing' to be completed by 2010.¹⁸ This would coincide with the commencement of Australia's Carbon Pollution Reduction Scheme and provide Indigenous peoples with an opportunity to share in the economic benefits that may arise as a result of the relevant knowledge we possess about our lands and waters.

The World Intellectual Property Organisation (WIPO) Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the IGC), which met for the first time in 2001, is in discussions about draft provisions for the enhanced protection of traditional knowledge and traditional cultural expressions against misappropriation and misuse.¹⁹

WIPO's work in these areas involves close cooperation with other international organisations and NGOs, as well as the organisation of a wide range of capacity-building activities. Capacity-building resources include practical guidelines for indigenous and local communities on developing intellectual property protocols, and information technology tools for managing intellectual property issues when digitising intangible cultural heritage, being developed within the Creative Heritage Project.²⁰

Significant consideration to the development of an international regime on access and benefit-sharing has also been given by the United Nations Permanent Forum on Indigenous Issues.

Discussions to date have considered the following issues:

- human rights treaties and other existing or emerging instruments that are applicable to traditional knowledge and genetic resources
- elements of customary law that are vested in traditional knowledge protection and transmission
- an analysis of indigenous participation, including the levels and roles in decision-making, including measures to ensure compliance with free, prior and informed consent
- options and opportunities in the proposed certificate of origin, source or legal provenance from genetic resources

17 H Fourmile-Marrie & G Kelly, *The Convention on Biological Diversity and Indigenous People: Information concerning the implementation of decisions of the Conference of the Parties under the Convention on Biological Diversity*, Centre for Indigenous History and the Arts, University of Western Sydney, 2000, pp 3-4.

18 J Carino (Tebtebba Foundation), *International Expert Group Meeting on the Convention on Biological Diversity's International Regime on Access and Benefit-Sharing and Indigenous Peoples' Human Rights*, United Nations Permanent Forum on Indigenous Issues Secretariat, 17-19 January 2007, New York.

19 The World Intellectual Property Organisation, *Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions/Folklore*. At: <http://www.wipo.int/tk/en/> (viewed 15 December 2008).

20 W Wendland and J van Weelde, *WIPO's capacity building tools for indigenous cultural heritage*, Arts Law Centre of Australia Online. At: <http://www.artslaw.com.au/ArtLaw/Archive/08WIPOtools.asp> (viewed 15 December 2008).

- the role of customary law in the protection of traditional knowledge and development of regimes on access to genetic resources and benefit-sharing.²¹

In applying these principles at the domestic and national level, it is envisaged that an international access and benefit-sharing regime would be supported by national legislation that addresses a *sui-generis* protection of indigenous traditional knowledge, innovation and practices, ensuring compliance.

The United Nations University (UNU) Centre on Traditional Knowledge

The UNU has been exploring the feasibility of establishing a research and training centre on traditional knowledge since 2004. A Traditional Knowledge Institute (TKI) has since been established and is hosted at Charles Darwin University, with an initial commitment of \$2.5m AUD (approx \$2.2m USD) from the Northern Territory Government.²² This centre has the potential to play a key role in efforts addressing traditional knowledge and indigenous communities, both nationally and internationally. However it will require a strong policy and financial commitment from the Australian Government including dedicated capital resources to enable the UNU TKI to become sustainably self sufficient.

Text Box 2: The United Nations University (UNU) Centre on Traditional Knowledge

The UNU TKI aims to promote and strengthen research on traditional knowledge of indigenous and local communities conducted from a global perspective, grounded in local experience. In particular, the Institute seeks to contribute to:

- change mindsets and paradigms about the role of traditional knowledge in our society and in key sectors such as academia, government and business
- increasing the recognition and importance of traditional knowledge
- developing the application of traditional knowledge in a broad range of contexts (e.g. ecosystem management and biotechnology)
- developing strategies for the preservation and maintenance of traditional knowledge
- facilitating the development of the capacity of indigenous communities to conserve and apply their knowledge in an increasingly globalised economy.²³

21 United Nations Permanent Forum on Indigenous Issues, *Report of the international expert group meeting on the international regime on access and benefit-sharing and indigenous peoples' human rights of the Convention on Biological Diversity*, Sixth Session, 14-25 May 2007, New York.

22 United Nations University, Institute of Advance Studies, *Traditional Knowledge Initiative*. At: http://www.ias.unu.edu/sub_page.aspx?catID=107&ddlID=302, (viewed 12 January 2009).

23 For further information, see the Traditional Knowledge Initiative website at: www.unutki.org.

The UNU TKI will investigate the threats to traditional knowledge, methods to maintain traditional knowledge, and the resilience of traditional knowledge systems. It will also consider the links between conventional and indigenous scientific systems while addressing some of the important questions this raises both in terms of research and capacity development, including:

- traditional knowledge and climate change
- traditional knowledge and water management
- traditional knowledge and biological resources
- traditional knowledge and marine management
- traditional knowledge and forestry
- traditional knowledge and international policy making.

A UNU-IAS pilot research programme on traditional knowledge, the Traditional Knowledge Initiative, was established in 2007 with the generous support of the Christensen Fund, a leading US based foundation active in the areas of cultural and biological diversity. The pilot programme is an important step in the process towards the establishment of a permanent UNU TKI.

Key pilot activities include:

- Climate change and indigenous peoples
- A book on the role of traditional knowledge
- Water management and traditional knowledge
- Traditional Knowledge Bulletin
- Pacific Islands programme.²⁴

3.2 Domestic

In Australia, non-Indigenous intellectual property is protected under various intellectual property laws, including:

- the *Copyright Act 1968*²⁵
- the *Patents Act 1990*²⁶
- the *Trademarks Act 1995*²⁷

Australian domestic policy provides for the recognition of Indigenous traditional knowledge in its environmental protection regulations, particularly concerning knowledge held by Indigenous people about biological resources. However, existing intellectual property laws offer limited scope for the recognition of Indigenous

24 For further information, see the Traditional Knowledge Initiative website at: www.unutki.org.

25 Copyright is a set of specific rights granted to the creators of literary, dramatic, artistic or musical works and the makers of sound recordings, films and audio recordings. Copyright does not need to be registered as defined by the Australian Institute of Aboriginal and Torres Strait Islander Studies, and the Aboriginal and Torres Strait Islander Commission, *Our Culture: Our Future, Report on Australian Indigenous Cultural and Intellectual Property Rights*, M Frankel and T Janke, 1998, p 51.

26 A patent is a right to protect inventions. The patentee is granted the exclusive right (for 20 years), to exploit and to authorise another person to exploit the invention. To be patentable, and invention must include a product or process which is new, involve an inventive step and be useful. Patent protection is not automatic and patents must be applied for by the Australian Industrial Property Organisation, as defined by the Australian Institute of Aboriginal and Torres Strait Islander Studies, and the Aboriginal and Torres Strait Islander Commission, *Our Culture: Our Future, Report on Australian Indigenous Cultural and Intellectual Property Rights*, M Frankel and T Janke, 1998, p 565.

27 A trademark is a sign used to indicate the trade origin or source of goods or services. A trade mark is registered for up to 10 years initially and applications can be made to have the trademark renewed. *Trade Marks Act 1995*, s 17.

peoples' rights in biodiversity related knowledge and practices.²⁸ While native title, cultural heritage and environmental laws provide some recognition and protection, it is currently insufficient.

The *Native Title Act 1993* (Cth), establishes principles for the recognition of customary property rights, including rights in knowledge, based on the traditional laws and customs observed and practiced by the native title holders. While traditional owners are required to disclose their traditional knowledge in order to have their native title recognised, it provides some protection for Indigenous traditional knowledge particularly in relation to information about particular sites that may be classified by the traditional owner groups as being sacred. This information is classified as confidential, in many instances held by the Native Title Representative Body or Land Council, and access is restricted only to those who have been nominated by the traditional owners of that information.

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1986* also has the potential to provide broader protection for Indigenous traditional knowledge. The purpose of this legislation is to preserve and protect areas and objects on lands and waters that are of particular significance to Indigenous people in accordance with their traditional law and custom.²⁹ Although this legislation is currently limited to the protection of physical heritage, and provides no mechanism to protect the secret and sacred knowledge relating to significant areas,³⁰ the Minister has the power to make a declaration in relation to areas of significance to Indigenous peoples which are under threat. A declaration under subsection 9(1) or 10(1) in relation to an area shall:

- a) describe the area with sufficient particulars to enable the area to be identified
- b) contain provisions for and in relation to the protection and preservation of the area from injury or desecration.³¹

Provisions provide for both emergency coverage of threatened areas for up to 60 days, and coverage for longer periods of time as declared by the Minister.³²

Additionally, the National Heritage List and the Commonwealth Heritage List are established under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act), the Australian Government's central piece of environmental legislation. However, this Act and the Heritage lists are limited to matters of national environmental significance. Issues of non national significance come under the jurisdiction of the States.

The Australian Heritage Council, the expert advisory body on heritage matters which draws on the knowledge of Indigenous experts, and the Indigenous Advisory Committee (IAC) provide advice to the Minister on the operation of the EPBC Act taking into account their knowledge of the land, conservation and the use of biodiversity.

28 M Davis, (Science, Technology, Environment and Resources Group), *Biological Diversity and Indigenous Knowledge*, 29 June 1998, Research Paper 17 1997-98, Parliament of Australia. At: <http://www.aph.gov.au/library/Pubs/RP/1997-98/98rp17.htm> (viewed 22 September 2008).

29 Australian Government, Department of the Environment, Water, Heritage and the Arts, *Heritage, Protecting Indigenous heritage places*. At: <http://www.environment.gov.au/heritage/about/indigenous/index.html> (viewed 25 September 2008).

30 M Davis, (Science, Technology, Environment and Resources Group), *Biological Diversity and Indigenous Knowledge*, 29 June 1998, Research Paper 17 1997-98, Parliament of Australia. At: <http://www.aph.gov.au/library/Pubs/RP/1997-98/98rp17.htm> (viewed 22 September 2008).

31 *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, s 11.

32 *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, ss 9-10.

As discussed in chapter 5, the scope of the IAC to be directive in their engagement is limited by their terms of reference. This is of particular concern in the development of climate change policy.

The protection of Indigenous peoples intellectual property will be a specific challenge for government and Indigenous groups, particularly where the protection of intellectual property in Australia is afforded as an individual protection and does not provide for communal or group protection.

4. Protection of Indigenous Knowledge's

Opportunities to preserve and value Indigenous Traditional Knowledge are endangered by the range of problems within our environment and communities today. Avenues for the preservation of traditional knowledge are fading and are at risk of being lost altogether. Loss of traditional knowledge will result in a decline of Indigenous identity and a severe reduction in the recognition and understanding of an invaluable sustainable knowledge system.³³

At the local level, Indigenous people have also been actively developing strategies for recording and protecting their traditional knowledge's. For example, traditional owners in Cape York have been actively recording their knowledge about the biodiversity and ecosystems which inhabit their lands and waters, through the Traditional Knowledge Revival Pathways (TKRP).

Text Box 3: Traditional Knowledge Revival Pathways³⁴

The TKRP was developed from the aspirations of Indigenous Elders, to preserve and recognise traditional indigenous knowledge. Through a grassroots methodology, the project is connecting Indigenous groups, to recognise and strengthen traditional knowledge to benefit environment and community well being, for present and future generations.

This project is based on ensuring the survival of cultural knowledge, and the opportunity to demonstrate practices that have the ability to 'innovate' contemporary management and community outcomes for the benefit of all generations to come.

The TKRP supports community aspirations with the recording and applying of their knowledge to strengthen outcomes for traditional and contemporary wellbeing. TKRP is currently operating with seven traditional owner groups including:

- Wik people – Aurukun
- Northern Gulf Indigenous Savannah Group (NGISG – includes seven language groups)
- Kuku-Thaypan people – Lakefield National Park, Laura region
- Buru people – Chinacamp – Wujal Wujal, Cooktown region
- Kuku Yalanji people – Shipton Flats, Wujal Wujal, Cooktown region
- Lamalama people – Kalpowar – Laura region
- Moriori – New Zealand

33 Traditional Knowledge Revival Pathways. At: http://tkrp.com.au/index.php?option=com_content&task=view&id=17&Itemid=26 (viewed 1 October 2008).

34 All information contained in this case study was obtained from the TKRP website. At: http://tkrp.com.au/index.php?option=com_content&task=view&id=17&Itemid=26 (viewed 1 October 2008).

TKRP seeks to support Indigenous elders to mentor the process of Indigenous knowledge research and recording throughout Australia and with interests Internationally. The project has a demonstrated record of success, with a focused methodology, that has been built over time from local communities, and is rapidly disbursing its recording and mentoring methodology into other regions including New Zealand.

Project Outcomes

The Project is achieving the following:

- Transfer of traditional knowledge from the elders to their young people based on the traditional methods as determined by the elders.
- Digitally recording this traditional knowledge before it is lost forever.
- Storing knowledge onto multi-versions of a digital knowledgebase.
- Incorporating traditional knowledge in cooperative land management strategies and building this practice into “best practice principles” in all land management.
- Building and improving the profile of Indigenous knowledge and its appreciation with other land managers and users both nationally and internationally (eg. pastoralists, government and the general public).
- Creating practical action, research-driven, projects as live case studies to better collaborative land and community management.

Community Training Program

The training program is based on community mentoring community on the skills and methodology of the TKRP project. This includes:

- the recording of traditional knowledge
- use of digital camera
- editing and database use
- TKRP presentations
- traditional land management projects
- TKRP Web.

TKRP is continuing to develop by assisting the elders to conduct their own research on their own terms.

The traditional owner groups that live on the Murray-Darling River Basin have also been conducting use and occupancy mapping of the activities they conduct on their lands and waters

Text Box 4: Use and Occupancy Mapping: Murray-Darling River Basin

The Living Murray Indigenous Partnerships Program (IPP) established in February 2006, recognises Indigenous people's spiritual and cultural connection to their country, and their aspirations to be actively involved in managing the environment.

An approach, developed in Canada,³⁵ and adopted by the Living Murray Indigenous Partnerships Program, is being introduced to engage Indigenous people in a meaningful way. It does this by applying a social science methodology to map Indigenous people's contemporary relationship with icon sites. This approach is based on the principle of informed consent. A Canadian First Nations Chief highlighted the importance of this work:

The Supreme Court of Canada, in *Delgamuukw*, said Aboriginal title must be established by evidence of physical and legal occupancy, or tenure. The principal way of establishing physical occupancy is to plot the First Nation's land use activities on a map. Therefore it is important for nations and their advisors to know how to do this research and how to do it well.³⁶

The Murray-Darling Basin Commission (MDBC) has worked with the Murray Lower Darling River Indigenous Nations (MLDRIN) and other representatives of Traditional Owners to gain support for the concept, and then undertook a pilot mapping project with an Indigenous community. As part of this pilot, use and occupancy maps have successfully been produced for several individuals at two of the icon sites.

Indigenous input will be provided into each of the icon site environmental management plans. Indigenous Working Groups will ensure that Indigenous involvement is undertaken in culturally appropriate ways. Local Indigenous facilitators are planned to be employed at each of the icon sites to work with their communities.

Over time these communities will produce "Use and Occupancy Maps" for each icon site. These maps can help identify and record the spiritual, cultural, environmental, social and economic interests of Indigenous people for each icon site. This approach focuses on Indigenous people's contemporary connections to the land in a way that can be directly related and considered in developing icon site management activities.

Considerable effort has been invested in involving and informing Indigenous community members regarding use and occupancy mapping, which is now gaining strong support within the Indigenous community.

35 T Tobias, *Chief Kerry's Moose: a guidebook to land use and occupancy mapping, research design and data collection*, A joint publication of the Union of BC Indian Chiefs and Ecotrust Canada, 2000, Canada. At: <http://www.ubcic.bc.ca/Resources/tus.htm> (viewed 12 January 2009).

36 Chief Arthur Manual in T Tobias, *Chief Kerry's Moose: a guidebook to land use and occupancy mapping, research design and data collection*, A joint publication of the Union of BC Indian Chiefs and Ecotrust Canada, 2000, Canada. At: <http://www.ubcic.bc.ca/Resources/tus.htm> (viewed 12 January 2009).

The maps can also be used as a basis for cultural heritage protection and management, and help monitor the impacts of The Living Murray. Use and occupancy mapping is sometimes referred to as the 'geography of oral tradition'.

The MDBC is working with Charles Sturt University to undertake a research and monitoring program to measure the impacts and benefits of use and occupancy mapping at the icon sites.

The MDBC is also closely involved in the development of the world's first textbook on use and occupancy mapping, currently being researched and written in Canada. This involvement will ensure that the textbook will be relevant to Australia and available for future training needs in the Murray-Darling Basin.³⁷

While processes for recording traditional knowledge are already developed by Indigenous communities, principles contained in recommendation 81 of *the Final Report of the Law Reform Commission in Western Australia on Customary Law*³⁸ (which are also in accordance with international standards) provide a good foundation for the protection of this knowledge and will be integral to the development of an appropriate regime, including to:

- undertake direct consultation with Indigenous peoples as to their customary law and other requirements
- ensure compliance with Indigenous peoples' customary law and other requirements
- seek free, prior and informed consent for the use of any Indigenous traditional knowledge from the custodians of that traditional knowledge
- seek free, prior and informed consent for access to Indigenous lands and waters for any purposes, including collection
- ensure ethical conduct in any consultation, collection, or other processes
- ensure the use of agreements on mutually agreed terms with Indigenous peoples for all parts of the process
- devise equitable benefit-sharing arrangements
- acknowledge the contribution of Aboriginal peoples.

Additionally, the Desert Knowledge Cooperative Research Centre (Desert Knowledge CRC) have developed a comprehensive *Protocol for Aboriginal Knowledge and Intellectual Property*.³⁹ This protocol has been developed with specific relevance to the Aboriginal communities that Desert Knowledge CRC work closely with.

The protocol acknowledges and respects that those Aboriginal communities and groups will have their own protocols that must also be observed, understood and engaged with as an essential ongoing part of any process with Indigenous people. However, the protocol serves as a very useful guide towards best practice in ethics, confidentiality, equitable benefit sharing and in managing research information.⁴⁰

37 Information for this case study was obtained from, Murray-Darling Basin Commission, *Indigenous Partnership*. At: http://www.mdbc.gov.au/subs/annual_reports/AR_2006-07/part1_1.htm, and The Living Murray, *Indigenous Partnerships*, at: <http://www.thelivingmurray.mdbc.gov.au/communities> (both viewed 1 October 2008).

38 Law Reform Commission of Western Australia, *Aboriginal Customary Laws, Final Report – The interaction of Western Australian law with Aboriginal law and culture*, Project 92, September 2006, p 267, Government of Western Australia.

39 Desert Knowledge Cooperative Research Centre, *Protocol for Aboriginal Knowledge and Intellectual Property*. At: <http://www.desertknowledgecrc.com.au> (viewed 15 December 2008).

40 Desert Knowledge Cooperative Research Centre, *Protocol for Aboriginal Knowledge and Intellectual Property*. At: <http://www.desertknowledgecrc.com.au> (viewed 15 December 2008).

I have included the complete protocol at Appendix 8 as an example of what should be considered in the development of a National Indigenous Knowledge Use and Protection Protocol.

5. Principles of Protection

In the previous chapters, I have raised a number of concerns and opportunities relevant to Indigenous peoples and our communities to engage in emerging carbon and environmental markets and the developing national emissions trading scheme. I have discussed the significant contributions and compromise that Indigenous people in Australia will be required to make to assist with mitigation and adaptation efforts, and to increase the capacity for the Australian environment not only to withstand the impacts of climate change, but to ensure that our country is in a position to effectively participate in the emerging global markets.

A huge proportion of Australia's habitat is on Indigenous owned land...we rely on the dedication and skills of indigenous people to conserve it for all Australians.⁴¹

This reliance on and expectation of Indigenous peoples in addressing the impacts of climate change in turn deserves the respect and protection of Indigenous peoples right to engage effectively in related processes. If this relationship is to be mutual it will also mean that Indigenous people will need to be protected in doing so.

In conclusion, Indigenous people and various reports on the subject of Indigenous traditional knowledge, including the *Our Culture: Our Future*, argue that the current legal framework offers limited recognition and protection of Indigenous traditional knowledge.

Research suggests the introduction of *sui generis* legislation to protect Indigenous intellectual and cultural material in a way which accords with Indigenous customary law.

Such a system will require mechanisms firstly, that do not assume that Indigenous traditional knowledge is freely and absolutely available for appropriation, and secondly, in light of emerging climate change policy, affords the right to share equitably in the benefits derived from the uses of this knowledge.

The principle of free, prior, and informed consent should be applied to the use and appropriation of Indigenous knowledge. The United Nations Permanent Forum concluded that:

The free, prior and informed consent principle in the context of intellectual property can mean defensive protection in which any use of traditional knowledge, and in particular acquisition of intellectual property rights over traditional knowledge and derivatives thereof, without the prior consent of the community, can be prevented. Free, prior and informed consent can also support positive forms of protection, in which, for example, a community would have the right to authorize any use or commercialization of its knowledge, either by itself or by a third party, that would be to the community's financial and other advantage.⁴²

41 The Hon P Garrett, Minister for the Environment, Water, Heritage and the Arts, *Millions for ranger work*, Koori Mail, Wednesday 22 October 2008, p 3.

42 United Nations Permanent Forum on Indigenous Issues, *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples*, New York, 17-19 January 2005, p 8. At: http://www.hreoc.gov.au/social_justice/conference/engaging_communities/report_of_the_international_workshop_on_fpic.pdf (viewed 3 October 2008).

5.1 A framework for protection

As identified earlier, the current arrangements for protecting intellectual property rights are inadequate to protect Indigenous knowledges. With significant challenges such as climate change ahead, a national legislative regime is urgently required to enable the fullest possible protection for Indigenous knowledges.

A national legislative regime framework for the protection of Indigenous peoples in a changing climate will require:

- An appropriate legislative framework
- National principles for engagement
- National principles for protection

(a) A Legislative framework that provides for:

- the full participation and engagement of Indigenous peoples in negotiations and agreements between parties
- the adoption of and compliance with the principle of free, prior and informed consent
- the protection of Indigenous interests, specifically access to our lands, waters and natural resources
- the protection of Indigenous areas of significance, biodiversity, and cultural heritage
- the protection of Indigenous knowledge relevant to climate change adaptation and mitigation strategies
- access and benefit-sharing through partnerships between the private sector and Indigenous communities
- non-discrimination and substantive equality.

(b) National Principles for Engagement⁴³ that includes:

A Human Rights-Based Approach to Development

- All policies and programs relating to indigenous peoples and communities must be based on the principles of non-discrimination and equality, which recognise the cultural distinctiveness and diversity of indigenous peoples.
- Governments should consider the introduction of constitutional and or legislative provisions recognising indigenous rights.
- Indigenous peoples have the right to full and effective participation in decisions which directly or indirectly affect their lives.
- Such participation shall be based on the principle of free, prior and informed consent, which includes governments and the private sector providing information that is accurate, accessible, and in a language the indigenous peoples can understand.
- Mechanisms should exist for parties to resolve disputes, including access to independent systems of arbitration and conflict resolution.

⁴³ These guidelines were developed at the *International Workshop on Engaging with Indigenous Communities* which took part at the *International Conference on Engaging Communities* in Brisbane in August 2005. Human Rights and Equal Opportunity Commission and United Nation Permanent Forum on Indigenous Issues, *Engaging the marginalised: Report of the workshop on engaging with Indigenous communities*, HREOC, Sydney, and United Nations, New York 2005. At: www.humanrights.gov.au/social_justice/.

Mechanisms for representation and engagement

- Governments and the private sector should establish transparent and accountable frameworks for engagement, consultation and negotiation with indigenous peoples and communities.
- Indigenous peoples and communities have the right to choose their representatives and the right to specify the decision-making structures through which they engage with other sectors of society.

Design, negotiation, implementation, monitoring, and evaluation

- Frameworks for engagement should allow for the full and effective participation of indigenous peoples in the design, negotiation, implementation, monitoring, evaluation and assessment of outcomes.
- Indigenous peoples and communities should be invited to participate in identifying and prioritising objectives, as well as in establishing (short and long term) targets and benchmarks.
- There should be accurate and appropriate reporting by governments on progress in addressing agreed outcomes, with adequate data collection and disaggregation.
- In engaging with indigenous communities, governments and the private sector should adopt a long term approach to planning and funding that focuses on achieving sustainable outcomes and which is responsive to the human rights and changing needs and aspirations of indigenous communities.

Capacity-building

- There is a need for governments, the private sector, civil society and international organisations and aid agencies to support efforts to build the capacity of indigenous communities, including in the area of human rights so that they may participate equally and meaningfully in the planning, design, negotiation, implementation, monitoring and evaluation of policies, programs and projects that affect them.
- Similarly, there is a need to build capacity of government officials, the private sector and other non-governmental actors, which includes increasing their knowledge of indigenous peoples and awareness of the human rights based approach to development so that they are able to effectively engage with indigenous communities.
- This should include campaigns to recruit and then support indigenous people into government, private and non-government sector employment, as well as involve the training in capacity building and cultural awareness for civil servants.
- There is a need for human rights education on a systemic basis and at all levels of society.

(c) National Principles for Protection that:

- undertake direct consultation with Indigenous peoples as to their customary law and other requirements.
- ensure compliance with Indigenous peoples' customary law and other requirements.
- seek free, prior and informed consent for the use of any Indigenous traditional knowledge from the custodians of that traditional knowledge.
- seek free, prior and informed consent for access Indigenous lands and waters for any purposes, including collection.
- ensure ethical conduct in any consultation, collection, or other processes.
- ensure the use of agreements on mutually agreed terms with Indigenous peoples for all parts of the process.
- devise equitable benefit-sharing arrangements.
- formally acknowledge the contribution of Aboriginal peoples, including for example co-authorship.

Recommendations	
7.1	That the Australian Government engage Indigenous peoples around the country to develop a legislative framework that provides for protection of Indigenous knowledge's and a protocol for the use of this knowledge.
7.2	That all governments amend relevant legislation and policy, such as the Native Title Act, Cultural Heritage legislations and various land rights regimes, to ensure consistency with the proffered national legislative regime framework. This should extend to all legislation that relates to Indigenous peoples and their rights and interests such as education, health, tourism, the arts and so on.
7.3	The proffered national legislative regime framework should be applied to all climate change and water policy and processes, including domestic and international negotiations relating to carbon, water and environmental markets.

Case study 1

Climate change and the human rights of Torres Strait Islanders

.....

Imagine the sea rising around you as your country literally disappears beneath your feet, where the food you grow and the water you drink is being destroyed by salt, and your last chance is to seek refuge in other lands...¹

This is a reality that a group of Indigenous Australians – the Torres Strait Islanders – are facing. If urgent action is not taken, the region and its Indigenous peoples face an uncertain future, and possibly a human rights crisis.

The Torres Strait Islands are a group of over 100 islands spread over 48,000km², between the Cape York Peninsula at the tip of Queensland, and the coast of Papua New Guinea.

It is a unique region, geographically and physically, and it is home to a strong, diverse Indigenous population. Approximately 7,105 Torres Strait Islanders live in the Torres Strait region, in 19 communities across 16 of the islands.² Each community is a distinct peoples – with unique histories, traditions, laws and customs. Although the communities are diverse, the islands are often grouped by location,³ and together they form a strong region whose considerable influence is evidenced by the very existence of native title law today.

The Torres Strait is home to the group of Islanders from Mer who first won recognition of native title, with Eddie (Koiki) Mabo triggering the land rights case which recognised Aboriginal peoples and Torres Strait Islanders' native title to the land and affirmed that Australia was not *terra nullius*

1 Avaaz, 'Avaaz petition', *Email to the Australian Human Rights Commission*, 3 September 2008.

2 Australian Bureau of Statistics, *Population Distribution, Aboriginal and Torres Strait Islander Australians 2006*, 4705.0. At: <http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4705.02006?OpenDocument> (viewed September 2008).

3 See www.tsra.gov.au. There are also two large Torres Strait communities on the mainland in Bamaga and Seisia. The Islands are grouped as: Northern Division (Boigu Island, Dauan Island, Saibai Island); Eastern Islands (Erub/Darnley Island, Mer/Murray Island, Ugar/Stephen Island); Western Division (Moa [which includes the Kubin and St Pauls communities], Badu Island, Mabuigai Island); Central Division (Masig/Yorke Island, Poruma/Coconut Island, Warraber/Sue Island, Iama/Yam Island); Southern Division (Waiben/Thursday Island [which includes the TRAWQ and Port Kennedy communities], and the Inner Islands of Hammond Island, Muralug/Prince of Wales Island, Ngurupai/Horn Island). There are a total of over 47,000 Torres Strait Islander people living throughout Australia. See Australian Bureau of Statistics, *Population Distribution, Aboriginal and Torres Strait Islander Australians 2006*, 4705.0. At: <http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4705.02006?OpenDocument> (viewed September 2008).

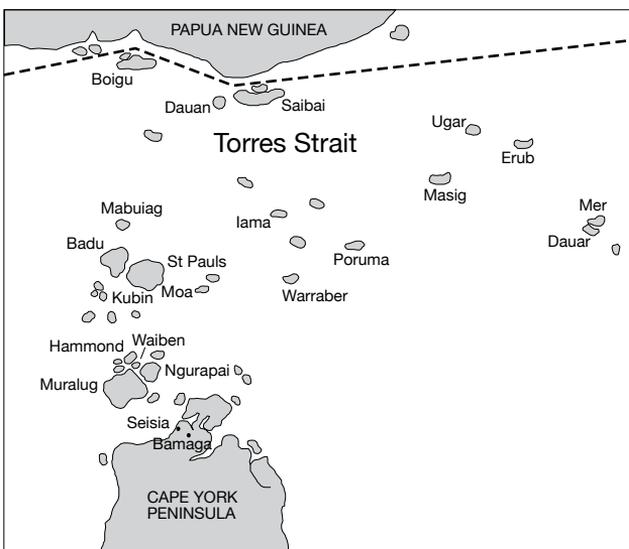
(belonging to no one) when the British arrived. It is also home to a group of Aboriginal people, known as the Kaurareg of the Kaiwalagal (inner) group of islands.

The Islanders were also successful in forming their own governance structure:

In 1994, in response to local demands for greater autonomy, the Torres Strait Regional Authority (TSRA) was established to allow Torres Strait [I]slanders to manage their own affairs according to their own *ailan kastom* (island custom) and to develop a stronger economic base for the region.⁴

Additionally, the region has its own flag symbolising the unity and identity of all Torres Strait Islanders,⁵ and the area is subject to a bilateral treaty with Papua New Guinea which recognises and guarantees their traditional fishing rights and traditional customary rights.⁶

Map 1: The Torres Strait region⁷



4 Australian Broadcasting Corporation Radio Australia, *Places: Torres Strait Islands*. At: http://www.abc.net.au/ra/pacific/places/country/torres_strait_islands.htm (viewed August 2008).

5 Torres Strait Regional Authority, *Torres Strait Flag*. At: <http://www.tsra.gov.au/the-torres-strait/torres-strait-flag.aspx> (viewed September 2008). In July 1995, the flag was officially recognised as a 'flag of Australia'. The flag was designed by the late Mr. Bernard Namok.

6 *Treaty between Australia and the Independent State of Papua New Guinea concerning Sovereignty and Maritime Boundaries in the area between the two Countries, including the area known as Torres Strait, and Related Matters*, Australian Treaty Series 1985, No 4. Article 11 provides for the free movement and traditional activities including traditional fishing and Article 12 provides for the exercise of traditional customary rights. At: <http://www.austlii.edu.au/au/other/dfat/treaties/1985/4.html> (viewed September 2008). For more information on the treaty see http://www.dfat.gov.au/geo/torres_strait/index.html (viewed September 2008).

7 Map recreated by Jo Clark based on the *Regional Map* provided by the Torres Strait Regional Authority located at <http://www.tsra.gov.au/the-torres-strait/regional-map.aspx>.

Despite these strengths, many Australians would be hard pushed to locate the region on a map, and the Torres Strait Islands and its Indigenous peoples are often overlooked in policy, research and Indigenous' affairs discourse in Australia. This is also true for many issues on the islands related to the environment. As one researcher has put it, the Torres Strait Islands have effectively been 'left off the map in research on biophysical change in Australia'.⁸

Yet the Islanders' cultures, societies and economies rely heavily on the ecosystem and significant changes to the region's environment are already occurring. For example, in mid 2005 and in early 2006,⁹ a number of the islands were subject to king tides which were so high that the life of one young girl was threatened, and significant damage was caused.¹⁰ Although there is no proof that these were attributable to climate change, Islanders believe that it is climate change that is threatening their existence.

Anecdotally, Islanders have voiced their concerns to me about the impact of climate change and the visible changes that are already occurring, such as increased erosion, strong winds, land accretion, increasing storm frequency and rougher seas of a sort that elders have never seen or heard of before. They have seen the impact these events have had on the number of turtles nesting, their bird life and sea grass. They feel that their lives are threatened both physically and culturally.¹¹

Abnormally high tides...the seasons are shifting, and the land is eroding. Birds' migration patterns have altered, and the turtles and dugongs (sea cow) that are traditionally hunted for meat have grown scarce. People are no longer certain when to plant their crops: cassava, yams, sugarcane, bananas and sweet potato.¹²

The potential impacts of climate change are severe. Ultimately, if predictions of climate change impacts occur, it poses such great threats to the very existence of the Islands that the government must seriously consider what the impact will be on the Islanders' lives, and provide leadership so that cultural destruction is avoided. As the United Nations Permanent Forum on Indigenous Issues recognised 'Indigenous peoples, who have the smallest ecological footprints, should not be asked to carry the heavier burden of adjusting to climate change.'¹³

8 D Green, 'How Might Climate Change Affect Island Culture in the Torres Strait?' (2006) *CSIRO Marine and Atmospheric Research Paper 011*, p 1. At: http://www.cmar.csiro.au/e-print/open/greendl_2006a.pdf (viewed September 2008).

9 There were a number of different incidences of king tides in the region. In 2005, king tides were experienced on the Island of Mer. In 2006, the islands of Boigu and Saibai, Poruma, Iama, Masig and Warraber were all subject to king tides. For further information see Queensland Government Environmental Protection Agency, *2006 King Tides in Torres Strait*, Fact Sheet 2006-1. At: <http://www.epa.qld.gov.au/publications?id=1864> (viewed September 2008).

10 L Minchin, 'Not waving but drowning at our back door', *The Age*, 12 August 2006. At: <http://universal-salvage.org.uk/pdf/AustraliaTidesRising.pdf> (viewed September 2008).

11 See for example, D Billy, Kulkalgal (Torres Strait Islanders) Corporation, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 18 September 2008; J Akee, Mer Gedkem Le (Torres Strait Islanders) Corporation, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 29 September 2008.

12 The Independent, 'Sinking without a trace: Australia's climate change victims', *The Independent*, 5 May 2008. At: <http://www.independent.co.uk/environment/climate-change/sinking-without-trace-australias-climate-change-victims-821136.html> (viewed September 2008).

13 Economic and Social Council Permanent Forum on Indigenous Issues, *Recommendations on the special theme, 'climate change, biocultural diversity and livelihoods: the stewardship role of indigenous peoples and new challenges'*, UN Doc E/C.19/2008/L.2 (2008). At: <http://daccessdds.un.org/doc/UNDOC/LTD/N08/317/04/PDF/N0831704.pdf?OpenElement> (viewed September 2008).

It is ironic that Torres Strait Islanders have been able to weather 400 years of European colonisation as a distinct Indigenous entity, only to have to face the problem of cultural annihilation as a result of rising sea level due to the greenhouse effect.¹⁴

Because of its geography, with many of the Islands being low-lying coral cays with little elevation, the Torres Strait Islands will be the inadvertent litmus test for how the Australian and Queensland governments distribute the costs and burden of climate change:

Socially, climate change raises profound questions of justice and equity: between generations, between the developing and developed worlds; between rich and poor within each country. The challenge is to find an equitable distribution of responsibilities and rights.¹⁵

The lessons learned will have wide application. FaHCSIA states that there are '329 discrete Indigenous communities across Australia located within 10 kilometres of the coast. The majority of these communities are located in remote locations.'¹⁶

1. Potential effects of climate change on the Torres Strait Islands

Both domestic and international research on climate change impacts identify the difficult situation that the Torres Strait Islanders face in order to survive:

Torres Strait Islanders and remote Indigenous communities have the highest risks and the lowest adaptive capacity of any in our community because of their relative isolation and limited access to support facilities. In some cases the Torres Strait islands are already at risk from inundation.¹⁷

Primarily there will be three major impacts with considerable flow on effects which overlap and form a cycle of destruction:

1. A temperature rise is predicted. 'By 2070, average temperatures are projected to increase by up to 6°C.'¹⁸
2. A rise in sea level is predicted. 'While global average sea level rise is projected between 9 and 88cm by 2100, sea level rise around some areas of the Australian coast and the Pacific region has recently shown short term larger-than-average variation.'¹⁹ Some of the Islands in the Torres Strait are barely a metre above sea level. However, the impact that sea

14 J Toscano, 'Torres Strait Islanders facing annihilation from rising sea levels', *Melbourne Independent Media Centre*, 17 August 2006, citing L Minchin. At: <http://melbourne.indymedia.org/news/2006/08/119708.php> (viewed September 2008).

15 Australian Human Rights Commission, *Background paper: Human rights and climate change* (2008) p 1, citing the Rt Hon David Miliband MP. At: http://www.humanrights.gov.au/pdf/about/media/papers/hrandclimate_change.pdf (viewed September 2008).

16 Department of Families, Housing, Community Services and Indigenous Affairs, *Submission to the House of Representatives Standing Committee on Climate Change, Water, Environment and the Arts inquiry into climate change and environmental impacts on coastal communities* (5 August 2008) p 5. At: <http://www.aph.gov.au/HOUSE/committee/ccwea/coastalzone/subs/sub099.pdf> (viewed September 2008).

17 PMSEIC Independent Working Group, *Climate change in Australia: regional impacts and adaptation – managing the risk for Australia*, Report prepared for the Prime Minister's Science, Engineering and Innovation Council (2007) p 28. At: <http://www.dest.gov.au/NR/rdonlyres/CE5D024E-8F58-499F-9EEB-D2D638E7A345/17397/ClimateChangeinAustraliareport.pdf> (viewed September 2008).

18 Sharing Knowledge, UNSW, *Climate change in the Torres Strait, Australia: Summary of climate impacts* (2007). At: http://www.ciel.org/Publications/Climate/CaseStudy_TorresStraitAus_Dec07.pdf (viewed September 2008).

19 D Green, 'How Might Climate Change Affect Island Culture in the Torres Strait?' (2006) *CSIRO Marine and Atmospheric Research Paper 011*, p 1. At: http://www.cmar.csiro.au/e-print/open/greendi_2006a.pdf (viewed September 2008).

level rise will have on the Islands could vary. It could include loss of land, sediment supply and possibly island growth, or increased inundation events.

3. An increase in severe weather events is predicted. 'Rainfall patterns are also likely to become more extreme, with projected changes of between +17 to -35 per cent (in the wet and dry seasons respectively compared to 1990 levels) in the region. This suggests the potential for heavier downpours during the monsoon as well as more extended dry spells.'²⁰

We see the big trees near the beach... falling down. The seagrass that the dugongs eat you used to find long patches of it, but not any more. The corals are dying, and the sand is getting swept away and exposing rock.²¹

These three primary impacts will flow on to potentially effect every aspect of society, including:²²

- reduced freshwater availability
- greater risk of disease from flooded rubbish tips and changing mosquito habitats
- erosion and inundation of roads, airstrips and buildings near the shoreline
- degradation of significant cultural sites, such as graveyards near the shoreline
- change in the location or abundance of plants and animals (and their habitat), such as turtles, dugongs and mangroves. This could extend to a complete loss of some plants and animals
- change in coral growth or coral bleaching
- inundation or destruction of essential infrastructure such as housing, sewerage, water supply, power
- inability to travel between islands
- movement of disease borne/pest insects from the tropical north
- loss of land, accretion or creation of land.

20 Sharing Knowledge, UNSW, *Climate change in the Torres Strait, Australia: summary of climate impacts* (2007). At: http://www.ciel.org/Publications/Climate/CaseStudy_TorresStraitAus_Dec07.pdf (viewed September 2008).

21 The Independent, 'Sinking without a trace: Australia's climate change victims', The Independent, 5 May 2008, citing Ron Day, a Murray Island elder and community leader. At: <http://www.independent.co.uk/environment/climate-change/sinking-without-trace-australias-climate-change-victims-821136.html> (viewed September 2008).

22 See Sharing Knowledge, UNSW, *Climate change in the Torres Strait, Australia: summary of climate impacts* (2007). At: http://www.ciel.org/Publications/Climate/CaseStudy_TorresStraitAus_Dec07.pdf (viewed September 2008). See also Torres Strait Regional Authority, *Submission No 2 to the House of Representatives Standing Committee on Climate Change, Water, Environment and the Arts Inquiry into climate change and environmental impacts on coastal communities* (27 November 2008). At: <http://www.aph.gov.au/house/committee/ccwea/coastalzone/subs/sub007b.pdf> (viewed December 2008). For more information on climate change impacts, see Council of Australian Governments, *National Climate Change Adaptation Framework* (2007). At: http://www.coag.gov.au/coag_meeting_outcomes/2007-04-13/ (viewed September 2008).

Text Box 1: Impacts of climate change on small islands

The Intergovernmental Panel on Climate Change summarises the impacts of climate change on small islands as:²³

Small islands, whether located in the tropics or higher latitudes, have characteristics which make them especially vulnerable to the effects of climate change, sea-level rise and extreme events.

Deterioration in coastal conditions, for example through erosion of beaches and coral bleaching, is expected to affect local resources, e.g., fisheries, and reduce the value of these destinations for tourism.

Sea-level rise is expected to exacerbate inundation, storm surge, erosion and other coastal hazards, thus threatening vital infrastructure, settlements and facilities that support the livelihood of island communities.

Climate change is projected by mid-century to reduce water resources in many small islands, e.g., in the Caribbean and Pacific, to the point where they become insufficient to meet demand during low-rainfall periods.

With higher temperatures, increased invasion by non-native species is expected to occur, particularly on mid- and high-altitude islands.

The consequences of these impacts will be greater because the Islanders are Indigenous. It is widely recognised that Indigenous communities are much more vulnerable to climate change because of the social and economic disadvantage Indigenous communities already face:²⁴

Vulnerability to climate change can be exacerbated by the presence of other stresses... vulnerable regions face multiple stresses that affect their exposure and sensitivity as well as their capacity to adapt. These stresses arise from, for example, current climate hazards, poverty and unequal access to resources, food insecurity, trends in economic globalisation, conflict, and incidence of diseases such as HIV/AIDS.²⁵

Many of these stresses are found in the Torres Strait Islands' communities. The Islands are remote, the Islanders do not have access to the same services and infrastructure as other Australians and the health and other social statistics of the Islanders are similar to other Indigenous Australians, that is, they are significantly worse than non-indigenous Australians:

23 Intergovernmental Panel on Climate Change, 2007: M.L. Parry, O.F. Canziani, J.P. Palutikof, P.J. van der Linden and C.E. Hanson, (eds), 'Summary for Policy Makers' in *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, 7, p 15. At: <http://www.ipcc.ch/pdf/assessment-report/ar4/wg2/ar4-wg2-intro.pdf> (viewed September 2008).

24 Secretariat of the United Nations Permanent Forum on Indigenous Issues, *Climate change: an overview*, United Nations Department of Economic and Social Affairs (2007), p 4. At: http://www.un.org/esa/socdev/unpfii/documents/Climate_change_overview.doc (viewed September 2008).

25 Intergovernmental Panel on Climate Change, 2007: M.L. Parry, O.F. Canziani, J.P. Palutikof, P.J. van der Linden and C.E. Hanson, (eds), 'Summary for Policy Makers' in *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, 7-22. At: <http://www.ipcc.ch/pdf/assessment-report/ar4/wg2/ar4-wg2-intro.pdf> (viewed September 2008).

Social and economic disadvantage further reduces the capacity to adapt to rapid environmental change, and so this problem is compounded on many of the Islands which lack adequate infrastructure, health services and employment opportunities.²⁶

2. Climate change and the human rights of Torres Strait Islanders

The predicted impact of climate change on the islands is severe. It threatens the land itself and the existence of the Islands. The impacts predicted above threaten the Islanders lives and their culture. If the serious predictions are not headed, and no action is taken, the Torres Strait Islands will face a human rights crisis.

In September 2007, the Interagency Support Group on Indigenous Issues pointed out that:

the most advanced scientific research has concluded that changes in climate will gravely harm the health of indigenous peoples' traditional lands and waters and that many of plants and animals upon which they depend for survival will be threatened by the immediate impacts of climate change.²⁷

Yet to date, action on climate change has focused on environment and conservation, and there has been little recognition of the need to protect Indigenous peoples' rights in the response to climate change. This must change.

By ratifying various human rights instruments, Australia has agreed to *respect, protect and fulfil* the rights contained within it.²⁸

- The obligation to *respect* means Australia must refrain from interfering with or curtailing the enjoyment of human rights.
- The obligation to *protect* requires Australia to protect individuals and groups against human rights abuses – whether by private or government actors.
- The obligation to *fulfil* means that Australia must take positive action to facilitate the enjoyment of basic human rights.²⁹

26 D Green & K Ruddock, 'What are the legal dimensions to climate change in the Torres Strait?' (2007) 70 *University of New South Wales Faculty of Law Research Series*, p 48. At: <http://law.bepress.com/cgi/viewcontent.cgi?article=1072&context=unswrps> (viewed September 2008).

27 Economic and Social Council Permanent Forum on Indigenous Issues, *Interagency Support Group on Indigenous Peoples Issues*, UN Doc E/C.19/2008/CRP.2 (2008), p 1. At: http://www.un.org/esa/socdev/unpfi/documents/E_C19_2008_8.pdf (viewed September 2008).

28 United Nations Office of the High Commissioner for Human Rights, *What are Human Rights?* (2008). At: <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx> (viewed September 2008).

29 Australian Human Rights Commission, *Background paper: Human rights and climate change* (2008), p 9. See UN Committee on the Rights of the Child, *General comment No 5 – General Measures of Implementation of the Convention on the Rights of the Child* (2003), UN Doc CRC/GC/2003/5. At: [http://www.unhcr.ch/tbs/doc.nsf/\(symbol\)/CRC.GC.2003.5.En](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/CRC.GC.2003.5.En) (viewed September 2008); UN Committee on Economic, Social and Cultural Rights, *General comment No 9 – the Domestic Application of the Covenant* (1998), UN Doc E/C.12/1998/24. At: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/E.C.12.1998.24.+CESC.R+General+comment+9.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/E.C.12.1998.24.+CESC.R+General+comment+9.En?Opendocument) (viewed September 2008); UN Human Rights Committee, *General comment 31 – Nature of the General Legal Obligation imposed on State Parties to the Covenant* (2004), UN Doc CCPR/C/21/Rev.1/Add.13. At: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.21.Rev.1.Add.13.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.21.Rev.1.Add.13.En?Opendocument) (viewed September 2008).

Thus, irrespective of the *cause* of a threat to human rights, Australia still has positive obligations to use all the means within its disposal to uphold the human rights affected.³⁰

Chapter 4 of this Report outlines some of the threats that climate change impacts pose to human rights generally. Some of the impacts that will be felt in the Torres Strait Islands are discussed here.

2.1 The right to life³¹

The right to life is protected in the *Universal Declaration of Human Rights* (UDHR)³² and the *International Covenant on Civil and Political Rights*³³ (ICCPR). Article 3 of the UDHR provides 'everyone has the right to life, liberty and security of person'. Article 6(1) of the ICCPR provides 'every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life'. The *Declaration on the Rights of Indigenous Peoples*³⁴ also includes a right to life and security.

Declaration on the Rights of Indigenous Peoples – article 7

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.
2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

In its General Comment on the right to life, the United Nations Human Rights Committee warned against interpreting the right to life in a narrow or restrictive manner. It stated that protection of this right requires the State to take positive measures and that 'it would be desirable for state parties to take all possible measures to reduce infant mortality and to increase life expectancy...'³⁵

As articulated by the Deputy High Commissioner for Human Rights, climate change can have both direct and indirect impacts on human life. This is true for the Torres Strait region, where the effect may be immediate; that is, as a result of a climate-change induced extreme weather, a threat that has already been felt when a young girl's life was at risk in the 2006 king tides; or it may occur gradually, through deterioration in health, diminished access to safe drinking water and increased susceptibility to disease.

30 Australian Human Rights Commission, *Background paper: Human rights and climate change* (2008) p 9; United Nations Committee on Economic, Social and Cultural Rights, *General comment No. 3 – On the Nature of State Parties' Obligations* (1990), UN Doc, E/1991/23, annex III. At: [http://www.unhcr.ch/tbs/doc.nsf/\(symbol\)/CESCR+General+comment+3.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/CESCR+General+comment+3.En?OpenDocument) (viewed September 2008).

31 See Australian Human Rights Commission, *Background paper: Human rights and climate change* (2008), pp 3-4.

32 *Universal Declaration of Human Rights*, GA Resolution 217A(III), UN Doc A/810 at 71 (1948). At: <http://un.org/Overview/rights.html> (viewed September 2008).

33 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976, Australia ratified the convention on 13 August 1980). At: http://www.unhcr.ch/html/menu3/b/a_ccpr.htm (viewed September 2008).

34 See chapter 1 for more information on the *Declaration on the Rights of Indigenous Peoples*.

35 UN Human Rights Committee, *General comment No. 6 – the Right to Life* (1982), UN Doc HRI/Gen/1/Rev.7 at 128, paras 1 and 5. At: <http://www.unhcr.ch/tbs/doc.nsf/0/84ab9690ccd81fc7c12563ed0046fae3> (viewed September 2008).

2.2 The right to water³⁶

The right to water is intricately related to the preservation of a number of rights protected through the *International Covenant on Economic, Social and Cultural Rights*³⁷ (ICESCR). It underpins the right to health in article 12 and the right to food in article 11. The right to water is also specifically articulated in article 24 of the *Convention on the Rights of the Child*³⁸ (CRC), and article 14(2)(h) of the *Convention on the Elimination of Discrimination against Women*³⁹ (CEDAW). Various articles of the *Declaration on the Rights of Indigenous Peoples* refer to rights to water for both cultural and economic uses.

In 2002, the UN Committee on Economic, Social and Cultural Rights recognised that water itself is an independent right.⁴⁰ Drawing on a range of international treaties and declarations it stated, ‘the right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival’.⁴¹ The same General Comment refers specifically to the rights of Indigenous peoples to water:

Whereas the right to water applies to everyone, States parties should give special attention to those individuals and groups who have traditionally faced difficulties in exercising this right...In particular, States parties should take steps to ensure that: ...

(d) Aboriginal peoples’ access to water resources on their ancestral lands is protected from encroachment and unlawful pollution. States should provide resources for Aboriginal peoples to design, deliver and control their access to water;⁴²

In the Torres Strait region, the right to water will be threatened by a number of factors.

Both surface and ground water resources are likely to be impacted by climate change making resource management in the dry season difficult. In the past, many islands depended on fresh water lenses to provide drinking water, but overexploitation of this resource has caused problems and created the need for water desalination plants on many of the islands. Rainwater tanks and large lined dams are now used to trap and store water for use in dry season. Many of the islands have already reached the limits of drinking water supply and must rely on mobile or permanent desalination plants to meet demand. Other problems are likely to include an increase in extreme weather

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- 36 See Australian Human Rights Commission, *Background paper: Human rights and climate change* (2008), pp 5-6.
- 37 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976, Australia ratified the convention on 10 December 1975). At: http://www.unhchr.ch/html/menu3/b/a_ceschr.htm (viewed September 2008).
- 38 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990, Australia ratified the convention on 17 December 1990). At: <http://www.unhchr.ch/html/menu3/b/k2crc.htm> (viewed September 2008).
- 39 *Convention on the Elimination of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 August 1981, Australia ratified the convention on 28 July 1983). At: <http://www.un.org/womenwatch/daw/cedaw/> (viewed September 2008).
- 40 UN Committee on Economic, Social and Cultural Rights, *General comment No. 15 – the Right to Water*, UN Doc E/C.12/2002/11 (2002). At: <http://www.unhchr.ch/tbs/doc.nsf/0/a5458d1d1bbd713fc1256cc400389e94?Opendocument> (viewed September 2008).
- 41 UN Committee on Economic, Social and Cultural Rights, *General comment No. 15 – the Right to Water*, UN Doc E/C.12/2002/11 (2002). <http://www.unhchr.ch/tbs/doc.nsf/0/a5458d1d1bbd713fc1256cc400389e94?Opendocument> (viewed September 2008).
- 42 See T McAvoy, ‘The human right to water and Aboriginal water rights in New South Wales’ (2008) 17(1) *Human Rights Defender*, p 6. At: http://www.ahrcentre.org/documents/Publications/HRD_Vol17_1_webextract.pdf (viewed September 2008).

events such as droughts and floods, and an increase in salt-water intrusion into fresh water supplies.⁴³

In addition, the rights that the right to water underpin, such as the right to food and the right to life, will also be threatened.⁴⁴

2.3 The right to food⁴⁵

The right to adequate food is recognised in several international instruments, most comprehensively in the ICESCR. Pursuant to article 11(1), state parties recognise 'the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions', while article 11(2) recognises that more immediate and urgent steps may be needed to ensure 'the fundamental right to freedom from hunger and malnutrition'. Article 20 of the *Declaration on the Rights of Indigenous Peoples* protects the right of Indigenous peoples to secure their subsistence.

Declaration on the Rights of Indigenous Peoples – article 20

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.
2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

The UN Special Rapporteur on the Right to Food has defined the right as follows:

The right to adequate food is a human right, inherent in all people, to have regular, permanent and unrestricted access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of people to which the consumer belongs, and which ensures a physical and mental, individual and collective fulfilling and dignified life free of fear.⁴⁶

There is little doubt that climate change will detrimentally affect the right to food in a significant way. In the Torres Strait, it is predicted that food production will be severely affected because of increased temperatures, changing rainfall patterns, salinity which will turn previously productive land infertile, and erosion. Fishing, a major source of food for the region, will also be affected by rising sea levels, making coastal land unusable, causing fish species to migrate, and an increase in the

43 D Green, 'How Might Climate Change Affect Island Culture in the Torres Strait?' (2006) *CSIRO Marine and Atmospheric Research Paper 011*, p 7. At: http://www.cmar.csiro.au/e-print/open/greendl_2006a.pdf (viewed September 2008).

44 See T McAvoy, 'The human right to water and Aboriginal water rights in New South Wales' (2008) 17(1) *Human Rights Defender*, p 6 At: http://www.ahrcentre.org/documents/Publications/HRD_Vol17_1_webextract.pdf (viewed September 2008); D Green, 'How Might Climate Change Affect Island Culture in the Torres Strait?' (2006) *CSIRO Marine and Atmospheric Research Paper 011*, p 1. At: http://www.cmar.csiro.au/e-print/open/greendl_2006a.pdf (viewed September 2008).

45 See Australian Human Rights Commission, *Background paper: Human rights and climate change* (2008), pp 4-5.

46 J Ziegler, *The Right to Food*, Report by the Special Rapporteur on the right to food to the Commission on Human Rights 57th session, UN Doc E/CN.4/2001/53 (2001) p 2. At: <http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/f45ea4df67ecca98c1256a0300340453?Opendocument> (viewed September 2008).

frequency of extreme weather events disrupting agriculture.⁴⁷ Islanders have already identified a change a fish stocks, dugongs and turtles, affecting their right to food that corresponds with their cultural traditions.

2.4 The right to health⁴⁸

Article 25 of the UDHR states that ‘everyone has the right to a standard adequate for the health and well-being of himself and his family’. Article 12(a) of the ICESCR recognises the right of everyone to ‘the enjoyment of the highest standard of physical and mental health’. The right to health is also referred to in a number of articles in the CRC. Article 24 stipulates that state parties must ensure that every child enjoys the ‘highest attainable standard of health’. It stipulates that every child has the right to facilities for the treatment of illness and rehabilitation of health. Article 12 of the CEDAW contains similar provisions.⁴⁹ Article 24 of the *Declaration on the Rights of Indigenous Peoples* protects the right of Indigenous peoples to health, their cultural health practices, and equality of health services.

Declaration on the Rights of Indigenous Peoples – article 24

1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.
2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

Many of these impacts are predicted to occur in the Torres Strait region.

Climate change will have many impacts on human health, and this threat is even more prevalent for Indigenous peoples, who commonly don’t have access to the same standard of health care that non-Indigenous Australians enjoy. Additionally, the dietary health of [Indigenous] communities is predicted to suffer as the plants and animals that make up our traditional diets could be at risk of extinction through climate change.⁵⁰

47 D Green, A Dupont and G Pearman, *Heating up the Planet: climate change and security* Lowy Institute Paper 12 (2006) pp 30-31. At: <http://www.lowyinstitute.org/Publication.asp?pid=391> (viewed September 2008).

48 See: Australian Human Rights Commission, *Background paper: Human rights and climate change* (2008), p 6.

49 Article 12 of the CEDAW states ‘(1) States parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning. (2) Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.’

50 Indigenous Peoples Organisations Network, *Response to Agenda Item 3: Climate Change Biological Diversity and Livelihoods: The Stewardship Role of Indigenous People’s and New Challenges*, Seventh Session of the United Nations Permanent Forum, New York, 21 April – 2 May 2008.

Climate change may affect the intensity of a wide range of diseases – vector-borne, water-borne and respiratory.⁵¹ Changes in temperature and rainfall will make it harder to control dengue fever and other diseases carried by mosquitoes, and there is a risk that the range and spread of tropical diseases and pests will increase.⁵²

Increasing temperatures may lead to heat stress, while rising sea levels and extreme weather events increases the potential for malnutrition and impoverishment. This is particularly true for communities such as those in the Torres Strait which rely on traditional harvest from the land and oceans, and small crops.

However, in addition to the direct physical impacts on health, there are health implications from disturbing Indigenous peoples' connection to country and their land and water management responsibilities:

Many Indigenous people living in remote areas have a heightened sensitivity to ecosystem change due to the close connections that exist for them between the health of their 'country', their physical and mental well-being and the maintenance of their cultural practices. A biophysical change manifested in a changing ecosystem has, for example, the potential to affect their mental health in a way not usually considered in non-Indigenous societies.⁵³

The impact of climate change on the mental well-being of Torres Strait Islanders has already been predicted:

The mental well-being of Islanders who feel that they can no longer predict seasonal change is another factor that needs to be considered in any assessment of Islander health. Given the close cultural connection between the natural environment and Islander culture, habitat change that impacts significant fauna (for example, reduction in turtle nesting beaches, migratory bird foraging or sea grass bed decline) is likely to affect Islanders' mental well-being.⁵⁴

2.5 The right to a healthy environment⁵⁵

In Australia, and elsewhere, there have been discussions about the existence of an internationally recognised human right to an environment of a particular quality. The Advisory Council of Jurists of the Asia-Pacific Forum on National Human Rights Institutions endorsed the idea that the protection of the environment is 'a vital part of contemporary human rights doctrine and a sine qua non for numerous human rights, such as the right to health and the right to life'.⁵⁶

51 Working Group on Climate Change and Development, *Up in Smoke? Asia and the Pacific* Report No. 5 (2007), p 6. At: <http://www.oxfam.org.au/campaigns/climate-change/docs/Up-in-Smoke-ASIA-EMBARGO-19-11-07.pdf> (viewed September 2008).

52 D Green, 'Climate change and health: Impacts on remote Indigenous communities in Northern Australia' (2006) *CSIRO Marine and Atmospheric Research Paper 012*, p 1. At: http://www.cmar.csiro.au/e-print/open/greendl_2006.pdf (viewed September 2008).

53 D Green, 'Climate change and health: Impacts on remote Indigenous communities in Northern Australia' (2006) *CSIRO Marine and Atmospheric Research Paper 012*, p 1. At: http://www.cmar.csiro.au/e-print/open/greendl_2006.pdf (viewed September 2008).

54 D Green, 'How Might Climate Change Affect Island Culture in the Torres Strait?' (2006) *CSIRO Marine and Atmospheric Research Paper 011*, p 7. At: http://www.cmar.csiro.au/e-print/open/greendl_2006a.pdf (viewed September 2008).

55 See Australian Human Rights Commission, *Background paper: Human rights and climate change* (2008), pp 3-4.

56 Per: C G Weeramantry J, in his separate opinion in the International Court of Justice's decision in *Gabcikovo-Nagymaros Project (Hungary v Slovakia)* 1997 ICJ 97, 110; 37 ILM 162, 206 (1998).

The link between the environment and human rights has been the subject of many ‘soft law’ instruments of international environmental law.⁵⁷ This includes the first international law instrument to recognise the right to a healthy environment, the 1972 *Stockholm Declaration on the Human Environment*.⁵⁸ Others followed, including the 1992 *Rio Declaration*⁵⁹ and the 1994 draft Declaration of Principles on Human Rights and the Environment which ‘demonstrates that accepted environmental and human rights principles embody the right of everyone to a secure, healthy and ecologically sound environment, and it articulates the environmental dimension of a wide range of human rights.’⁶⁰

Article 29 of the *Declaration on the Rights of Indigenous Peoples* protects the right of Indigenous peoples to the conservation and protection of the environment.

Declaration on the Rights of Indigenous Peoples – article 29

1. 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.
2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.
3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

There are domestic laws in Australia that are related to the protection of a healthy environment. Chapters 4 and 5 of this report, outline some of these mechanisms.

Relevant to the Torres Strait region is the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) (EPBCA) which was passed in response to the International Convention on Biodiversity. The EPBCA provides a legal framework to protect and manage matters of national and international environmental significance and it aims to balance the protection of these crucial environmental and cultural values with our society’s economic and social needs.

There are significant concerns about the threats to biodiversity in the Torres Strait. The Intergovernmental Panel on Climate Change has predicted a significant loss of biodiversity in surrounding regions.⁶¹ Already, turtle nesting failures and other impacts on biodiversity have been identified by Islanders. Acting on this concern, the Torres Strait Regional Authority has recommended to the government:

57 M Byrne and M Iljadica, ‘There goes the neighbourhood’ (2007) 12 *Uniya Occasional Paper*. At: http://www.uniya.org/talks/byrne_may07-op1.html (viewed September 2008).

58 *Declaration of the United Nations Conference on the Human Environment*, 1972. At: <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=97&ArticleID=1503> (viewed September 2008).

59 *Rio Declaration on environment and development*, 1992. At: <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=78&ArticleID=1163> (viewed September 2008).

60 1994 draft Declaration of Principles on Human Rights and the Environment. At: <http://cesr.org/draft-declarationenvironment> (viewed September 2008).

61 Intergovernmental Panel on Climate Change, 2007: M.L. Parry, O.F. Canziani, J.P. Palutikof, P.J. van der Linden and C.E. Hanson, (eds), ‘Summary for Policy Makers’ in *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, 7, p 13. At: <http://www.ipcc.ch/pdf/assessment-report/ar4/wg2/ar4-wg2-intro.pdf> (viewed September 2008).

that there are further studies of island processes and projected climate change impacts on island environments, including uninhabited islands with problems such as turtle nesting failures.⁶²

2.6 The right to culture⁶³

While the focus of media and political debates in Australia presently rests with the environmental and economic impacts of climate change, inextricably linked to environmental damage is damage to Indigenous peoples cultural heritage and identity. The devastation of sacred sites, burial places and hunting and gathering spaces, not to mention a changing and eroding landscape, cause great distress to Indigenous peoples.⁶⁴

Indigenous peoples across the world have a right to practice, protect and revitalise their culture without interference from the state. Governments have an obligation to promote and conserve cultural activities and artefacts.⁶⁵ The right to culture is entrenched in a number of international law instruments. Article 27 of the ICCPR protects the rights of minorities to their own culture. The Human Rights Committee's General Comment 23 makes it clear that this right applies to Indigenous peoples. The Committee also confirmed that this may require the states to take positive legal measures to protect this right.⁶⁶

The right to culture is also found in a number of other instruments including article 15 of the ICESCR which upholds the right of everyone to 'take part in cultural life', the *Convention on the Elimination of All Forms of Racial Discrimination*⁶⁷ (ICERD), commits all states to 'ensure that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practise their languages.'⁶⁸ The General Comment to the ICERD also provides that 'no decisions directly relating to [Indigenous communities]' rights and interests are taken without their informed consent.'⁶⁹

Article 30 of the CRC protects the rights of children to their culture. Article 8 of *International Labour Organisation Convention 169* provides a specific protection for indigenous peoples stating that: '[Indigenous peoples] shall have the right to retain their own customs and institutions, where these are not incompatible with

62 Torres Strait Regional Authority, *Submission to the House of Representatives Standing Committee on climate change, water, environment and the arts inquiry into climate change and environmental impacts on coastal communities* (15 September 2008). At: <http://www.aph.gov.au/house/committee/ccwea/coastalzone/subs/sub007a.pdf> (viewed November 2008).

63 See the Human Rights Education Associates website at: http://www.hrea.org/index.php?base_id=157.

64 E Gerrard, 'Impacts and opportunities of climate change: indigenous participation in environmental markets' (2008) 3(13) *Australian Institute of Aboriginal and Torres Strait Islander Studies*, p 12. At: <http://ntru.aiatsis.gov.au/publications/2008pdfs/Issues%20Paper%20Vol%203%20No%2013.pdf> (viewed November 2008).

65 See Human Rights Education Associates, *Right To Culture*, http://www.hrea.org/index.php?base_id=157 (viewed September 2008).

66 United Nations Office of the High Commissioner for Human Rights, *General Comment No. 23: The rights of minorities (Art. 27)*, UN Doc CCPR/C/21/Rev.1/Add.5 (1994). At: <http://www.unhcr.ch/tbs/doc.nsf/0/fb7fb12c2fb8bb21c12563ed004df111?Opendocument> (viewed September 2008).

67 *Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969). Australia ratified the convention on 30 September 1975). At: http://www.unhcr.ch/html/menu3/b/d_icerd.htm (viewed September 2008).

68 Committee on the Elimination of Racial Discrimination, *General Comment No. 23: Indigenous peoples* Gen. Rec. No. 23 (1997). At: <http://www.unhcr.ch/tbs/doc.nsf/0/73984290dfea022b802565160056fe1c?Opendocument> (viewed September 2008).

69 Committee on the Elimination of Racial Discrimination, *General Comment No. 23: Indigenous peoples* Gen. Rec. No. 23 (1997). At: <http://www.unhcr.ch/tbs/doc.nsf/0/73984290dfea022b802565160056fe1c?Opendocument> (viewed September 2008).

fundamental rights defined by the national legal system and with internationally recognized human rights.⁷⁰

Importantly, under the *Declaration on the Rights of Indigenous Peoples*, Indigenous peoples have a number of rights related to the right to practice and revitalisation of their cultural practices, customs and institutions.⁷¹

Declaration on the Rights of Indigenous Peoples – various articles

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 8

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
2. States shall provide effective mechanisms for prevention of, and redress for:
 - (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities.
 - (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources.
 - (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights.
 - (d) Any form of forced assimilation or integration.
 - (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Article 11

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.
2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.
2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

70 *Convention (No. 169) concerning Indigenous and Tribal peoples in Independent Countries* (entered into force 5 September 1991). At: <http://www.unhchr.ch/html/menu3/b/62.htm> (viewed September 2008).

71 See *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295, UN Doc A/61/L.67 (2007), articles 5, 8, 11, 12 and 25 among others. At: <http://www.un.org/esa/socdev/unpfii/en/declaration.html> (viewed September 2008).

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

In 2000, the United Nations Human Rights Committee expressed concern about Australia's recognition of the cultural rights of its Indigenous population:

The Committee expresses its concern that securing continuation and sustainability of traditional forms of economy of indigenous minorities (hunting, fishing, gathering), and protection of sites of religious or cultural significance for such minorities, which must be protected under article 27, are not always a major factor in determining land use.⁷²

This recognition could become even more limited with climate change, as there is expected to be a significant threat to cultural rights as a result. One way this will occur is through damage to the land, which in turn can damage cultural integrity:

Indigenous people don't see the land as distinct from themselves in the same way as maybe society in the south-east (of Australia) would. If they feel that the ecosystem has changed it's a mental anxiety to them. They feel like they've lost control of their 'country' — they're responsible for looking after it.⁷³

In the Torres Strait Islands, the threats to culture from climate change are already being felt; for example graveyard sites have already been threatened and damaged by recent king tides, and the nesting behaviour of turtles has already become unpredictable because of changing weather patterns and erosion. Many aspects of *Ailan Kastom* are threatened if the predicted impacts of climate change eventuate:

Islander culture, or *Ailan Kastom*, refers to a distinctive Torres Strait Islander culture and way of life, incorporating traditional elements of Islander belief and combining them with Christianity. This unique culture permeates all aspects of island life...*Ailan Kastom* governs how Islanders take responsibility for and manage particular areas of their land and sea country; how and by whom natural resources are harvested, and allocation of seasonal and age-specific restrictions on catching particular species. The strong cultural, spiritual and social links between the people and the natural resources of the sea reinforces the significance of the marine environment to Islander culture. One major component of *Ailan Kastom* relates to the role of turtle and dugong, which have great significance as totemic animals for many Islanders.⁷⁴

72 Human Rights Committee, *Concluding observations of the Human Rights Committee: Australia*, UN Doc 1/55/40, (2000), paras 498-528. At: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/A.55.40,paras.498-528.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/A.55.40,paras.498-528.En?OpenDocument) (viewed September 2008).

73 Friends of the Earth International, *Climate change: voices from communities affected by climate change* (2007), p 6. At: <http://www.foei.org/en/publications/pdfs/climate-testimonies> (viewed September 2008).

74 D Green, 'How Might Climate Change Affect Island Culture in the Torres Strait?' (2006) *CSIRO Marine and Atmospheric Research Paper 011*, p 4. At: http://www.cmar.csiro.au/e-print/open/greendl_2006a.pdf (viewed September 2008).

(a) Dispossession and relocation

The land and waters are such an integral part of *Ailan Kastom*, that before native title law, one author wrote:

The Strait does not have to worry about custom; the society of Islanders there remains axiomatic as long as they are in occupation of their ancestral islands and are living off resources which, whatever the legality, are theirs by customary right.⁷⁵

Yet, if climate change predictions are accurate, some Islands in the region may disappear completely, and others may lose large tracts of land (see page 264 of this Report for photos of sea level predictions for Masig Island). Because of this, some Islanders will be dispossessed of their lands and be forced to relocate, threatening the existence of *Ailan Kastom*.

An Islander from Saibai has said ‘But we will lose our identity as Saibai people if we scatter. If we separate, there will be no more Saibai’.⁷⁶ Another, the TSRA chairman John Toshie Kris, has been quoted as saying that relocation has been discussed as a last resort; however, he believes it can be avoided with the help of government, but ‘at the moment, you cannot move these people, because they are connected by blood and bone to their traditional homes.’⁷⁷

This outcome would be in breach of Australia’s international human rights obligations that protect a right to culture. General comment 23 to the ICERD explicitly deals with returning lands to Indigenous peoples:

The Committee especially calls upon State parties to recognise and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return these lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.⁷⁸

Article 10 of the *Declaration on the Rights of Indigenous Peoples* also confirms that Indigenous peoples cannot be moved from their lands without having given their free, prior and informed consent.

Declaration on the Rights of Indigenous Peoples – article 10

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

75 D Green, ‘How Might Climate Change Affect Island Culture in the Torres Strait?’ (2006) *CSIRO Marine and Atmospheric Research Paper 011*, p 3 citing Jeremy Beckett, *Torres Strait Islanders: Custom and colonialism* (1987). At: http://www.cmar.csiro.au/e-print/open/greendl_2006a.pdf (viewed September 2008).

76 L Minchin, ‘Sea wall no match for tide’s fury’, *Sydney Morning Herald*, 12 August 2006. At: <http://www.smh.com.au/news/national/sea-wall-no-match-for-tides-fury/2006/08/11/1154803102257.html> (viewed September 2008).

77 L Minchin, ‘Not waving but drowning at our back door’, *The Age*, 12 August 2006. At: <http://universal-salvage.org.uk/pdf/AustraliaTidesRising.pdf> (viewed September 2008).

78 Committee on the Elimination of Racial Discrimination, *General Comment No. 23: Indigenous peoples* (1997), para 5. <http://www.unhchr.ch/tbs/doc.nsf/0/73984290dfea022b802565160056fe1c?OpenDocument> (viewed September 2008).

The history of dispossession of the Indigenous peoples of Australia has resulted in various state, territory and federal laws being passed in recent years with an intention of making reparation for dispossession.⁷⁹ However, if any Islanders are relocated and dispossessed of their lands, it will not only affect their culture, but it will impact on their existing legal rights to the land, and potentially the legal rights of other Indigenous people. All of these impacts must be considered by government.

(b) Native Title

As I noted at the beginning of this chapter, the Torres Strait Islands are the birthplace of native title law. All inhabited islands in the region, and some uninhabited islands have native title rights determined over them. Other uninhabited islands and the surrounding sea have native title claims over them, but are yet to be determined. However, with the impacts of climate change predicted above, those hard won native title rights may be lost.

Erosion and the threat of extreme weather events including king tides have already damaged and ruined sites that have native title rights and interests determined over them. It has also already forced some to move off the lands that they have native title determined over, onto higher ground.

The possibility of native title being extinguished by climate change raises questions about what remedies the Islanders might be able to seek if this occurs. This is discussed later in this chapter.

(c) Relocation

The Council of Australian Governments' (COAG) adopted National Climate Change Adaptation Framework (the Framework) states that a potential area of action is to 'identify vulnerable coastal areas and apply appropriate planning policies, including ensuring the availability of land, where possible, for migration of coastal ecosystems.'⁸⁰ The Framework discusses the expected need for Islanders to migrate to the mainland or urban centres.

Currently, the discussion about intra-Australia relocation has focused on relocation as a predominantly economic issue with social implications, particularly the resulting strain on infrastructure.

However, culture and cultural practices will have implications on the social and economic dimensions of relocation, something which has not been acknowledged by the federal government. But '[s]ocial conflicts stemming from ecological changes are not easily resolved'.⁸¹

For Torres Strait Islanders, there are two possible relocations that may occur, depending on what impacts of climate change eventuate.

Firstly, some Islanders may be forced to move onto higher land on their island or another Torres Strait Island. Some have already started to negotiate such a move, and some families have already made agreements with another family that when the impact of erosion gets too bad, they can move onto the other's land.⁸² However this is not guaranteed.

79 This includes the *Native Title Act 1993* (Cth), and various state and territory land rights regimes.
80 Council of Australian Governments, *National climate change adaptation framework* (2007). At: http://www.coag.gov.au/coag_meeting_outcomes/2007-04-13/ (viewed September 2008).
81 R White, *Climate change, social conflict and environmental criminology* (2008), p 13.
82 See for example, D Billy, Kulkalgal (Torres Strait Islanders) Corporation, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 18 September 2008.

Well on Murray Island what we'll do is go up the hill a bit further. The only thing we'll have to do is every Island community is owned by a particular family or clan; so for argument's sake, if I need to move because I live down the bottom, I'd have to start negotiating with another family or clan to move into their area. If they refuse, I'd have to go back down.⁸³

Secondly, Islanders may be forced to move onto the mainland. This would probably mean moving to the Cape York region – closest to their homes and where some of their relatives may now reside.⁸⁴ However, this is land that traditionally belongs to the Aboriginal people of that area, and some of that land has in fact been handed back to the Traditional Owners by the Queensland government. Some has also had native title determined over it.

Relocation to the mainland occurred in the 1940s, when in response to a flood, some Islanders decided to move. However:

This relocation, however, did not take account of the potential cultural sensitivities of moving Islander people on to what is now recognised as Aboriginal land. These concerns would need to be at the forefront of any relocation negotiations in the future (Jensen Warusam pers. comm. 2006).⁸⁵

The impacts of such a move on the land rights and cultural rights of Aboriginal people and Torres Strait Islanders, is a serious issue that the government must factor in to its decision making on climate change adaptation. It is a complicating factor, as one Islander put it:

...if there's an influx of a thousand people settling in Cairns or somewhere, it's going to cause a lot of major problems.⁸⁶

3. What is already being done?

Recognising the impacts of climate change that are already being felt in the region, and the vulnerable position that the Islanders are in, a number of initiatives have begun. However, many of these projects are in their initial stages and need to be supported, improved and complemented so that the potential human rights crisis in the Torres Strait is averted. The primary state, regional and federal responses to climate change in the Torres Strait are listed below.

83 J Akee, Mer Gedkem Le (Torres Strait Islanders) Corporation, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 29 September 2008.

84 Some of the communities in Cape York are predominantly Torres Strait Islander communities, for example Bamaga. See Australian Bureau of Statistics, *Population Distribution, Aboriginal and Torres Strait Islander Australians*, 4705.0. At: <http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4705.02006?OpenDocument> (viewed September 2008).

85 D Green, 'How Might Climate Change Affect Island Culture in the Torres Strait?' (2006) *CSIRO marine and atmospheric research paper 011*, p 10. At: http://www.cmar.csiro.au/e-print/open/greendl_2006a.pdf (viewed September 2008).

86 J Akee, Mer Gedkem Le (Torres Strait Islanders) Corporation, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 29 September 2008.

3.1 The Torres Strait Coastal Management Committee⁸⁷

The Torres Strait Coastal Management Committee (the Committee) was established by TSRA in 2006 to enable a whole-of-government coordinated response to coastal issues in the Torres Strait. It consists of representatives from the Queensland government, the islands, and recently it has included a federal government representative. It coordinates and oversees a range of projects that were initially developed to deal solely with coastal care. However, in recognition of the link between coast care and the predicted significant impacts of climate change, the Committee's work has recently expanded to include projects dealing with climate change. Some projects include:

- Investigation of sea erosion affecting communities and solution development
- Sea level survey and land datum corrections
- Sustainable land use planning
- Climate impacts in the Torres Strait, and incorporation of traditional environmental knowledge
- Development of a climate change strategy for the Torres Strait
- A survey to develop high level resolution digital evaluation model for low lying areas to assist in planning for sea level rise and storm tide inundation.⁸⁸

The Committee actively involves island communities in decision making and project activities⁸⁹ and considers community support for any action to be vital.

One of the projects the committee has established is the Coastal Erosion Project. It too has been developed and expanded to deal with climate change impacts on erosion through inundation and extreme weather events.

(a) Coastal Erosion Project: Masig, Warraber, Poruma, Iama

In December 2005, the Natural Heritage Trust approved funding for a Coastal Erosion Impacts Project in the Torres Strait to be undertaken by James Cook University with the communities of Warraber, Masig and Poruma Islands. The project, which commenced in April 2006, was extended to include Iama Island, and is due to be finalised in very near future.⁹⁰

87 For additional information on this section, see Torres Strait Regional Authority, *Submission No 2 to the House of Representatives Standing Committee on Climate Change, Water, Environment and the Arts: Inquiry into climate change and environmental impacts on coastal communities* (27 November 2008). At: <http://www.aph.gov.au/house/committee/ccwea/coastalzone/subs/sub007b.pdf> (viewed December 2008).

88 J McNamara, Executive Director, Indigenous Services, QLD Department of Natural Resources and Water, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 September 2008.

89 D Shankey, Senior Policy Adviser, Office of the QLD Minister for Sustainability, Climate Change and Innovation, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 10 September 2008.

90 K Parnell and S Smithers, *Coastal erosion project: Masig, Warraber, Poruma, Iama* (Presentation to the board of the Torres Strait Regional Authority, 2008).

The long term outcome that the project is seeking is management of erosion on the cay islands, which are the lowest lying islands in the Torres Strait.⁹¹ In order to achieve this, the project aims to:⁹²

1. Work with communities to identify and prioritise threats. The project has a strong focus on community participation and decision making and it 'engage[s] the community to understand the cultural and social aspects of the problem and determine what it most important to the community'.⁹³
2. Identify the underlying causes of coastal erosion on Torres Strait reef islands, and to develop long-term, sustainable solutions that work with, rather than against, the natural processes.
3. To provide real data about the processes involved and the way in which solutions may address these, these can be used to develop strong funding applications for appropriate works.

At the conclusion of the project, the community is to decide a suitable long-term response to the problem.

(i) *Masig's response*⁹⁴

To date, the only island that has made a decision about how they will adapt to erosion is Masig Island. Masig will be severely affected by climate change if the Intergovernmental Panel on Climate Change sea level rise predictions occurs. This will include inundation of most of the inhabited areas of the island (see page 264 of this Report for photos of Masig Island).

With the assistance of the coastal erosion project, the Masig community has made some decisions about their future and how they want to progress an adaptation strategy.

The people of Masig reaffirm that they wish to continue to live on Masig into the future. The people of Masig understand that much of the island (and in particular the area around the village) is low, and that flooding events may become more regular and more significant in the future due to climate change. However, it is also understood that flooding will only happen occasionally, on the highest tides and when weather conditions are unfavourable, at least for the foreseeable future.

- The people of Masig are prepared to participate in a process of adaptation to environmental and climate change which may include things such as:
 - As houses or other infrastructure reaches the end of its usable life, not rebuilding in the same place if that place may be subjected to erosion or inundation due to rising sea levels

91 K Parnell, *Management of coastal erosion and inundation* (Presentation at Sharing Knowledge: A Workshop on Climate Change Impacts and Adaptation Strategies for Northern Australian Indigenous Communities, Darwin, March 30-31, 2006). At: http://pandora.nla.gov.au/pan/77805/20071019-0751/www.dar.csiro.au/sharingknowledge/files/parnell_darwin2006.pdf (viewed November 2008).

92 K Parnell and S Smithers, *Coastal erosion project: Masig, Warraber, Poruma, lama*, (Presentation to the board of the Torres Strait Regional Authority, 2008).

93 K Parnell, *Management of coastal erosion and inundation* (Presentation at Sharing Knowledge: A Workshop on Climate Change Impacts and Adaptation Strategies for Northern Australian Indigenous Communities, Darwin, March 30-31, 2006.). At: http://pandora.nla.gov.au/pan/77805/20071019-0751/www.dar.csiro.au/sharingknowledge/files/parnell_darwin2006.pdf (viewed November 2008).

94 K Parnell and S Smithers, *Coastal erosion project: Masig, Warraber, Poruma, lama*, (Presentation to the board of the Torres Strait Regional Authority, 2008).

- Not building new infrastructure in hazardous locations unless absolutely essential.
 - Over time, moving the focus of the island village towards higher parts of the island
 - Managing boeywadh (berms) with the intention of building them higher and wider, and managing access tracks through them to ensure that water cannot enter the island interior
 - Allowing some parts of the island to erode, where that erosion is not causing harm to people, infrastructure or important cultural sites, while monitoring the situation.
- The Masig community recognises that adaptation will raise issues that must be addressed within the community, such as land ownership and traditional rights, and the community is willing to work through these issues.
 - The community wants to further explore the possibility of dredging off-reef sand to renourish the island beaches.
 - The community is willing to be involved in the testing of innovative solutions to coastal erosion, where appropriate.
 - The community will do the important things that they can, such as implementing management plans for the buoywadh and coastal vegetation.
 - The community is willing to work with government at all levels, researchers and infrastructure providers to make a case to obtain funds to progress these measures, and to make decisions when options are put before the community.⁹⁵

The project must continue to be supported so that it can be implemented in its entirety. In addition, further strategies will be needed to complement these activities which primarily deal with only one aspect of climate change.

3.2 A federal study: climate change for northern Indigenous communities

The Australian Government is funding a study on 'how climate change will impact on Indigenous communities in northern Australia'. For the purpose of the study, northern Australia includes the Torres Strait region. In announcing the initiative, the Minister for Climate Change and Water recognised that the Government has 'limited understanding of how climate change will affect Indigenous communities, their resilience and their capacity to adapt.' Positively, the study will take a more holistic approach than most climate change policy to date, and will examine the impacts on health, the environment, infrastructure, education, employment and opportunities that may arise from climate change. The study, which should be completed by April 2009, will enable the Government to determine what action needs to be taken to reduce the impact of climate change in the region.⁹⁶

95 Masig Island also made site specific decisions (relating to the problem sites) as well as the broader decisions listed here.

96 Minister for Climate Change and Water, 'New climate change study for northern Indigenous communities', (Media Release, 8 September 2008). At: http://www.environment.gov.au/minister/wong/2008/mr2008_0908a.html (viewed September 2008).

4. What next?

The Australian Human Rights Commission has outlined what a human rights based response to climate change must involve:

[A] human rights-based approach...should focus on poverty-reduction, strengthening communities from the bottom up, building on their own coping strategies to live with climate change and empowering them to participate in the development of climate change policies. It needs to be locally grounded and culturally appropriate...the human rights-based approach...emphasises the importance of local knowledge and seeks the active participation and consultation of local communities in working out how best to adapt to climate change. This could mean, for example, incorporating the traditional cultural practices of indigenous communities into climate change responses.⁹⁷

Such an approach is being followed by the Coastal Erosion Project, where the ultimate decision makers are the communities. If the power to make decisions is taken away from communities, the project would lose legitimacy and run the risk of failure:

Decisions made without consultation of Indigenous communities can force unwelcome lifestyle changes for them. Westerners don't listen to worries about land—but we want natural protection from climate change that doesn't conflict with traditional ways of life.⁹⁸

A human rights based approach to climate change can easily be integrated into the various stages of 'adaption as a process' identified by the Intergovernmental Panel on Climate Change. The adaptation process includes:⁹⁹

- knowledge, data, tools
- risk assessments
- mainstreaming adaptation in to plans, policies, strategist
- evaluation and monitoring for feedback and change
- awareness and capacity building

All of these areas have been identified as lacking in the Torres Strait where improving knowledge, information, risk assessment, planning, and capacity building, have all been identified as urgent priorities.

4.1 Information, knowledge, data

The lack of data and information on climate change impacts in the Torres Strait region has been acknowledged by many parties.

The TSRA, CSIRO and Queensland government submissions to House of Representatives Standing Committee Inquiry into climate change and environmental impacts on coastal communities both identified a lack of data as an issue. In response, the Queensland government is undertaking some projects in the Torres Strait Islands such as the Tide Gauge Project:

97 Australian Human Rights Commission, *Background paper: Human rights and climate change* (2008), p 17.

98 Traditional Owner, cited in D Green, 'How Might Climate Change Affect Island Culture in the Torres Strait?' (2006) *CSIRO marine and atmospheric research paper 011*, p 11. At: http://www.cmar.csiro.au/e-print/open/greendl_2006a.pdf (viewed September 2008).

99 K Hennessy, B. Fitzharris, B.C. Bates, N. Harvey, S.M. Howden, L. Hughes, J. Salinger and R. Warrick, '2007: Australia and New Zealand' in Intergovernmental Panel on Climate Change, 2007: M.L. Parry, O.F. Canziani, J.P. Palutikof, P.J. van der Linden and C.E. Hanson, (eds), 'Summary for Policy Makers' in *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, 507, p 513. 7, p 13. At: <http://www.ipcc.ch/> (viewed September 2008).

Tidal data for the Torres Strait Islands region is insufficiently accurate to manage and respond to events such as storm surge and projected sea level rise. The project will provide accurate data to inform such activities as storm surge and sea-level rise mapping for the Islands.¹⁰⁰

This lack of information is not unique to the Torres Strait. The COAG adopted National Climate Change Adaptation Framework identifies the lack of information and knowledge gaps as integral to the two priority areas for potential action. However, the timeframe for implementing the framework is up to seven years.

It is an urgent priority in the Torres Strait. The TSRA, in its submission, has identified the lack of local data and science as a major impediment to their planning and projects to deal with climate change. It has proposed that the Australian Government fund long term monitoring of sea levels through the installation of gauges and mapping, which could contribute to an inundation warning system. It has also proposed that the Government undertake specific regional scale modelling of changes to climate, which hasn't been undertaken in the Torres Strait to date.¹⁰¹

One aspect of remedying this problem, which is consistent with a human rights based response to climate change, is recognising and utilising traditional environmental knowledge, which has already been identified by natural scientists as an under-used resource for climate impact and adaptation assessment. Recognition is slowly beginning to grow of the untapped resource of Indigenous knowledge about past climate change in Australian and internationally, which could be used to inform adaptation options.¹⁰² However, as chapter 7 highlights, it is important that the legal ownership of this knowledge remains with its true owners.

4.2 Governance, planning and strategies

It is integral that agencies' roles, responsibilities and accountability for governance of climate change issues in the Torres Strait Islands is clear.

There are unique characteristics of the Torres Strait region that make this particularly important. There are complex international border issues with Papua New Guinea, and the area is governed by an international treaty. The Torres Strait Regional Authority, the Torres Strait Regional Islands Council, the Queensland Government and the Commonwealth all have some jurisdiction over the governance of the region. Within each of these there are additional layers of complexity about which portfolio is responsible for what. For example, there are 22 Queensland government agencies responsible for carrying out the actions outlined in the State's *ClimateSmart Adaptation* plan over the next 5 years.¹⁰³ Further, there are numerous Non-Government Organisations (NGOs) operating in the region, who are eager to play a role in supporting the Islanders to mitigate and adapt to climate change impacts.

100 Queensland Government, *Submission to the House of Representatives Standing Committee on Climate Change, Water, Environment and the Arts: Inquiry into climate change and environmental impacts on coastal communities* (18 June 2008). At: <http://www.aph.gov.au/house/committee/ccwea/coastalzone/subs/sub091.pdf> (viewed December 2008).

101 Torres Strait Regional Authority, *Submission No 2 to the House of Representatives Standing Committee on climate change, water, environment and the arts inquiry into climate change and environmental impacts on coastal communities* (27 November 2008). At: <http://www.aph.gov.au/house/committee/ccwea/coastalzone/subs/sub007b.pdf> (viewed December 2008).

102 D Green, *Submission to the Garnaut climate change review* (February 2008), p 14.

103 Queensland Government, *ClimateSmart Adaptation 2007-12: An action plan for managing the impacts of climate change* (2007), p 18. At: http://www.climatechange.qld.gov.au/response/adaptation_plan.html (viewed September 2008).

The CSIRO has highlighted the need for clear governance responsibilities in order for climate change responses to be effective:

Coastal governance should seek to maintain a flow of multiple values from multiple natural and built assets, across several scales, to diverse stakeholders, including future generations... each coastal region faces different challenges and opportunities from climate change. Meanwhile, overlapping, unclear or juxtaposed jurisdictions across local, state and Commonwealth governments do hamper integrated and coordinated responses.¹⁰⁴

In its submission to the House of Representatives Committee, the CSIRO noted the need for governance and decisions to be made at the right scale.¹⁰⁵ Consistent with the human rights based approach outlined above, the governance of climate change issues should primarily involve clear decision making responsibilities and powers that rest with the community.

4.3 Evaluation and monitoring

At the moment there are only a small number of projects being undertaken in the Torres Strait, but it is important to ensure that all projects that are undertaken include evaluation and monitoring in their design. Consistent with the human rights based approach, this monitoring and evaluation should be done with particular emphasis on the Islanders themselves identifying the impacts that climate change, and the projects undertaken, are having on their lives. The United Nations Permanent Forum on Indigenous Issues recommends:

Monitor and report on impacts of climate change on indigenous peoples, mindful of their socio-economic limitations as well as their spiritual and cultural attachment to lands and waters.¹⁰⁶

4.4 Awareness and capacity building

Any information or data that is available must be distributed to the communities so that they can engage in the decision making process.

Our duty as Indigenous peoples to Mother Earth impels us to demand that we be provided adequate opportunity to participate fully and actively at all levels of local, national, regional and international decision-making processes and mechanisms in climate change.¹⁰⁷

104 CSIRO, *Submission to the House of Representatives Standing Committee on Climate Change, Water, Environment and the Arts: Inquiry into climate change and environmental impacts on coastal communities* (May 2008), p 21. At: <http://www.aph.gov.au/house/committee/ccwea/coastalzone/subs/sub102.pdf> (viewed September 2008).

105 CSIRO, *Submission to the House of Representatives Standing Committee on Climate Change, Water, Environment and the Arts: Inquiry into climate change and environmental impacts on coastal communities* (May 2008), p 29. At: <http://www.aph.gov.au/house/committee/ccwea/coastalzone/subs/sub102.pdf> (viewed September 2008).

106 Economic and Social Council Permanent Forum on Indigenous Issues, *Recommendations on the special theme, 'climate change, biocultural diversity and livelihoods: the stewardship role of indigenous peoples and new challenges'*, UN Doc E/C.19/2008/L.2 (2008), para 22. At: <http://daccessdds.un.org/doc/UNDOC/LTD/N08/317/04/PDF/N0831704.pdf?OpenElement> (viewed September 2008).

107 Economic and Social Council Permanent Forum on Indigenous Issues, *Impact on climate change migration measures on Indigenous peoples and on their territories and lands*, UN Doc E/C.19/2008/10 (2008), p10, citing Indigenous peoples statement to the UNFCCC, Delhi, 2002. At: http://www.un.org/esa/socdev/unpfii/documents/E_C19_2008_10.pdf (viewed September 2008).

The CSIRO considers that successful adaptation requires investment in leadership, skills, knowledge, and adaptable infrastructure so that communities can self organise and respond quickly and effectively.¹⁰⁸

To ensure this can occur, the United Nations Permanent Forum on Indigenous Issues recommended that all states ensure Indigenous peoples are well resourced and supported to make those decisions including through providing policy support, technical assistance, funding and capacity-building.¹⁰⁹

Text Box 2: TSRA recommendations

The TSRA has made the following recommendations to the House of Representatives Standing Committee Inquiry into climate change and environmental impacts on coastal communities.¹¹⁰

Recommendation 1: That there is further support for all Torres Strait Island communities and regional institutions to access information about projected climate change impacts at a locally and regionally relevant scale, to enable informed decision making and adaptive planning.

Recommendation 2: That there are further studies of island processes and projected climate change impacts on island environments, including uninhabited islands with problems such as turtle nesting failures.

Recommendation 3: That reliable data is obtained on island interior heights and elevations to support more accurate predictions of inundation levels.

Recommendation 4: That a feasibility study be undertaken to investigate and recommend the most suitable renewable energy systems for servicing the Torres Strait region, including the investigation of tidal, wind, solar and other systems suitable for the region's environmental conditions and demand for power.

Recommendation 5: That the Torres Strait region is considered as a potential case study for small scale trials of solutions to coastal erosion and inundation problems, as well as sustainable housing and building design and construction for remote communities in tropical environments.

108 CSIRO, *Submission to the House of Representatives Standing Committee on Climate Change, Water, Environment and the Arts: Inquiry into climate change and environmental impacts on coastal communities* (May 2008), p 29. At: <http://www.aph.gov.au/house/committee/ccwea/coastalzone/subs/sub102.pdf> (viewed September 2008).

109 Economic and Social Council Permanent Forum on Indigenous Issues, *Recommendations on the special theme, 'climate change, biocultural diversity and livelihoods: the stewardship role of indigenous peoples and new challenges'*, UN Doc E/C.19/2008/L.2 (2008), para 28. At: <http://daccessdds.un.org/doc/UNDOC/LTD/N08/317/04/PDF/N0831704.pdf?OpenElement> (viewed September 2008).

110 Torres Strait Regional Authority, *Submission to the House of Representatives Standing Committee on Climate Change, Water, Environment and the Arts: Inquiry into climate change and environmental impacts on coastal communities* (15 September 2008). At: <http://www.aph.gov.au/house/committee/ccwea/coastalzone/subs/sub007a.pdf> (viewed November 2008).

*TSRA proposal to address coastal management and climate change issues in the Torres Strait:*¹¹¹

The proposal details a comprehensive approach to investigate, monitor and plan for adaptation to climate change. It covers:

- Basic data collection and monitoring, including a tide gauge network, accurate bathymetry (targeted nearshore surveys) and topographic mapping
- Climate science (eg detailed modelling of regional sea level rise, winds, waves, storm surge, water chemistry etc) to determine changes to key regional climate variables. Island process modelling/ impact assessment – to determine impacts of coastal hazards and climate change on an island by island basis.
- Dredge feasibility study – A feasibility study to examine the potential for dredging for harbour maintenance and possibly beach renourishment or sand placement to address sea level rise.
- Adaptation planning – to determine the best suite of adaptation measures to address impacts of coastal hazards and climate change at the community level. (This would build on current projects and address the islands that have yet to be included and more fully address climate change issues – particularly sea level rise at Boigu and Saibai).
- Identification of sustainable energy options suitable for Torres Strait and ways of encouraging more sustainable practices in the region.
- Implementation of adaptation plans. Potential options/works/costs to address sea level rise/inundation.

5. If things continue as they are? Torres Strait Islanders rights of action

Less than twenty years ago Australian law did not recognise Torres Strait Islanders' rights to their land. But the Islanders fought for their rights through the courts and won. However, '[t]oday it is the sea, not the law, that is taking their land',¹¹² and the Islanders may once again want to consider how the law can be used to enforce their rights if government action is inadequate.

Internationally, communities are testing domestic and international legal frameworks in an attempt to protect themselves from the impacts of climate change.

Climate-related litigation is a reality, particularly in the United States where action has been taken against private companies, administrative decisions and government agencies...In relation to the impacts on Indigenous peoples, in February 2008 the Alaskan native village of Kivalina filed a lawsuit against a number of oil, coal and power companies for their contribution to global warming and the impacts on homes and country disappearing into the Chukchi Sea. The village is facing relocation due to sea erosion and deteriorating coast. The Kivalina seek monetary damages for the defendants. Past and ongoing contributions to global warming, public nuisance and damages caused by certain defendants, acts in conspiring to suppress the awareness of the link between their emissions and global warming...Based on examples from the United States, there

111 Torres Strait Regional Authority, *Submission No 2 to the House of Representatives Standing Committee on Climate Change, Water, Environment and the Arts: Inquiry into climate change and environmental impacts on coastal communities* (27 November 2008). At: <http://www.aph.gov.au/house/committee/ccwea/coastalzone/subs/sub007b.pdf> (viewed December 2008).

112 L Minchin, 'Torres Strait: going under', *Sydney Morning Herald*, 12 August 2006. At: <http://www.smh.com.au/news/national/going-under/2006/08/11/1154803102254.html> (viewed September 2008).

may be scope for litigation outside administrative review in Australia. Other possible climate related legal action may exist in negligence or nuisance. Indigenous people do and will continue to suffer loss, damage and substantial interference with their use or enjoyment of country as a result of climate change.¹¹³

There are currently no laws in Australia that deal specifically with protecting people from climate change impacts¹¹⁴ but there may be other laws the Islanders can use to seek a remedy. Some of those possibilities are explored here.

5.1 *Environmental Protection Act 1994 (Qld)*

In Queensland, the principal law dealing with environment protection is the *Environmental Protection Act 1994 (Qld)* (EPA). The object of the EPA is to 'protect Queensland's environment while allowing for development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends', that is, 'ecologically sustainable development'.¹¹⁵ It includes an offence of causing serious or material environmental harm.

The notion of 'environmental harm' is widely defined, with people and culture being recognised as an integral part of 'environment' under the legislation and, although it has not been judicially tested, could foreseeably encompass the emission of greenhouse gases and consequential climate change.

One of the benefits of the *Environmental Protection Act 1994 (Qld)* is that it does not require a particular power station to be the sole cause of climate change, which is caused by many contributing factors. The benefit of this type of action is that a court could potentially order the power station to pay for the cost of repairs to infrastructure caused by storms or even the costs of relocating homes and people. One of the difficulties in bringing such an action is that the power station might present a number of arguments in response, including that it had all the necessary approvals.¹¹⁶

5.2 Negligence

The tort of negligence essentially considers whether there has been a failure to take reasonable care to prevent injury to others. There is some potential to argue that various local, state and commonwealth authorities have failed in their duty of care to protect Torres Strait Islander communities from the impacts of climate change and are therefore liable for the damage to those communities.¹¹⁷ It may be difficult for the Islanders to prove a duty of care, but if one could be established, it may be possible to apply such an argument to large emitters of greenhouse gas emissions. However, the greatest obstacle will be proving who has caused the injury.

113 E Gerrard, 'Impacts and opportunities of climate change: indigenous participation in environmental markets' (2008) 3(13) *Australian Institute of Aboriginal and Torres Strait Islander Studies*, pp 12-13 citing *Native Village of Kivalina and City of Kivalina v ExxonMobil Corporation and others* Complaint for Damages and Demand for Jury Trial, (US District Court, Northern District of California, 28 U.S.C. §§ 1331, 2201) and *Hargrave v Goldman* (1963) 110 CLR 40. At: <http://ntru.aiatsis.gov.au/publications/2008pdfs/Issues%20Paper%20Vol%203%20No%2013.pdf> (viewed September 2008).

114 D Green & K Ruddock, 'Climate change impacts in the Torres Strait, Australia' (2008) 7(8) *Indigenous Law Bulletin*.

115 *Environmental Protection Act 1994 (Qld)* s 3.

116 D Green & K Ruddock, 'Climate change impacts in the Torres Strait, Australia' (2008) 7(8) *Indigenous Law Bulletin*.

117 D Green & K Ruddock, 'Climate change impacts in the Torres Strait, Australia' (2008) 7(8) *Indigenous Law Bulletin*.

5.3 Public nuisance¹¹⁸

The tort of public nuisance focuses on an interference with the right to use and enjoy land. Public nuisance is defined as an unlawful act, the effect of which is to endanger the life, health, property, or comfort of the public. Public nuisance must affect the public at large.

It is not a defence to a nuisance action based on pollution for the polluter to prove that the environment was already polluted from another source or that the polluter's individual actions were not the sole cause of the nuisance.¹¹⁹ This may mean that public nuisance is better suited to climate change actions than negligence because causation issues are likely to be less complex. However, if all polluters were acting legally, then the action may fail.

5.4 Human Rights Remedies

Although the Australian Government may have no obligations to Pacific and Indian islanders and other non-Australians under human rights law, because it has ratified and implemented all the major human rights treaties it does already have human rights obligations towards its *own* citizens...¹²⁰

This chapter has laid out a number of the human rights implications of climate change on the lives of Torres Strait Islanders. It threatens their lives, health, food, water and culture among others. Without a federal or Queensland charter of human rights, there are only a few human rights mechanisms that the Islanders could pursue. However, in summary 'Australia's current human rights laws do not provide adequate protection to Torres Strait Islanders faced with damage to their culture and possible relocation as a result of climate change'.¹²¹

(a) Native title

The Native Title Act is intended to protect and recognise native title.¹²² As I've already stated, all the inhabited islands in the Torres Strait have had native title rights and interests determined over them, and under the Act, those native title rights cannot be extinguished contrary to it.¹²³

Yet, one of the real risks posed by climate change is that those native rights and interests will be lost as a result of climate change – through damage or complete loss of particular sites and land. So how can the NTA protect the native title rights and interests of the Torres Strait Islanders'? Is sea level rise an 'act' in the sense contemplated by and protected under the Act?¹²⁴

118 D Green & K Ruddock, 'Climate change impacts in the Torres Strait, Australia' (2008) 7(8) *Indigenous Law Bulletin*.

119 D Green & K Ruddock 'Climate change impacts in the Torres Strait, Australia', *unpublished*.

120 M Byrne and M Ilijadica, 'There goes the neighbourhood' (2007) 12 *Uniya Occasional Paper*. At: http://www.uniya.org/talks/byrne_may07-op1.html (viewed September 2008).

121 M Byrne and M Ilijadica, 'There goes the neighbourhood' (2007) 12 *Uniya Occasional Paper*. At: http://www.uniya.org/talks/byrne_may07-op1.html (viewed September 2008).

122 *Native Title Act 1993* (Cth) s 3.

123 *Native Title Act 1993* (Cth) s 11.

124 The *Native Title Act 1993* (Cth) refers to 'acts' which affect or extinguish native title. See section 11 and s 226.

Section 226 of the NTA defines 'acts that affect native title' to include not only positive acts such as the making of legislation or granting of a licence, but the 'creation, variation, extension, renewal or extinguishment of any interest in relation to land or waters'. Sea level rises will extinguish certain rights and interests over land because they will disappear. The question will be whether the flooding of land will be interpreted as an 'act' despite the fact that the cause of that rise is essentially inaction on the part of governments to protect native title interests by taking steps to prevent climate change. Under section 227, such an act will 'affect' native title as it is wholly or partly inconsistent with the continued existence, enjoyment or exercise of native title rights and interests.

The NTA regulates activities or developments that may 'affect' native title rights. These acts are known as 'future acts'. Government inaction to prevent the impact of climate change on the Torres Strait Islands could constitute a 'future act'. In addition, those persons or companies who are taking actions that contribute to global warming and hence impacts on sea levels and native title rights in due course may also be undertaking 'future acts' which require different procedures in the NTA to be complied with. At present, the requirements of the future acts provisions in the NTA, such as notifying Traditional Owners, are not being undertaken by any of these parties. If this line of argument can be proven, the acts would be invalid under s 240A of the NTA.

The NTA provides various circumstances in which native title holders may be eligible to receive compensation for acts which have impaired their native title rights or would have otherwise been invalid.¹²⁵ It could be argued that the failure to take steps to mitigate climate change means that the Commonwealth and Queensland governments in particular have contributed to the extinguishment of native title rights and they are liable to pay compensation.

As I reported in my *Native Title Report 2007*, there have been no successful claims for compensation under the NTA.¹²⁶ This is partly because native title must be proved before an application for compensation can be successful, and as my native title reports show, native title is extraordinarily difficult to prove. However, native title has already been proven and determined in much of the Torres Strait. The compensation they could claim would be based on market value plus any amount to reflect the cultural value of the land, and could be of significant value. It won't, however, keep their land above water.

(b) International human rights law

In 2005, the Inuit (the Indigenous inhabitants of the Arctic region of North America and Greenland) brought a petition to the Inter American Commission of Human Rights¹²⁷ requesting its assistance in obtaining relief from human rights violations resulting from the impacts of climate change caused by the acts and omissions of the United States. In particular, the petition argued that the US had violated a number of rights set out in the *American Declaration of the Rights and Duties of Man*, the ICCPR, and the ICESCR.

125 See for example: *Native Title Act 1993* (Cth) ss 17, 20, 22G, 22L, 23J, 50, 51, 51A.

126 See chapters 7 and 8 of T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Australian Human Rights Commission (2008).

127 Inuit Circumpolar Conference, *Petition to the Inter American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States*, 7 December 2005 ("Inuit Petition"). At: http://www.earthjustice.org/library/legal_docs/petition-to-the-inter-american-commission-on-human-rights-on-behalf-of-the-inuit-circumpolar-conference.pdf (1 November 2007)? (viewed September 2008).

Similar to the impacts expected in the Torres Strait, climate change is, and will continue to, impact on the Inuit people's rights under international human rights law.

However, unlike the Americas, Australia does not have a regional human rights body. Nonetheless, it is possible that Torres Strait Islanders could bring their complaints to United Nations bodies. In particular, the United Nations Human Rights Committee can receive individual complaints of violation of rights under the ICCPR, and actively investigate and rule upon them.¹²⁸ While the Human Rights Committee cannot make binding decisions, its recommendations can highlight the problem and put pressure on the government to act.

6. Conclusion

I have written this brief chapter to highlight the breadth and seriousness of the potential consequences of climate change on the human rights of one of Australia's Indigenous populations – the Torres Strait Islanders. The possible challenges the Islanders will face in the coming years are overwhelming and potentially devastating.

In order to avoid a human rights crisis, the Australian Government must respond immediately.

It's been said to me by some Islanders that they're very happy that the Australian government is investing in the Pacific, to help their brothers and sisters deal with the impact of climate change. But they wonder why they government is not more strongly investing in similar communities in Australia, and they feel a bit overlooked.¹²⁹

The Islanders are seeking attention and support from government, and are committed to working with all layers of government to protect and ensure their future. In one of my discussions, James Akee, an islander from Mer, invited Senator the Hon Penny Wong, Minister for Climate Change and Water, and The Hon Kevin Rudd MP, Prime Minister to the island to see for themselves the difficult situation they face.¹³⁰ However, if that assistance, guidance and support is not forthcoming, then the consequences for the Islanders, and the rest of Australia could be very grim.

It is hoped that the progress toward a carbon-constrained future involves collaboration and opportunity as opposed to litigation. However the pathway will no doubt be shaped by the action or inaction of government and the private sector...The alternative, if this relationship further deteriorates, lies in litigation for loss and damage of lifestyle, identity, sacred places, cultural heritage and impairment of human rights and native title rights and interests. Investment in relationships is, in effect, an investment in mitigating the ecological, economic and human risks associated with climate change.¹³¹

128 Australia acceded to the Optional Protocol to the ICCPR on 25 September 1991.

129 The Independent, 5 May 2008, *Sinking without a trace: Australia's climate change victims*, citing Donna Green. At: <http://www.independent.co.uk/environment/climate-change/sinking-without-trace-australias-climate-change-victims-821136.html> (viewed September 2008).

130 J Akee, Mer Gedkem Le (Torres Strait Islanders) Corporation, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 29 September 2008.

131 E Gerrard, 'Impacts and opportunities of climate change: indigenous participation in environmental markets' (2008) 3(13) *Australian Institute of Aboriginal and Torres Strait Islander Studies*, p 14. At: <http://ntru.aiatsis.gov.au/publications/2008pdfs/Issues%20Paper%20Vol%203%20No%2013.pdf> (viewed November 2008).

Climate change and the human rights of Torres Strait Islanders

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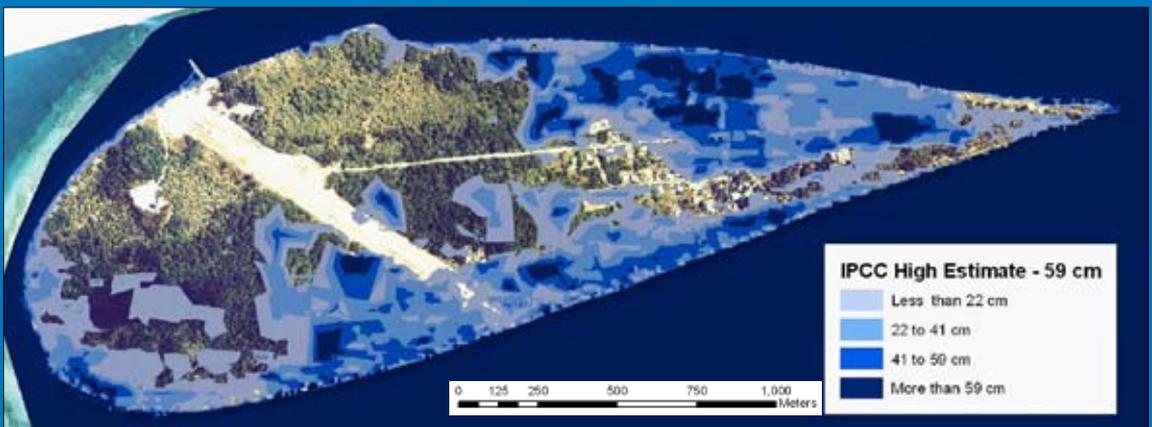
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Iama Island after the king tide in February 2006.¹

1 Torres Strait Regional Authority, *Supplementary Submission to the House of Representatives Standing Committee on Climate Change, Water, Environment and the Arts: Inquiry into climate change and environmental impacts on coastal communities* (15 September 2008). At: <http://www.aph.gov.au/house/committee/ccwea/coastalzone/subs/sub007a.pdf> (viewed November 2008).

Masig Island



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Masig Island: highest tides now.²



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Masig Island: IPCC high tide estimate for 2100.³

The Murray-Darling Basin: an ecological and human tragedy

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Arial View of Mildura – the Murray-Darling Basin, December 2008.⁴

- 2 K Parnell and S Smithers, *Coastal erosion project: Masig, Warraber, Poruma, lama*, (Presentation to the board of the Torres Strait Regional Authority, 2008).
- 3 K Parnell and S Smithers, *Coastal erosion project: Masig, Warraber, Poruma, lama*, (Presentation to the board of the Torres Strait Regional Authority, 2008). Note, these are predicted maximum high tides (without storm surge) for a few hours over the highest of the high tides.
- 4 Photograph taken by Katie Kiss.



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Bottle Bend Lagoon December 2008, Arial View.⁵



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Bottle Bend Lagoon in October 2001.⁶



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Bottle Bend Lagoon in May 2007.⁷

5 Photograph taken by Katie Kiss.
6 Photograph provided courtesy of NSW Murray Wetlands Working Group.
7 Photograph provided courtesy of NSW Murray Wetlands Working Group.

Case Study 2

The Murray-Darling Basin – an ecological and human tragedy

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1. Overview

The landscape of the Murray-Darling Basin (MDB) is under severe ecological stress. Issues such as salinity, poor water quality, stressed forests, dried wetlands, threatened native species, feral animals and noxious weeds are commonplace within the MDB. The reasons for this dramatic decline in river health are caused by water mismanagement including reversal of natural flow cycles and over allocation of water licences. Generations of bad farm practices such as deforestation have also played a major role in the ecological disaster that is the MDB.¹

Made up of the River Murray, the Darling River, the Murrumbidgee River, and all creeks and rivers that flow into them, the landscape within the Murray-Darling Basin (MDB) is incredibly diverse. It includes forests, plains, grasslands, mountain ranges, and both dry and ephemeral lakes and wetlands. The MDB supports a significant portion of Australia's biodiversity including species of flora and fauna found only within the MDB, such as the Coorong Mullet, Superb Parrot and the Murray Cod. These systems rely on the natural drying and flooding regime at appropriate times of the year. This variability provides for major breeding events of birds, fish and other fauna.

Text Box 1: The Murray-Darling Basin

The MDB is home to a large number of different plants and animals including:

- 35 endangered species of birds
- 16 species of endangered mammals
- over 35 different native fish species.

The MDB also includes over 30,000 wetlands – some of which are listed internationally for their importance to migratory birds from within the Basin, other parts of Australia and overseas.

1 Murray Lower Darling Rivers Indigenous Nations, *Murray-Darling Basin (Draft)*, unpublished, as cited by the Indigenous Peoples Organisation Network (IPO), *Environment – Indigenous Peoples Organisation of Australia Response*, Response to Agenda Item 4.2 – Environment of the Seventh Session of the United Nations Permanent Forum, New York, 21 April – 2 May 2008.

The MDB is also characterised by a variety of climatic conditions across its diverse landscape, ranging from sub-tropical conditions in the far north, cool humid eastern uplands, high alpine country of the Snowy Mountains, temperate conditions in the south-east, and hot and dry in the semi arid and arid western plains.²

Map 1: The Murray-Darling Basin³



The MDB is also an ancestral geographic domain, with nationally and internationally significant ecological sites, including four of the largest River Redgum forests in the world. The MDB also includes a number of Ramsar and World Heritage listed sites:

- Barmah-Millewa Forest
- Gunbower/Koondrook Forest

2 Murray-Darling Basin Commission, *The Murray-Darling Basin*, Information Sheet. For further information, see www.mdbc.gov.au.
 3 Murray-Darling Basin Commission, Map of the Murray-Darling Basin. At: http://kids.mdbc.gov.au/_data/page/75/Basin_Map.pdf.

- Perricoota Forest
- Werai Forest
- Hattah Lakes
- Chowilla Floodplain
- Menindee Lakes
- Lake Victoria
- Coorong and Lower Lakes
- Lake Mungo.

The MDB covers 1,061,469 square kilometres, about 14 percent of Australia's total area.⁴ The Basin is currently managed between five states and territories: Queensland, the Australian Capital Territory, New South Wales, Victoria, and South Australia. Each have their own water laws and policies which amount to an inconsistent approach to the effective management of the Basin.

The MDB is home to more than two million Australians. As well as providing drinking water to over three million people (more than one third of these people live outside the basin), the MDB provides for almost 45 percent of the value of Australia's agricultural output, including its sheep and cattle industry and major food and produce such as wheat, rice, cotton, vineyards, canola and soy. The MDB also generates approximately \$800 million per year in tourism and recreational industry income.

Text Box 2: Modern perceptions of the Murray-Darling Basin⁵

The Murray River has been perceived by governments and many others as central to the economic potential of the nation. This includes modern conceptualisations of nature, economy and nation – and water.

The Murray River was perceived as a liquid lifeline for agriculture in the semi-arid and arid inland. In the 1940s and 1950s governments and private industry popularised the Murray River as a powerful unlimited resource for the production of agricultural crops.

However, with limited knowledge of the variable natural flow of the inland rivers and weather patterns (which was at odds with methods of European agriculture), early settler farmers suffered valuable crop and stock losses, and extensive flooding destroyed townships such as Moama and Gundagai. To manage this problem irrigation schemes to drought proof agriculture were developed and townships were built on higher ground.

With irrigation activity in southern NSW and northern VIC, weirs have raised the height of water so it can move by gravity to agricultural lands, along canals and channels.⁶ By the mid 1970s, almost all of the water in the Murrumbidgee Irrigation Area had been allocated to irrigators.⁷

Today, 90 percent of the water consumed in the Murray-Darling Basin is used to irrigate agricultural lands, effectively diverting water into new networks, expanding the system of waterways from ephemeral creeks, to regulated channels next to irrigated fields.

4 Murray-Darling Basin Commission, *The Murray-Darling Basin*, Information Sheet. For further information see www.mdbc.gov.au.

5 J Weir, *Murray River Country: An ecological dialogue with traditional owners*, PhD thesis, Australian National University, October 2007, pp 60-63.

6 D Eastburn, the River, in *The Murray*, ed N Mackay and D Eastburn, Murray-Darling Basin Commission, Canberra 1992, as cited by J Weir, *Murray River Country: An ecological dialogue with traditional owners*, PhD thesis submitted to Australian National University, October 2007, p 63.

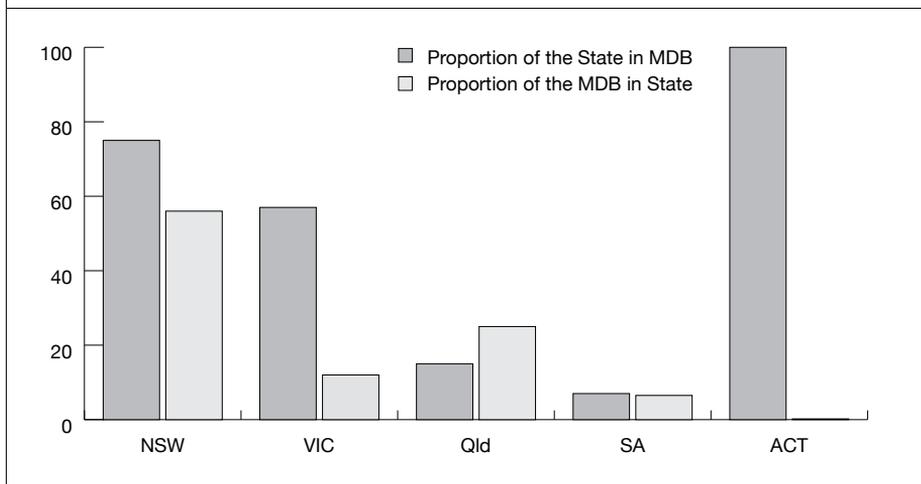
7 P Sinclair, *The Murray: a River and its People*, Melbourne University Press, 2001, as cited by J Weir, *Murray River Country: An ecological dialogue with traditional owners*, PhD thesis submitted to Australian National University, October 2007, p 63.

Individuals and companies apply to State governments for water permits, licences, allocations or entitlements which are issued as use rights rather than ownership. Use rights confer the authority to take water from a water source.⁸ More recently, control and allocation systems have extended to groundwater, with growing recognition that all water sources are connected.⁹

By way of comparison, the MDB is one of the driest catchments in the world. The catchment of the Mississippi River contributes 20 times more runoff per square kilometre while the Amazon catchment contributes 75 times more runoff per square kilometre.¹⁰

Although the MDB is one of the most variable riparian ecosystems in the world, research conducted by CSIRO and the Bureau of Meteorology (BOM) indicates that while these extreme climate conditions are caused partly by drought, they may be also partly attributed to global climate change, and that such conditions are likely to become more common.¹¹

Table 1: Proportion of the State in Murray-Darling Basin¹²



8 Productivity Commission, *Water Rights Arrangements in Australia and Overseas*, Commission Research Paper, Melbourne, 2003, as cited by J Weir, *Murray River Country: An ecological dialogue with traditional owners*, PhD thesis submitted to Australian National University, October 2007, p 63.

9 J McKay, Water, rivers and ecologically sustainable development, in *Fresh Water: New Perspectives on Water in Australia*, ed, E Potter, S McKenzie, A Mackinnon, J McKay, Melbourne University Press, 2007, as cited by J Weir, *Murray River Country: An ecological dialogue with traditional owners*, PhD thesis submitted to Australian National University, October 2007, p 63.

10 The Senate Standing Committee on Rural and Regional Affairs and Transport, *Report of the Standing Committee on Rural and Regional Affairs and Transport, Water management in the Coorong and Lower Lakes (including consideration of the Emergency Water (Murray-Darling Basin Rescue) Bill 2008)*, October 2008, Commonwealth of Australia, p 9. At: http://www.aph.gov.au/Senate/committee/rrat_ctte/lowerlakes_coorong/report/report.pdf (viewed 12 January 2009).

11 CSIRO and Bureau of Meteorology (2007) Climate change in Australia. Online technical report, CSIRO, 2007. At: <http://www.climatechangeinaustralia.gov.au>. As cited by CSIRO, *Water Availability in the Murray-Darling Basin – A report from CSIRO to the Australian Government*, October 2008, p 7. For further information see www.csiro.au.

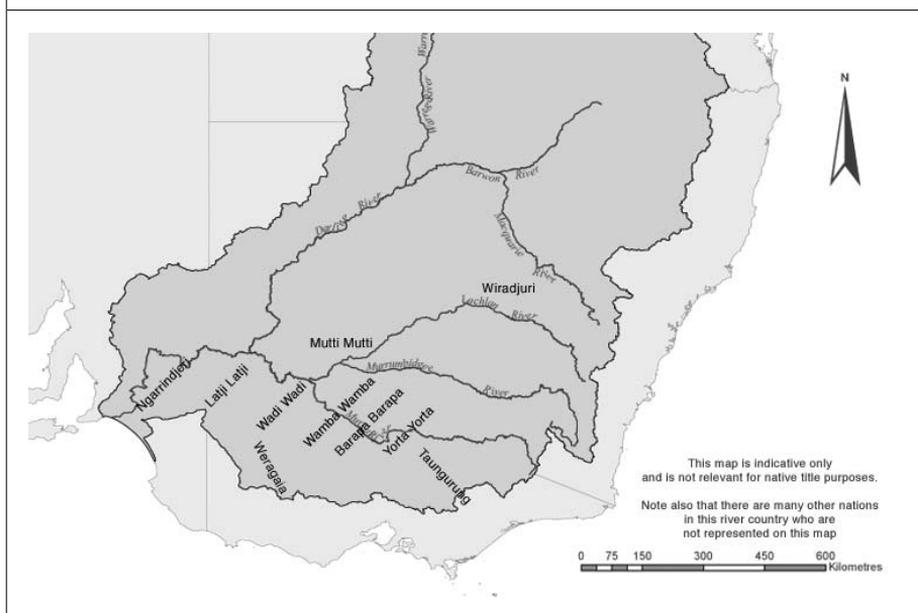
12 Proportion of the State in MDB: NSW – 75%, VIC – 57%, Qld – 15%, SA – 7%, ACT – 100%, proportion of the MDB in State: NSW – 56%, VIC – 12%, Qld – 25%, SA – 6.5%, ACT – 0.2%. For further information see www.mdbc.gov.au.

2. Indigenous peoples of the Murray-Darling Basin

Indigenous peoples currently make up 3.4 percent of the Basin's total population, 15 percent of the national Indigenous population.

The Murray-Darling River Basin is home to up to 40 autonomous Indigenous Nations¹³ across the five states and territories. These Traditional Owner groups include the Ngarrindjeri, Kurna, Peramangk, Wamba Wamba, Wadi Wadi, Wiradjuri, Yorta Yorta, Muthi Muthi, Mungatanga, Barkindji, Taungurung, Latji Latji, Wergaia, Wotjabulak, Barapa Barapa, Gamiloroi, Bugditji, and Nyiamppa Nations.

Map 2: The Indigenous Nations who have formed the alliance the Murray Lower Darling Rivers Indigenous Nations¹⁴



These Indigenous groups are interconnected by a compatible system of kinship law, who 'maintain an on-going social, cultural, economic and spiritual connection to their lands, waters and natural resources within the Murray-Darling Basin. Combined, their country extends between the Qld headwaters through to the Darling and Murray rivers systems within NSW, ACT and VIC to the ocean in SA'.¹⁵

13 The Traditional Owner groups of the Murray-Darling River Basin region identify as Indigenous Nations. For the purposes of this report, the use of the term 'Indigenous Nations' will be used in the same context as 'Indigenous peoples' and 'traditional owner groups'.

14 J Weir, 2007, *Murray River Country: An Ecological Dialogue with Traditional Owners*, PhD Thesis, The Australian National University, p 161.

15 M Morgan, L Strelein and J Weir, 'Authority, Knowledge and Values: Indigenous Nations Engagement in the Management of Natural Resources in the Murray-Darling Basin' in M Langton, O Mazel, L Palmer, K Shain and M Tehan (eds), *Settling with Indigenous Peoples: Modern treaty and agreement-making*, 2006, The Federation Press, Sydney.

While these Indigenous Nations, are independently identified based on their inherent cultural diversity and their traditions, sites, stories and cultural practices; they all share a vision for the Murray-Darling River Basin – and that is a healthy, living river with natural flows and cycles, sustaining communities and preserving its unique values.

The Indigenous Nations of the Murray-Darling River Basin possess distinct cultural and customary rights and responsibilities including:

- a spiritual connection to the lands, waters and natural resources of the Basin
- management of significant sites located along the river banks, on and in the river beds, and sites and stories associated with the water and natural resources located in the rivers and their tributaries
- protection of Indigenous cultural heritage and knowledge
- access to cultural activities such as hunting and fishing, and ceremony.

For the Indigenous Nations of the Murray-Darling River, water is not separate to the river and the river is not separate from the water within it. The river incorporates all of the lands and natural resources that rely on the water, and without the necessary management of the river and its lands and natural resources the water disappears.

Text Box 3: The Importance of the Rivers to the Indigenous Nations¹⁶

Indigenous people tell Dreaming stories that embed the inland rivers as places of energetic spiritual action by the ancestors. Rather than just one story, each language group has their own stories about how their country was created.

One of the most well known Dreaming stories of the Murray River is that of the giant Murray Cod. The Ngarrindjeri relate how this giant pondee (cod) was chased down the Murray River, from the junction with the Darling River, by their ancestral being Ngurunderi who was trying to spear the fish. The pondee thrashed through what was a small stream, widening it by the movement of its strong tail and thus creating the Murray River in what is now known as South Australia. When the pondee was caught it was cut up and the pieces of the pondee became different fresh and salt water fish species to sustain the Ngarrindjeri people.

Further upstream, the Yorta Yorta people, whose country includes the Barmah-Millewa forest tell us about Baiame's creation of Dhungala (the Murray River). Baiame sent a giant snake to follow his wife as she travelled from the mountains to the sea. The path of the giant snake made curves, creating the river bed which was later filled with rain water to form Dhungala.¹⁷

Such stories tie people to the rivers in a potent, spiritual way.

16 J Weir, *Murray River Country: An ecological dialogue with traditional owners*, PhD thesis submitted to Australian National University, October 2007, p 59.

17 A Arnold, Turning back the tide of history, *The Sunday Age*, Melbourne, 8 January 2006, p 18, as cited by J Weir, *Murray River Country: An ecological dialogue with traditional owners*, PhD thesis submitted to Australian National University, October 2007, p 59.

The river provides life through food and quality drinking water to Indigenous Nations, as it does to the Australian community. It also provides natural medicines to heal sickness, and enjoyment for recreational purposes. The natural flows and cycles feed all the rivers parts such as the tributaries, creeks, and nurseries. The native plants and wildlife depend on the river for survival.

Indigenous nations have for generations sought to engage government about the health of rivers.¹⁸ The entire ecosystem in and around the river needs to be maintained and looked after. If water is unhealthy, everything else will decline.¹⁹

Indigenous peoples have an obligation under their traditional law and custom to protect, conserve, and maintain the environment and the ecosystems in their natural state to ensure the sustainability of the whole environment.

However, historically Indigenous peoples have been excluded from water management. With low levels of awareness among Indigenous peoples of water institutions and regulation²⁰ and very little opportunity to participate in water management, Indigenous people have had little to no involvement in state, territory and national consultation processes, or the development of water policy. This has resulted in a limited capacity to negotiate enforceable water rights.²¹

As the physical water scarcity of Australia will be increasingly compounded by the impacts of drought and climate change, the capacity for Indigenous peoples to access water and secure Indigenous cultural water rights will be become increasingly important and difficult.

3. Potential effects of climate change on the Murray-Darling River Basin and it's Indigenous Peoples

In an interview with Jessica Weir, Elder of the Ngarrindjeri peoples, Agnes Rigney discussed the state of the Murray River saying:

It is not alive today, it is a dead river. Not only from just looking at it, but what it produces. Yes I've seen changes. I've seen the time when the river did produce for us well, when the river was clean. You could see the bottom of it. But to see it now, it makes you wonder how anything could live in it actually...²²

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- 18 M Morgan, L Strelein and J Weir, 'Authority, Knowledge and Values: Indigenous Nations Engagement in the Management of Natural Resources in the Murray-Darling Basin' in M Langton, O Mazel, L Palmer, K Shain and M Tehan (eds), *Settling with Indigenous Peoples: Modern treaty and agreement-making*, 2006 The Federation Press, Sydney.
- 19 M Morgan, L Strelein, J Weir, *Indigenous Rights to Water in the Murray-Darling Basin – in support of the Indigenous final report to the Living Murray Initiative*, Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), Research Discussion Paper No.14, 2004, The Native Title Unit, AIATSIS.
- 20 S Jackson, (CSIRO), *Indigenous Interests and the National Water Initiative Water Management, Reform and Implementation Background Paper and Literature Review*, (2007), pp 65-66. At http://www.nailsma.org.au/nailsma/publications/downloads/NAISMA_NWI_Review_UPDATEDDec07.pdf (viewed 26 July 2008).
- 21 M Durette, *Indigenous Legal Rights to Freshwater: Australia in the International Context*, (2008) Centre for Aboriginal Economic Policy Research Working Paper No. 42/2008, p vii. At <http://www.anu.edu.au/caepr/Publications/WP/CAEPRWP42.pdf> (viewed 28 August 2008).
- 22 J Weir, *Murray River Country: An ecological dialogue with traditional owners*, PhD thesis Australian National University, October 2007, p 109.

3.1 Mismanagement, long-term drought, and climate change

Indigenous peoples raised a number of concerns in their responses to the Living Murray Initiative.²³ Central responses were that:

The river is overused and abused and that government has failed to ensure the river's resources are used in a sustainable way. In doing so, government has failed future generations.²⁴

The Murray-Darling River Basin is in a state of crisis and ecological stress. It is widely acknowledged that extensive land and water mismanagement including bad farming practices that has included widespread deforestation, and significant human manipulation of the rivers through the construction of dams and weirs, has resulted in the reversal of natural flow cycles and over allocation of water licences.

I am concerned that if this current level of mismanagement continues, the added effects of long-term drought and climate change will see the demise of the Murray-Darling Basin.

The CSIRO reports that:

The major challenge for future water resource management in the MDB is to achieve sustainable water resource use while optimising economic, social and environmental outcomes in the context of a climate which is highly variable and non-stationary. The approaches of the past which assume an 'equilibrium' climate are no longer adequate.²⁵

The condition of the Murray-Darling Basin was established by the MDBC who found in 2001 that:

The rivers in the Basin are generally in poor ecological condition and that the current level of health is less than what is required for ecological sustainability.²⁶

Some of the findings of the MDBC included that:

- Fish populations are in very poor to extremely poor condition throughout the River Murray.
- Macroinvertebrate communities are generally in poor condition and declining toward the river mouth.

23 The *Living Murray Initiative*, is the Intergovernmental Agreement on Addressing Water Over-allocation and Achieving Environment Objectives in the Murray-Darling Basin of 25 June 2004, read together with: (a) the Supplementary Intergovernmental Agreement on Addressing Water Over-allocation and Achieving Environmental Objectives in the Murray-Darling Basin on 14 July 2006; and (b) arrangements referred to in clause 3.9.2 of the Agreement on Murray-Darling Basin Reform-Referral, as defined in the *Water Amendment Bill 2008*, s18H(2).

24 Farley Consulting Group, *Report to the Murray-Darling Basin Commission – Indigenous Response to the Living Murray Initiative*, Report commissioned by the Murray-Darling Basin Commission to report to the Ministerial Council on community engagement, April 2003, p 14.

25 CSIRO, *Water Availability in the Murray-Darling Basin – A report from CSIRO to the Australian Government*, October 2008, p 10. See www.csiro.au for further information.

26 Murray-Darling Basin Commission, *Environmental Challenges in the Murray-Darling Basin*, Information Sheet, Murray-Darling Basin *Initiative* Series, 2002. For further information see www.mdbc.gov.au.

- Riparian vegetation condition along the entire river was assessed as poor.
- Wetland quality is significantly reduced.
- The condition of floodplain inundation is very poor.
- Levels of nutrients and suspended sediments are undesirably high and worsening towards the river mouth.
- Throughout the River Murray and lower Darling River unseasonal flooding of wetlands, loss of connection with the floodplain, habitat simplification, water quality and bank erosion are all significant issues.²⁷

More recently, the Murray-Darling Basin Commission (MDBC) identified a number of challenges that require responses if the area is to survive. These challenges include the following:

- to improve the quality of the water
- to discover ways of sharing the water for the long term
- to keep the river systems healthy
- to manage the land in a way that provides jobs for the community, while at the same time taking care of the environment.²⁸

The Lower Murray now experiences drought every second year, instead of every twentieth. In the last two years the Murray has had its lowest inflow in recorded history and this will worsen with the increased impacts of climate change. For example, Garnaut reported that a one percent increase in maximum temperature will result in a 15 percent decrease in streamflow in the Murray-Darling Basin and he confirmed that as temperatures increase there will be a simultaneous increase in evaporation rates.²⁹

Additionally, the level of extraction of water from both groundwater³⁰ and surface water³¹ resources for consumptive, industrial and agricultural purposes is a major contributor to the stress on this fragile river system. This has been demonstrated by the fact that consumptive water use across the MDB has reduced average annual streamflow at the Murray Mouth by 61 percent. The river now ceases to flow through the mouth 40 percent of the time compared to one percent of the time in the absence of water resource development.³²

27 Murray-Darling Basin Commission, *A snapshot of the Murray and Darling River*, 2001. At: www.mdbc.gov.au/whatson/snapshot-exec.html.

28 Murray-Darling Basin Commission, *Taking up the challenge – Caring for the Murray River – an environmental challenge*, Information Sheet, April 2008. See www.mdbc.gov.au for further information.

29 R Garnaut, *The Garnaut Climate Change Review, Draft Report*, Commonwealth of Australia, 4 July 2008, p 147. At: <http://www.garnautreview.org.au/CA25734E0016A131/pages/all-reports--resources-draft-report> (viewed 17 October 2008).

30 Groundwater is water that flows or seeps downward and saturates soil or rock, supplying springs and wells. The upper surface of the saturate zone is called the water table. US Geological Survey Water Glossary. At www.ga.water.usgs.gov/edu/dictionary.html (viewed 19 November 2008).

31 Surface water is water that is on the Earth's surface, such as in a stream, river, lake or reservoir. US Geological Survey Water Glossary. At: www.ga.water.usgs.gov/edu/dictionary.html (viewed 19 November 2008).

32 CSIRO, *Water Availability in the Murray-Darling Basin – A report from CSIRO to the Australian Government*, October 2008, p 5. See www.csiro.au for further information.

Text Box 4: Projected climate change impacts in the MDB – The Murray-Darling Basin Sustainable Yields Project

In November 2006 as a result of the Summit on the south Murray-Darling Basin (MDB) the then Prime Minister and the MDB state Premiers commissioned CSIRO to report on sustainable yields of surface and groundwater systems within the MDB. The report provided assessments for the 18 regions that make up the Basin.

With water extraction and consumption a major concern within the MDB, the CSIRO found that while the impacts of climate change are uncertain:

- by 2030, surface water availability across the entire MDB is more likely to decline than to increase, with a substantial decline in the south. However, it is possible that there may be increases in surface water availability in the north of the MDB. The median decline for the MDB region is 11 percent – 9 percent in the north and 13 percent in the south of the MDB.
- the median water availability decline would reduce total surface water use by four percent under current water sharing arrangements but would further reduce flow at the Murray mouth by 24 percent to be 30 percent of the total without-development³³ outflow. The majority of the impact of climate change would be borne by the environment rather than by consumptive water users.
- the relative impact of climate change on surface water use would be much greater in dry years. Under the median 2030 climate, diversion in driest years would fall by more than 10 percent in most NSW regions, around 20 percent in the Murrumbidgee and Murray regions and from around 35 to over 50 percent in the Victorian regions. Compared to the dry extreme 2030 climate, diversions in driest years would fall by over 20 percent in the Condamine-Balonne, around 40-50 percent in NSW regions, over 70 percent in the Murray and 80-90 percent in the major Victorian regions.
- groundwater use currently represents 16 percent of total water use in the MDB. Current groundwater use is unsustainable in seven of the twenty high-use groundwater areas in the MDB and is expected to lead to major drawdowns in groundwater levels in the absence of management intervention. Groundwater use could increase by 2030 to be over one-quarter of total water use. One-quarter of current groundwater use will eventually be sourced directly from induced streamflow leakage which is equivalent to about four percent of current surface water diversions.

33 'Without development' refers to a scenario that removes the effects of water management infrastructure and consumptive water use. Catchment characteristics such as vegetation cover are not adjusted and so this scenario does not represent 'pre-development' or 'natural' condition. As defined by CSIRO, *Water Availability in the Murray-Darling Basin – A report from CSIRO to the Australian Government*, October 2008, p 4. See www.csiro.au for further information.

- expansion of commercial forestry plantations and increases in the total capacity of farm dams could occur by 2030. While the impacts of these developments³⁴ are expected to be minor in terms of the runoff reaching rivers across the MDB. The amount of surface water required by these developments and the impacts on the within-subcatchment streamflow may be significant.

Despite the information provided by the CSIRO on the projected impacts of climate change on the MDB, the Government continues to develop strategies that encourage the use of water resources. For example, the Governments Carbon Pollution Reduction Scheme provides incentives for carbon offsets through forest plantations on an opt-in (voluntary) basis.³⁵ This encourages further farming activity which will also require extraction and manipulation of water resources. As noted by the Australian Government:

The inclusion of forestry on an opt-in basis will provide an incentive for forest landholders, including indigenous land managers, to establish additional forests, or carbon sinks (forests planted for the purpose of permanently storing carbon). This raises other questions regarding potential shifts in land use from agriculture and other environmental impacts such as on water systems and biodiversity. The incentive will be greatest for carbon sinks that are planted with no intention of cutting the trees down. The incentive will be weaker for forests that have been planted for the purpose of felling as forest landholders will need to take account of the possibility of a liability at the point of felling. The Government is aware of these complex land use policy challenges and believes that they are best addressed directly through water policy and natural resource management policy.³⁶

3.2 Wetlands, Water Rights and the Cultural Economy

Specific to the interests of the Indigenous peoples of the MDB, I am particularly concerned about:

- the health of fragile ecosystems including the many wetlands and the River Red Gums
- the recognition and provision of cultural water rights in order to maintain culture as well as the environment
- Indigenous peoples ability to access the cultural economy.

34 The 'development' scenario anticipated the likely future development and the 2030 climate. Development includes growth in farm dam capacity, expansion of commercial forestry plantations and increases in groundwater extraction. The projections of future farm dam and commercial forestry plantation development are approximates and in the context of current policy and recent trends. The projections of future groundwater extraction represent maximum allowable use under existing water sharing arrangements. As defined by CSIRO, *Water Availability in the Murray-Darling Basin – A report from CSIRO to the Australian Government*, October 2008, p 5. See www.csiro.au for further information.

35 Department of Climate Change, *Carbon Pollution Reduction Scheme, Green Paper*, Australian Government, July 2008, p 17. At: <http://www.climatechange.gov.au/greenpaper/report/pubs/greenpaper.pdf> (viewed, 29 August 2008).

36 Department of Climate Change, *Carbon Pollution Reduction Scheme, Green Paper*, Australian Government, July 2008, p 17. At: <http://www.climatechange.gov.au/greenpaper/report/pubs/greenpaper.pdf> (viewed, 29 August 2008).

(a) The health of fragile ecosystems

Massive extractions of water from the Murray River for irrigation have degraded the ecological health of the river country, transforming relationships previously sustained by the flow of the river water...The consequences of the over-extraction of water from the inland rivers are so serious that it is being experienced by the traditional Aboriginal land owners as a contemporary dispossession of their country.³⁷

The culture and existence of the Indigenous Nations of the MDB is affirmed by the Rivers. Through circumstance, some have lost opportunities to connect with and reaffirm relationships with country and with each other. We often hear Indigenous peoples say that 'we have survived'. However, extensive settlement and agricultural industry in the MDB has bought with it ecological destruction. This has resulted in impacts to traditional owners ability to maintain their connection to country and their traditional identity. A second wave of dispossession.

Agnes Rigney of the Ngarrindjeri peoples, defines her experience of living in, surviving on and experiencing and enjoying country as 'cultural living'. Weir understands Agnes Rigney's understanding of cultural living as 'reaffirming continuities with the ecological world through the practicing and passing on of cultural knowledge and experience. This worldview clearly identifies a direct link with the loss of life by the river to the loss of 'cultural living'.³⁸

Text Box 5: Cultural Living – Agnes Rigney of the Ngarrindjeri peoples

I remember as a kid growing up in Loxton how clear the river was, the water was, and my father was actually making us spears from bamboo. And we used to walk down to the river and we used to spear the fish. And it is just sad what's happened to it now. That was part of cultural living, connected to the river, that we can't really practice anymore.³⁹

However, despite 15 years of native title which is centred around Indigenous peoples proving their continued connection to their traditional lands and waters, the connectivity of Indigenous peoples to their lands and waters remains unaccounted for in the majority of Indigenous policy.

Traditionally, many Indigenous peoples depended upon the natural resources of their lands and waters for their livelihoods. Some of these peoples lived within diverse but fragile ecosystems. As identified by the International Work Group for Indigenous Affairs at the Conference on Indigenous Peoples and Climate Change:

The consequences of ecosystem changes have implications for the use, protection and management of wildlife, fisheries, and forests, affecting the customary uses of culturally and economically important species and resources.⁴⁰

37 J Weir, 'The traditional owner experience along the Murray River', in E Potter, S Mackenzie, A Mackinnon, and J Mackay (eds), *Fresh Water: New Perspectives on Water in Australia*, Melbourne University Press, 2007, p 44.

38 J Weir, *Murray River Country: An ecological dialogue with traditional owners*, PhD thesis, Australian National University, October 2007, p 105.

39 J Weir, *Murray River Country: An ecological dialogue with traditional owners*, PhD thesis, Australian National University, October 2007, p 105.

40 International Work Group for Indigenous Affairs (IWGIA), *Conference on Indigenous Peoples and Climate Change, Meeting Report*, Copenhagen, 21-22 February 2008, Submitted to the Permanent Forum on Indigenous Issues, Seventh session, New York, 21 April – 2 May 2008.

These consequences are also a reality for the Murray-Darling Basin, where the rapid ecological decline of the rivers and waterways is leading to issues such as salinity, poor water quality, stressed forests, dried wetlands, threatened native species, feral animals and noxious weeds.

For example, there are 26 native fish species that complete their life cycles within the Murray-Darling river system. Changes in river flow, physical barriers to movement (such as dams and weirs), the decline in water quality, removal of habitat, overfishing, and the introduction of exotic fish (such as carp) and diseases have made it extremely difficult for many native species to survive.⁴¹

(b) Wetlands

The stress experienced by various fauna and flora that rely on the ecosystems of the MDB is further exacerbated by the declining health of the many wetlands that form a crucial part of the MDB.

Text Box 6: What is a wetland?

A wetland is any depression in the landscape that has the capacity to contain water at some time. Wetlands can contain fresh, brackish or saline water, and can be still or flowing, permanent or temporary, large or small, deep or shallow, natural or man-made.

Natural wetlands include lakes, billabongs, swamps, estuaries, rivers, streams and shallow marine areas. Artificial wetlands include reservoirs, sewage farms and drainage basins.

Many people think that all wetlands must be wet all of the time. In fact, many wetlands require a cycle of both wet and dry periods to be healthy.⁴² Each wetland has its own unique ecosystem of plants and animals that depend on the wetland for food, water and habitat.

Wetlands are areas of high biological diversity and assist with maintaining water quality and protecting the biodiversity. They also provide flood and erosion protection, a habitat and breeding place for native fish, waterbirds and reptiles.

Wetlands are also sites of archaeological and cultural significance for Indigenous and non-indigenous peoples.⁴³ For Indigenous peoples, wetlands are often places where there is significant cultural heritage including scar trees, artefacts, shell middens, and burial sites. The devastation of sacred sites, burial places and hunting and gathering spaces, not to mention a changing and eroding landscape, cause great distress to Indigenous peoples.

41 Murray-Darling Basin Commission, *Environmental Challenges in the Murray-Darling Basin*, Information Sheet, Murray-Darling Basin *Initiative Series*, 2002. For further information see www.mdbc.gov.au.

42 Mallee Catchment Management Authority, *What is a wetland?*, Information Sheet, Mallee Catchment Management Authority, Victoria. For further information see www.malleecma.vic.gov.au.

43 Mallee Catchment Management Authority, *What is a wetland?*, Information Sheet, Mallee Catchment Management Authority, Victoria. For further information see www.malleecma.vic.gov.au.

The importance of wetlands has been internationally recognised by the adoption in 1971 of the Ramsar Convention on Wetlands of International importance especially as Waterfowl Habitat (the Ramsar Convention).⁴⁴ Across Australia, 49 wetlands have now been recognised as being of international significance and are listed under the Ramsar Convention.⁴⁵ Sixteen of these wetlands are in the MDB, and around 220 wetlands in the MDB are listed in the Directory of Important Wetlands in Australia.⁴⁶

According to the Mallee Catchment Management Authority, many of the wetlands are under threat from river regulation, pollution, land clearing, introduced species and climate change.

The Lower Lakes, Coorong and the Murray Mouth are Ramsar listed wetlands that have been significantly degraded as a result of water resource development, through for example the construction of barrages that isolate the Lower Lakes from the Murray mouth.⁴⁷ It is expected that while the impacts of climate change are unclear, the impacts of climate change would be exacerbated under current water sharing arrangements. Furthermore, the impact of reduced surface water availability would be transferred to the riverine environments along the Murray River including the Lower Lakes and the Coorong.

The most significant impact from reduced inflows is the exposure of sediments high in sulfates which have the potential to oxidize and produce sulphuric acid upon rewetting.

Historically a problem of coastal regions, sulfidic sediments have emerged as a significant threat to the long-term ecological sustainability of Australia's inland wetlands and are a sure sign of poor wetland condition.⁴⁸

Around 3,000 hectares of the Coorong lake bed is affected by sulfidic sediments and the problem is spreading up the Murray River Valley.⁴⁹ Bottle Bend Lagoon provides evidence of the most detrimental impacts from reduced inflows into wetlands resulting in sulfidic sediments.

44 Convention of the Parties 2002, *Convention on Wetlands of International Importance especially as Waterfowl Habitat*, Ramsar, 1971. At: www.ramsar.org (viewed 3 October 2008).

45 Murray-Darling Basin Commission, *Natural Resource Management, Wetlands*, Information Sheet. For further information see http://www.mdbc.gov.au/nrm/water_issues/wetlands.

46 CSIRO, *Water Availability in the Murray-Darling Basin – A report from CSIRO to the Australian Government*, October 2008, p 19. See www.csiro.au for further information.

47 CSIRO, *Water Availability in the Murray-Darling Basin – A report from CSIRO to the Australian Government*, October 2008, p 20. See www.csiro.au for further information.

48 National Water Commission, *Sulfidic Sediments, Threatening Australia's inland wetlands*, Information Sheet. For further information see www.mwwg.org.au.

49 J Pittock, *Australia's Coorong Ramsar site as an example of climate change challenges – Over-allocation of water and climate change wreck ecological havoc: big issues for Ramsar COP10?*, The Ramsar Convention on Wetlands, 29 September 2008. At: www.ramsar.org/features/features_australia_coorong.htm (viewed on 12 January 2009).

Text Box 7: What are sulfidic sediments?

- Sulfidic sediments form naturally when soils are inundated for extended periods.
- Long term wetting, combined with increased salinity leads to the formation of sulfidic sediments. When sulfidic sediments are dried and rewet a chemical process occurs which releases lots of acid into the system.
- When the soil is rewetted, excess acid may be flushed into the water resulting in harm to fish and vegetation.

Bottle Bend Lagoon is a natural ephemeral wetland located in the Gol Gol State Forest near Mildura in Victoria, on the NSW side of the Murray River. The construction of Lock 11 weir pool at Mildura changed the natural flows of this wetland, which has resulted in many years of semi-permanent inundation. This inundation combined with a drying and wetting cycle in 2001/2002 lead to significant changes in pH levels from 7.24 (April 2002) to 3.69 (June 2002), and the intrusion of highly saline groundwater which resulted in lethal concentrations of heavy metals such as aluminium and manganese. This cycle resulted in a massive fish kill and the eventual death of thousands of trees and other vegetation.

On a site visit to Bottle Bend Lagoon, traditional owners discussed their concerns about the state of the Lagoon, and their frustration in addressing these issues with Government. In particular, they were concerned that some wetlands are significantly deteriorating in very short periods of time.⁵⁰

Other traditional owners have also expressed their concern over the scale and speed of the decline. Mutti Mutti Elder Mary Pappin said:

Such a short space of time! I can't take my grandchildren down to my favourite fishing spots and do what I used to do.⁵¹

In 2004, the NSW Environmental Trust and the NSW Murray Working Wetlands Group co-funded a project to examine a range of wetlands in NSW. Of 81 NSW wetlands surveyed by the Murray-Darling Freshwater Research Centre, 20 percent showed some evidence of sulfidic sediments. If mismanaged, significant ecological damage is expected.⁵²

Such degradation of wetlands and waterways also has a significant affect on the rights of the Indigenous peoples of the MDB to conduct cultural activities and undertake their responsibilities which ensure the health of the rivers.

50 Traditional Owner, *Site Visit to Bottle Bend Lagoon, Gol Gol State Forest Victoria*, CSIRO's 2nd National Indigenous Science and Research Roundtable, Mildura, 6-7 November 2008.

51 Up the River Forum, Message Stick Festival, Sydney Opera House, May 2004, as cited by J Weir, *Murray River Country: An ecological dialogue with traditional owners*, PhD thesis, Australian National University, October 2007, p 104.

52 National Water Commission, *Sulfidic Sediments, Threatening Australia's inland wetlands*, Information Sheet. For further information see www.mwwwg.org.au.

(c) River Red Gum Forests

A major feature of the Murray-Darling Basin and its wetlands are the river red gum forests. River red gum is the dominant tree species on the Murray River floodplain in Victoria. River red gum forests exist on 269, 444 hectares of public land within the MDB extending from Lake Hume to the South Australian border.⁵³ The two largest river red gum forests in the world occur within the MDB: the Gunbower-Perricoota and Barmah-Millewa forests.

For generations, the River Red Gum forests along the Murray River and its tributaries have supported and nurtured many Aboriginal peoples including Bangerang, Bararapa Bararapa, Dhudoroa, Dja Dja Wurrung, Jarra Jarra, Jupagulk, Latje Latje, Ntait, Nyeri Nyeri, Robinvale, Tati Tati, Taungurung, Wadi Wadi, Wamba Wamba, Way Wuru, Wergaia, Yorta Yorta, and Yulupna. Each of these groups had deep spiritual links with the land.⁵⁴

These forests provided Indigenous people with vital resources including plants, animals, water, minerals and stone, and sustained a lifestyle that not only serviced basic needs such as food, clothing, tools, medicine, housing and heating, but also a rich cultural life with jewellery, ornaments, transport, mythology, art and crafts.

Text Box 8: The high biodiversity value of river red gum forests

River red gum forest wetlands have high biodiversity value as they provide habitat for fish and waterbirds (breeding, feeding and refuge areas). This requires a certain length of flooding duration and time of year. Hollows and spouts in river red gum provide habitat for water and forest birds, including two rare species of parrot (Superb Parrot (*Polytelis swainsonii*) and Regent parrot (*Polytelis anthopeplus*)) in the Murray River region.⁵⁵

This biodiversity is maintained by the health of the river red gum ecosystem. Stands of river red gum are intimately associated with the surface-flooding regime of the watercourses and related ground water flow. The high water use of river red gums contributes to maintaining the watertables at depth.⁵⁶

These forests are also of considerable value to the non-indigenous residents of the MDB. Many industries, including timber harvesting, honey production and grazing, have been active in forest areas since the early days of European settlement.⁵⁷

53 Victorian Environment Assessment Council, *River Red Gum Forests Investigation – Report*, Melbourne, July 2008, p 88. At: <http://www.veac.vic.gov.au/riverredgumdiscussionpaper.htm> (viewed 12 January 2009).

54 Victorian Environment Assessment Council, *River Red Gum Forests Investigation – Discussion Paper*, Melbourne, October 2006, p 88. At: <http://www.veac.vic.gov.au/riverredgumdiscussionpaper.htm> (viewed 12 January 2009).

55 K Dalton, *Managing our river red gums*, Soil Conservation Service of New South Wales, Sydney, 1990, as cited by CSIRO, *Water for a health country, River Red Gum*, Information Sheet. At: <http://www.anbg.gov.au/cpbr/WfHC/Eucalyptus-camaldulensis/index.html> (viewed 12 January 2009).

56 K Dalton, *Managing our river red gums*, Soil Conservation Service of New South Wales, Sydney, 1990, as cited by CSIRO, *Water for a health country, River Red Gum*, Information Sheet. At: <http://www.anbg.gov.au/cpbr/WfHC/Eucalyptus-camaldulensis/index.html> (viewed 12 January 2009).

57 Victorian Environment Assessment Council, *River Red Gum Forests Investigation – Discussion Paper*, Melbourne, October 2006, p 1. At: <http://www.veac.vic.gov.au/riverredgumdiscussionpaper.htm> (viewed 12 January 2009).

While these forests are most common in high rainfall areas, river red gum have adapted to the extremes of the MDB with alternating periods of excess water availability during floods and periods of water deficit during drought. They are dependent on surface flooding and groundwater.

A report to the Northern Victorian Catchment Management Authorities and the Department of Sustainability and Environment, *Mapping the Current Condition of River Red Gum Stands along the Victorian Murray River Floodplain*,⁵⁸ has identified that the regulation of the Murray River through dams, weirs, levees and diversion has drastically altered the flow regime.

In general, average peak monthly flows have been reduced by over 50 percent along the Murray River. The seasonal distribution of flows has shifted from winter-spring to summer-autumn since the construction of Hume Dam, regulation has reduced extensive flooding in the Barmah Forest, and the reduction has been more pronounced in the Mallee, with the frequency of extensive floods on Wallpolla Island and Lindsay Island having been reduced. The decline in flooding frequency, has resulted in a substantial decline in river red gum tree condition over the past twenty years.⁵⁹

Based on a random selection of 140 sites surveyed on the floodplains of the Murray River between the Hume Dam and the South Australian border, the lower Ovens River and the lower Goulburn River, the report predicts that:

- only 30.1 percent of river red gum stands across the Victorian Murray River Floodplain are currently in good condition
- a downstream decline in the stand condition of river red gum forests and woodlands along the Victorian Murray River Floodplain
- the Victorian Riverina is the only region where the majority of river gum stands are in good condition.⁶⁰

The decline in the health of the river red gum forests in the Murray-Darling Basin has been public knowledge since 1990 with a number of surveys conducted. These surveys found:

- in the late 1980s degradation of tree canopies increased dramatically below the Wakool Junction in the Mallee⁶¹

58 S Cunningham, R Mac Nally, M White, J Read, P Baker, J Thomson, and P Griffioen, *Mapping the Current Condition of River Red Gum (Eucalyptus Camaldulensis Dehnh.) Stands along the Victorian Murray River Floodplain*, A Report to the Northern Victorian Catchment Management Authorities and the Department of Sustainability and Environment.

59 S Cunningham, R Mac Nally, M White, J Read, P Baker, J Thomson, and P Griffioen, *Mapping the Current Condition of River Red Gum (Eucalyptus Camaldulensis Dehnh.) Stands along the Victorian Murray River Floodplain*, A Report to the Northern Victorian Catchment Management Authorities and the Department of Sustainability and Environment, pp 3-4.

60 S Cunningham, R Mac Nally, M White, J Read, P Baker, J Thomson, and P Griffioen, *Mapping the Current Condition of River Red Gum (Eucalyptus Camaldulensis Dehnh.) Stands along the Victorian Murray River Floodplain*, A Report to the Northern Victorian Catchment Management Authorities and the Department of Sustainability and Environment, p 1.

61 Margules and Partners, *Riparian Vegetation of the River Murray. Report prepared by Margules and Partners Pty. Ltd., P. & J. Smith Ecological Consultants and Department of Conservation Forests and Lands*, Murray-Darling Basin Commission, 1990, Canberra, as cited by S Cunningham, R Mac Nally, M White, J Read, P Baker, J Thomson, and P Griffioen, *Mapping the Current Condition of River Red Gum (Eucalyptus Camaldulensis Dehnh.) Stands along the Victorian Murray River Floodplain*, A Report to the Northern Victorian Catchment Management Authorities and the Department of Sustainability and Environment, p 4.

- in 2002, around 52 percent of trees were identified as stressed or dead in the Mallee between Wentworth and Renmark⁶²
- in 2003 approximately 80 percent of trees showed some signs of crown stress on the Lower Murray in South Australia⁶³
- in 2004, the sites between Wentworth and Renmark were resurveyed, the proportion of trees that were stressed in the had increased to 78 percent.⁶⁴

While the rapid decline in tree condition has been attributed to the drought, regulation of the river may also limit the potential of trees to recover. The *Mapping the Condition of River Red Gum Report* observes that stressed trees are generally found away from the banks of the Murray River and permanently inundated anabranches on the floodplain.⁶⁵

Despite the current pressure on the river red gum forests and the biodiversity that is supported by them, environmental degradation and climate change presents the market with the impetus to create large scale plantations. Many commercial interests have enthusiastically engaged with Government to establish there business in pursuance of new timber products and for the emerging carbon trade industry in Australia.⁶⁶

Climate change challenge and mitigation and adaptation strategies that are being developed to address the associated issues appear to be predominantly market driven, or focused on economic outcomes. This in itself has the potential to increase the pressure on the MDB, particularly its area's of ecological and biodiversity importance. Weir discusses this in the context of oppositional worldviews. For example, the influential 'ecology versus economy' position.

This perspective tells us what happened and what our responses should be: we understand that unhealthy rivers are the unfortunate sacrifice we had to make for economic growth, and that investing in river health is to the detriment of economic growth. However, we can see with our own eyes that a dying river does not support

62 Resource and Environmental Management, *Hydrogeological Benchmark Assessment for the River Murray Between Wentworth and Renmark. Final Report – Work Initiatives*, Resource and Management Pty. Ltd., Kent Town, South Australia, 2003, as cited by S Cunningham, R Mac Nally, M White, J Read, P Baker, J Thomson, and P Griffioen, *Mapping the Current Condition of River Red Gum (Eucalyptus Camaldulensis Dehnh.) Stands along the Victorian Murray River Floodplain*, A Report to the Northern Victorian Catchment Management Authorities and the Department of Sustainability and Environment, p 4.

63 Murray-Darling Basin Commission, *Preliminary Investigations Into Observed River Red Gum Decline Along the River Murray Below Euston*, Technical Report 03/03, Murray-Darling Basin Commission, Canberra, 2003, as cited by S Cunningham, R Mac Nally, M White, J Read, P Baker, J Thomson, and P Griffioen, *Mapping the Current Condition of River Red Gum (Eucalyptus Camaldulensis Dehnh.) Stands along the Victorian Murray River Floodplain*, A Report to the Northern Victorian Catchment Management Authorities and the Department of Sustainability and Environment, p 4.

64 Murray-Darling Basin Commission, *Survey of River Red Gum and Black Box Health Along the River Murray in New South Wales, Victoria and South Australia – 2004*. Murray-Darling Basin Commission, Canberra, 2005, as cited by S Cunningham, R Mac Nally, M White, J Read, P Baker, J Thomson, and P Griffioen, *Mapping the Current Condition of River Red Gum (Eucalyptus Camaldulensis Dehnh.) Stands along the Victorian Murray River Floodplain*, A Report to the Northern Victorian Catchment Management Authorities and the Department of Sustainability and Environment, p 4.

65 S Cunningham, R Mac Nally, M White, J Read, P Baker, J Thomson, and P Griffioen, *Mapping the Current Condition of River Red Gum (Eucalyptus Camaldulensis Dehnh.) Stands along the Victorian Murray River Floodplain*, A Report to the Northern Victorian Catchment Management Authorities and the Department of Sustainability and Environment, p 4.

66 As cited by Indigenous Peoples Organisations Network, *Oil Palm and Other Commercial Tree Plantations, Monocropping: Impacts on Indigenous Peoples' Land Tenure and Resource Management Systems and Livelihoods – Indigenous Peoples Organisation of Australia Response*, Response to Item 4 of the Seventh Session of the United Nations Permanent Forum New York 21 April – 2 May 2008.

our economies. Rather, the far reaching relationships sustained by healthy fresh water ecologies provide water as a resource for production and a nurturing life force.⁶⁷

Contingency planning has been conducted by the Prime Minister and the Premiers of New South Wales, Victoria and South Australia regarding wetlands in the River Murray. This planning acknowledges that some wetlands have an impact on threatened species that come under the Ramsar Convention and that actions in relation to these will be subject to the *Environmental Protection and Biodiversity Conservation Act 1999*.⁶⁸

Text Box 9: Declaration on the Rights of Indigenous Peoples

Article 29 states:

- Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands and territory and resources. States shall establish and implement assistance programs for Indigenous peoples for such conservation protection, without discrimination.
- States will take effective measures to ensure that no storage or disposal of hazardous materials shall take place on lands or territory of Indigenous peoples without their consent.

(d) Cultural water rights

The cultural flow is not a competition for water. It is a philosophical change in water management which respects a living world within which our lives are embedded in ethical relationships of care. There is no cultural flow from a dead river. The ecological philosophers, the traditional owners, and the ecologists concur. We must look to our relationships with rivers to understand how to get ourselves out of this catastrophe.⁶⁹

Indigenous rights to waters are part of a holistic system of land and water management. The imposition of the European systems of land and water management has meant that this holistic system has been fragmented. Under European administration, Indigenous water needs are not adequately addressed.

While the current legislative arrangements make provision for the recognition of environmental water, there is limited consideration given to social, cultural and Indigenous issues.

As identified by Morgan, Strelein and Weir:

Water is central to the survival of Indigenous peoples in Australia. Indigenous peoples' survival depended upon knowledge of the both the episodic and seasonal behaviour of the creeks and rivers, reliable water holes, and the availability of swamps, springs and soaks. Careful management of the natural resources of the Murray River meant that food would be available for important gatherings of thousands of people held over

67 J Weir, *Ecological Dialogue*, Ecological Humanities, Australian National University. At: <http://www.ecologicalhumanities.org/ecodialogue.html> (viewed 12 January 2009).

68 Department of the Environment and Water Resources, *Murray-Darling Basin Dry Inflow Contingency Planning – Overview Report to First Ministers, 20 April 2007*, Prime Minister and the Premiers of New South Wales (NSW), Victoria and South Australia, April 2007. At: <http://www.environment.gov.au>.

69 J Weir, *Murray River Country: An ecological dialogue with traditional owners*, PhD thesis, Australian National University, October 2007, p 238.

several days. The right to use and to take water is an essential part of the historical and contemporary lives of Indigenous Nations.⁷⁰

With Australia naturally being a country of physical water scarcity, I am concerned about the capacity for the recognition of Indigenous rights and access to water. In the context of the predicted impacts of drought and climate change, securing Indigenous cultural water rights will become increasingly important.

The Indigenous Nations of the Murray-Darling River Nations argue that they require specific cultural water allocations, which they refer to as 'cultural flows', to meet their spiritual, cultural, social, economic and environmental management responsibilities and development aspirations.

Text Box 10: What is cultural water?

The Indigenous Nations of the Murray-Darling River Basin define cultural flows as:

Water entitlements that are legally and beneficially owned by the Indigenous Nations of a sufficient and adequate quantity and quality to improve the spiritual, cultural, environment, social and economic conditions of those Indigenous Nations.⁷¹

The impacts and benefits of cultural water to Indigenous peoples include:

- empowerment and social justice - water is being delivered to country by the peoples
- growing native plants
- protecting and hunting animals
- song, dance, art and ceremony
- spiritual sites
- improved cultural-economic and health outcome through the provision of food, medicines and materials for art.⁷²

While some of the points raised above could be classified as environmental water, this does not reduce the government's responsibility to provide sustainable resources for the management of water resources.

The Indigenous Nations of the Murray-Darling River Basin distinguish between cultural and environmental water.

They argue that:

The difference between environmental and cultural water is that it is the Indigenous peoples themselves deciding where and when water should be delivered based on traditional knowledge and their aspirations. This ensures Indigenous peoples are empowered to fulfil their responsibilities to care for country.⁷³

70 M Morgan, L Strelein, J Weir, *Indigenous Rights to Water in the Murray-Darling Basin – in support of the Indigenous final report to the Living Murray Initiative*, Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), Research Discussion Paper No.14, 2004, The Native Title Unit, AIATSIS, p 35.

71 Murray Lower Darling Rivers Indigenous Nations, *Cultural Flows*, undated.

72 Murray Lower Darling Rivers Indigenous Nations, *Cultural Flows*, undated.

73 Murray Lower Darling Rivers Indigenous Nations, *Cultural Flows*, undated.

Ian Cohen of the Greens Party, addressed the issue of cultural water provisions for Indigenous peoples in NSW:

Australia's international obligations under article 8(j) of the Convention of Biological Diversity require indigenous traditional owners not be engaged as stakeholders but as co-managers to map out how to energise and implement the provision of cultural water in natural resource management frameworks. Our indigenous communities have an intrinsic and spiritual connection with the Murray-Darling that goes back untold generations before invasion. Forging ahead, we must take steps to understand the connectivity between the cultural and societal capital needs of indigenous nations and align such needs with allocations for cultural water.⁷⁴

The provision of environmental water is the responsibility of the State, however Indigenous people may choose to use cultural water for the purposes of maintaining their environment and culture.

The Indigenous Nations of the Murray-Darling River Basin also understand that the volume of water required to bring the Rivers back to a healthy state is well-known. Therefore questions of volume for cultural water need to be explored through scoping work with the Indigenous Nations, and that is negotiated using informed consent and good faith processes.⁷⁵

(e) Access to the cultural economy

The difficult task of determining how best to manage the scarce water resources of the MDB cannot side-step the inherent rights of Indigenous Nations to the use, access, enjoyment and economic utility of the water of the MDB.

Whilst the cultural economy is understood by governments and others to describe the subsistence economy of the traditional owners,⁷⁶ the Indigenous Nations of the MDB 'use cultural economy to express themes of ecological restoration and repair, using the logic of holism to connect ecology, culture and economy'.⁷⁷

Text Box 11: The cultural economy – Jeanette Crew of the Mutti Mutti peoples

Jeanette discussed with Jessica Weir how Wamba Wamba women (her close relatives) want to revive the art of making woven grass baskets and trade them as part of their cultural economy.

Jeanette raised concerns that the way the water is managed today is 'interfering with our cultural economy'. For example, for the grasses needed to make the baskets to grow, the seasonal flood waters need to return to the swamps in the Werai forest near Deniliquin.⁷⁸

74 I Cohen, *Indigenous Traditional Owners Cultural Water Provision*, Hansard, Legislative Council, Parliament of New South Wales, 25 November 2008, p 11639. At: www.parliament.nsw.gov.au/prod/parlament/hansart.nsf/V3Key/LC20081125050 (viewed 13 January 2009).

75 Murray Lower Darling Rivers Indigenous Nations, *Cultural Flows*, undated.

76 E A Povinelli, *Labor's Lot: The Power, History, and Cultural of Aboriginal Action*, 1993, Chicago: University of Chicago Press, and J Altman, *Promoting Aboriginal Economic Interests in Natural Resource Management in NSW: Perspectives Tropical North Australia and Some Prospects*. Presented at Relationships between Aboriginal people and land management issues in NSW: Barriers and bridges to successful partnerships, University of Wollongong, 1-3 October 2003, as cited by J Weir, *Murray River Country: An ecological dialogue with traditional owners*, PhD thesis, Australian National University, October 2007, p 215.

77 J Weir, *Murray River Country: An ecological dialogue with traditional owners*, PhD thesis, Australian National University, October 2007, p 215.

78 J Weir, *Murray River Country: An ecological dialogue with traditional owners*, PhD thesis, Australian National University, October 2007, p 215.

For the Indigenous peoples of the MDB, water resources are an opportunity for developing rural industries. Water allocation rights can mean inclusion in the water trading environment for economic development opportunities, or for achieving cultural and environmental objectives by allocating water for cultural or environmental flows.⁷⁹

Indigenous peoples across Australia are increasingly being encouraged to consider options for the effective use of their lands, waters and resources for economic development. The Federal Government have committed to supporting the efforts of Indigenous Australians to use their land for economic development, by facilitating appropriate land use arrangements through negotiation and agreement with traditional owners.⁸⁰

However, access to economic development for the Indigenous peoples of the Murray-Darling via their lands and waters has to date been significantly limited by the priority of water allocations being given to industrial and agricultural activities, and the policy barriers to having their rights to their lands, waters and natural resources recognised, including the recognition of native title.

While it is estimated that the Indigenous estate is currently 20 percent of land in Australia, the Indigenous peoples of the MDB (who comprise approximately 3.4 percent of the Basin's population) currently hold less than 0.2 percent of land. This is despite land reforms such as the *NSW Aboriginal Land Rights Act 1983* and the *Native title Act 1993* which were introduced with a specific aim of returning access to lands to Indigenous people. The National Water Initiative also commits all States and Territories of the MDB to increasing indigenous representation in water planning; recognising Indigenous peoples water needs, and providing for Indigenous access to water resources; incorporating indigenous social, spiritual and customary objectives and strategies; and acknowledging the possible existence of native title rights to water.⁸¹

Addressing the Senate Rural and Regional Affairs and Transport Standing Committee, Steven Ross explained:

Importantly for traditional owners, under the National Water Initiative there is a component which allows water allocation to native title holders but in southern New South Wales, Victoria and South Australia the capacity for those traditional owners to gain native title is limited. We would like to see a broader expansion of water allocation to other traditional owners who may not hold or seek native title.⁸²

79 M Morgan, L Strelein, J Weir, *Indigenous Rights to Water in the Murray-Darling Basin – in support of the Indigenous final report to the Living Murray Initiative*, Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), Research Discussion Paper No.14, 2004, The Native Title Unit, AIATSIS, p 35.

80 Australian Labor Party, *Indigenous economic development*. At: http://www.alp.org.au/download/now/indig_econ_dev_statement.pdf (viewed 8 October 2008).

81 National Water Commission, Intergovernmental Agreement on a National Water Initiative between the Commonwealth of Australia and the Governments of New South Wales, Victoria, Queensland, South Australia, the Australian Capital Territory and the Northern Territory, 25 June 2004, Council of Australian Governments meeting. At: <http://www.nwc.gov.au/www/html/117-national-water-initiative.asp> (viewed 12 January 2008).

82 Commonwealth of Australia, *Official Committee Hansard – Senate Standing Committee On Rural and Regional Affairs and Transport, Reference: Water policy initiatives*, Friday, 15 September 2006, Canberra, p 52. At: <http://www.aph.gov.au/hansard/senate/commtee/S9618.pdf> (viewed 12 January 2009).

Text Box 12: Declaration on the Rights of Indigenous Peoples

Article 27 states:

States shall establish and implement, in consultation with indigenous peoples concerned, a fair system to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources.

Article 28 states:

Indigenous peoples have the right to redress, which can include restitution or compensation, for the lands, territories and resources which they have traditionally owned but have been confiscated, taken, occupied, used or damaged without their consent. Compensation usually taking the form of lands, territories and resources equal in quality, size and legal status or monetary compensation.

Indigenous peoples have a human right to maintain a ‘cultural economy’. This relates to Indigenous peoples being able to undertake activities that secure sustainable capital from the natural resources that traditionally and historically belong to each Nation.

Text Box 13: International Covenant on Economic, Social, and Cultural Rights

Article 1 of the Covenant states:

- (1) All peoples have the right to self determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
- (2) All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit and international law. In no case may a people be deprived of its own means of subsistence.

Declaration on the Rights of Indigenous Peoples

Article 26 states:

Indigenous peoples have the right to own, use and develop the lands, territories and resources, which they have traditionally owned. Additionally, States should give legal recognition and protection to these areas.

In this regard, the Murray-Darling Basin must be seen as a ‘cultural economy’ to the Indigenous Nations that belong to the Rivers. The ‘cultural economy’ includes all the natural resources in the River Murray definition.

The river should be recognised and accepted as a ‘cultural economy’, which has declined as the health of the river has declined. There has been a reduction in the quantity and quality of fish, yabbies, plants and animals. Some species have disappeared completely. As this has occurred, there has been greater reliance on other forms of income, mainly welfare, to survive.⁸³

83 Farley Consulting Group, *Report to the Murray-Darling Basin Commission – Indigenous Response to the Living Murray Initiative*, Report commissioned by the Murray-Darling Basin Commission to report to the Ministerial Council on community engagement, April 2003, p 44.

This cultural economy, which previously allowed Indigenous Nations to maintain their traditional lifestyle across their country, has been diminished by the poor health of the river system that has decimated traditional sources of food and medicines. As one group explained:

The healing that we use Old Man Weed for needs to be done by the River. It is the same with fish – we need to catch, cook and eat by the River. Now, we can't get clay out of the bank to coat the fish or to use on our skin – this is a big part of women's business.⁸⁴

Healthy rivers have the potential to provide commercial opportunities for indigenous people, for example in areas such as eco-tourism, cultural tourism, native nurseries and seed collection. However, the current decline in the health of the river system has led to a decline in the economic position of Indigenous people.

Cultural water allocations are crucial to increasing the opportunities for the Indigenous peoples of the MDB to leverage economic development through cultural economies.

There was a widely held view that a water allocation should be available to each Indigenous Nation to enable them to exercise their custodial responsibilities to care for the river system. Each Nation would decide whether its allocation should be used to increase environmental flows or to help generate a more independent economic base for their people. The decision would be taken in the context of the health of the river system and their custodial responsibilities.⁸⁵

The Murray Lower Darling Indigenous Nations have voiced their position to the Senate Rural and Regional Affairs and Transport Committee stressing that the provision of cultural water:

will provide for the continuation of cultural economy, for a sense of justice for Indigenous people, for the continuation of Indigenous knowledge, for our involvement in natural resource management and for what ultimately we believe will be sustainable social, cultural and environmental outcomes for all Australians.⁸⁶

However, in order for Indigenous people to effectively engage and access their lands, waters, and natural resources initiatives to encourage more efficient use of water are vital. Public investment in incentives and assistance for industry and other water users to change management systems is urgently required.

84 Farley Consulting Group, *Report to the Murray-Darling Basin Commission – Indigenous Response to the Living Murray Initiative*, Report commissioned by the Murray-Darling Basin Commission to report to the Ministerial Council on community engagement, April 2003, p 12.

85 Farley Consulting Group, *Report to the Murray-Darling Basin Commission – Indigenous Response to the Living Murray Initiative*, Report commissioned by the Murray-Darling Basin Commission to report to the Ministerial Council on community engagement, April 2003, p 7.

86 Commonwealth of Australia, *Official Committee Hansard – Senate Standing Committee on Rural and Regional Affairs and Transport, Reference: Water policy initiatives*, Friday, 15 September 2006, Canberra, p 52. At: <http://www.aph.gov.au/hansard/senate/commtee/S9618.pdf> (viewed 12 January 2009).

4. Climate change and the human rights of the Indigenous Peoples living in the Murray-Darling River Basin

The Indigenous peoples of the MDB have a unique relationship with the Murray-Darling River Basin. This relationship not only includes the benefits they receive from the river and its environment in terms of sustenance and cultural economies, but the rivers sustain their culture and confirm their existence and their identity. In return, Indigenous people have a responsibility to the maintenance and care of their country that is the MDB. Matt Rigney, a Ngarrindjeri man describes this special relationship:

We are of these waters, and the River Murray and the Darling and all of its estuaries are the veins within our body. You want to plug one up, we become sick. And we are getting sick as human beings because our waterways are not clean. So it is not sustaining us as it was meant to by the creators of our world.⁸⁷

The impacts of climate change compounded by the current use and management arrangements in the MDB are currently affecting the human rights of Indigenous peoples whose livelihoods depend on the MDB. The United Nations Permanent Forum on Indigenous Issues are particularly concerned with the impacts of climate change on Indigenous populations and recommended:

that States develop mechanisms through which they can monitor and report on the impacts of climate change on indigenous peoples, which considers our socio-economic limitations as well as our spiritual and cultural attachment to lands and waters.⁸⁸

For the Indigenous peoples of the Murray-Darling River Basin this is of great significance. Particularly where non-Indigenous development has restricted Indigenous peoples' access to their lands, waters and natural resources. The commercialisation of water has also meant that the spiritual and cultural connection to these lands and waters has in many cases been denied.

4.1 International obligations

As discussed throughout this report, Australia has a number of obligations regarding the environment and Indigenous peoples rights. These obligations are the result of Australia's support for international treaties and mechanisms, including:

- the International Covenant on Civil and Political Rights (ICCPR)
- the International Covenant on Economic, Social and Cultural Rights (ICESCR)
- the United Nations Framework Convention on Climate Change (UNFCCC)
- the Kyoto Protocol
- the Convention on Biological Diversity (CBD)
- the Ramsar Convention
- The Second International Decade on the World's Indigenous People
- the Declaration on the Rights of Indigenous Peoples⁸⁹

87 J Weir, *Murray River Country: An ecological dialogue with traditional owners*, PhD thesis submitted to Australian National University, October 2007, p 103.

88 United Nations Economic and Social Council, *Recommendations on the special theme, 'Climate Change, biocultural diversity and livelihood: the stewardship role of indigenous peoples and new challenges'*, Permanent Forum on Indigenous Issues, Seventh Session, New York, 21 April – 2 May 2008, E/C.19/2008/14, pp3-7.

89 For further discussion about the international human rights, Indigenous peoples and climate change, see chapters 5 and 6 of this report.

- the Convention of the Elimination of all forms of Racial Discrimination (CERD).

The Australian Government has an obligation to ensure the full enjoyment and exercise of these human rights for its citizens, including Indigenous peoples. As articulated by AIATSIS:

Clean water access is critical for health in all communities. In Indigenous communities' lack of supply of clean water is linked to high morbidity and mortality rates. Unlike the broad rural demographic trends of rural to urban migrations and an ageing population, Indigenous Nations are staying on their lands and Indigenous communities have growing, young populations. Supporting these Indigenous communities is integral to the support of the socio-economic viability of rural Australia. The provision of services and infrastructure and the future development of growing Indigenous communities and Nations should be incorporated into planning objectives.⁹⁰

In addition, as Indigenous peoples, the Murray-Darling River Basin Indigenous Nations hold a special status as the first peoples of the lands and waters. As such, they must be afforded a number of distinct rights that recognise their rights to; their lands, waters, and natural resources; self determination; and engagement and participation in government processes that directly or indirectly impact on their lives.

While the right to life, health, and food are fundamental human rights that are clearly provided for in international treaties and mechanisms, the following internationally recognised rights have additional significance for the Indigenous Nations of the Murray-Darling Basin. These rights include:

- The right to water
- The right to a healthy environment
- The right to culture
- The right to economic development

How these rights relate to indigenous peoples is discussed in detail in chapters 4, 5 and 6 of this report.

While the right to water is critical to the well-being of Indigenous peoples, Yorta Yorta woman Monica Morgan argues that the United Nations interpretation of the right to water is limited in that it denies the agency of living beings other than humans. She argues that the importance of water is considered only in terms of human needs and therefore is being disrespectful to country. Such perspectives enable people to transform nature without considering the ethical consequences.⁹¹

This argument emphasises discussion raised earlier regarding the disruption of connectivity for Indigenous peoples and ecology versus economy.

The Declaration on the Rights of Indigenous Peoples supports Indigenous people's rights to access, conservation and economic development of water. It provides that indigenous peoples have a right to maintain and strengthen the distinctive indigenous spiritual relationship with 'traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas.' It also provides that indigenous peoples have the right to conservation and protection of indigenous lands and resources with state assistance and the right to development for all indigenous lands and resources including water. Allocations of water for cultural purposes (cultural flows) to the

90 M Morgan, L Strelein, J Weir, *Indigenous Rights to Water in the Murray-Darling Basin – in support of the Indigenous final report to the Living Murray Initiative*, Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), Research Discussion Paper No.14, 2004, The Native Title Unit, AIATSIS.

91 J Weir, 'Connectivity', *Australian Humanities Review*, Issue 45, November 2008. At: <http://www.australianhumanitiesreview.org/> (viewed 12 January 2009).

Indigenous Nations of the Murray-Darling River Basin will be integral to fully realise their rights to water.

4.2 Domestic Protection

At the domestic level, Indigenous peoples' rights require legislative protection. In the development of legislative frameworks such as those relevant to land, water, and natural and cultural heritage, the following must be protected:

- the full participation and engagement of Indigenous peoples in the development of policy and legislation that directly or indirectly affects their lives and their rights
- the adoption of and compliance with the principle of free, prior and informed consent
- the protection of Indigenous interests, specifically access to our lands, waters and natural resources
- the protection of Indigenous areas of significance, biodiversity, and cultural heritage
- the protection of Indigenous knowledge's
- access and benefit-sharing through partnerships between the government, private sector, and Indigenous communities
- non-discrimination and substantive equality.

In order to fully realise the above human rights for Indigenous peoples, governments must be conscious of:

- the need for the protection of intergenerational human rights which requires a consideration of ecologically sustainable development
- the need for conservation regimes which recognise and provide for the existence of Indigenous peoples and their co-dependence on their lands and waters. For example, that Indigenous peoples rely on their lands and waters for survival and caring for country is crucial to both the lands and waters and meeting cultural obligations.

For further discussion on the international and domestic legislative and policy context of Indigenous peoples and climate change, see chapters 4 and 5 of this Report.

5. What is being done?

Since the Yorta Yorta Federal Court decision in 1998,⁹² the Indigenous Nations of the Murray-Darling Basin resolved to develop a stronger voice for traditional owners in policy and management responses to the severely degraded Murray River, including strengthening the relationships between traditional owner groups through the development of 'Nation to Nation' protocols.⁹³ This resolution resulted in the establishment of the Murray Lower Darling Rivers Indigenous Nations (Aboriginal Corporation) (MLDRIN), with an objective to represent traditional owners and be a platform to engage with government.

92 *Members of the Yorta Yorta Aboriginal Community v The State of Victoria* [1998] 1606 (18 December 1998) – Federal Court Decision.

93 M Morgan, L Strelein and J Weir, 'Authority, Knowledge and Values: Indigenous Nations Engagement in the Management of Natural Resources in the Murray-Darling Basin' in M Langton, O Mazel, L Palmer, K Shain and M Tehan (eds), *Settling with Indigenous Peoples: Modern treaty and agreement-making*, 2006 The Federation Press, Sydney. See also J Weir and S Ross, "Beyond Native Title: Murray Lower Darling Rivers Indigenous Nations", 2007 in F Morphy and B R Smith (eds), *The Social Effects of Native Title: Recognition, Translation, Coexistence*, CAEPR Research Monograph No. 27, ANU E-Press.

MLDRIN is an alliance of 10 traditional owner groups, also known as Nations whose countries lie in the southern part of the Murray-Darling Basin, including:

- Wiradjuri, Yorta Yorta, Taungurung, Wamba Wamba, Barapa Barapa, Mutti Mutti, Wergaia, Wadi Wadi, Latji Latji, and Ngarrindjeri.

In particular, MLDRIN provides strategic advice from traditional owners to natural resource management agencies responsible for water and forestry issues.⁹⁴ MLDRIN engage primarily with State Governments and departments, the Murray-Darling Basin Commission, and the Commonwealth Government, and it works closely with environmental groups who are concerned with the health of the rivers and their interconnected waterways. They have also developed strategic relationships with Indigenous Research Centres, National Indigenous Working Groups, and Other Indigenous groups working on the issue of the protection and management of water resources.

In particular, more recently and throughout 2008, MLDRIN have been actively engaging with the National Water Commission on the National Water Initiative and lobbying for the recognition of Indigenous water rights and cultural water allocations under the *Water Act 2007*. The Water Act is being amended in the near future and this will be an opportunity for MLDRIN to strongly advocate for the provision of cultural water allocations and the recognition of such allocations to be considered as a 'critical human need'. They will also have the opportunity to stress the importance of Indigenous specific representation by traditional owners on the Murray-Darling Basin Authority.

MLDRIN have also been engaged at the International level, attending the United Nations Permanent Forum in 2008 in New York, and the International Union on the Conservation of Nature World Congress on Conservation in Barcelona advocating for the rights of the Indigenous Nations of the Murray-Darling Basin, and discussing their concerns related to the Ramsar Convention and the Convention of Biological Diversity with other Indigenous peoples around the world.

A number of developments have been progressed in recent years including:

(a) The Murray-Darling Basin Commission (MDBC) and the Murray Lower Darling Rivers Indigenous Nations – The Indigenous Partnerships Project (IPP)⁹⁵

The MDBC has formed a collaborative partnership arrangement with the Murray Lower Darling Rivers Indigenous Nations (MLDRIN). Over the last three years together they have developed the Indigenous Partnerships Project which focuses on establishing a new basis for engaging Indigenous people in The Living Murray in a way which ensures their social, spiritual, cultural, environmental and economic interests are included in planning and management of the icon sites.

94 Murray Lower Darling Rivers Indigenous Nations, Correspondence with T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, 22 October 2008.

95 N Ward (Murray-Darling Basin Commission), *Effective Indigenous Involvement In The Living Murray – Introducing A New Methodology*, Murray-Darling Basin Commission Canberra, ACT, Australia. At: <http://www.riversymposium.com/index.php?element=WARD> (viewed 12 January 2009).

The Indigenous Partnerships Project takes a principle-based approach aimed at achieving consistent and grounded involvement of Indigenous people in The Living Murray's decision making and planning processes. Aimed at improving Indigenous engagement in natural resource management, the Indigenous Partnerships Project funds the employment of a small number of Indigenous facilitators and supports an equal number of Indigenous advisory groups at each icon site.

With this program, the emphasis is on pursuing an approach that elucidates Indigenous people's contemporary relationship with the land as a basis for their input into the environmental management planning process of The Living Murray.

(b) Memorandum of Understanding between Murray Lower Darling Rivers Indigenous Nations and Murray-Darling Basin Commission

Four years of negotiation with the Murray-Darling Basin Commission (MDBC) has resulted in a 'historic partnership agreement',⁹⁶ a Memorandum of Understanding (MOU) between the Murray Lower Darling Rivers Indigenous Nations (MLDRIN) and Murray-Darling Basin.

The MOU was signed by the President of the MDBC and authorised representatives of the Indigenous nations at a ceremony near Albury, New South Wales, in March 2006. It enables MLDRIN's participation in the management of the natural resources of the Murray and Darling River valleys below the Menindee Lakes Storage and establishes a cooperative relationship, so that the use of the natural resources of the Murray and Darling River valleys respect and benefit the cultural heritage of the Indigenous nations.⁹⁷

Of the Agreement, Matt Rigney, traditional owner and Chairperson of MLDRIN, said:

The signing of the MOU signifies the formalisation of Indigenous involvement in the programs and projects of the Murray-Darling Basin Commission. We are very pleased with the increased opportunities to be involved in the management of natural resources on our Country. This MOU signifies a start of what we hope will be a long term relationship.⁹⁸

The Right Hon. Ian Sinclair AC, President of the MDBC also commented:

Cultural perspectives need to be taken into account in the long term management of natural resources. Managing the Murray and Lower Darling Rivers requires decisions that go beyond a site-by-site approach.⁹⁹

96 Murray-Darling Basin Commission, *Murray-Darling Basin Commission – April 2006*, E-letter No 53. At: http://mdbc.gov.au/communications/s-scribe/eLetter_menu/e-letter_april_2006#Indigenous (viewed 12 January 2009).

97 Agreements, Treaties and Negotiated Settlements Project, *Memorandum of Understanding between Murray Lower Darling Rivers Indigenous Nations and Murray-Darling Basin Commission*, Information Sheet. At: <http://www.atns.net.au/agreement.asp?EntityID=3661> (viewed 12 January 2009).

98 Murray-Darling Basin Commission, *Murray-Darling Basin Commission – April 2006*, E-letter No 53. At: http://mdbc.gov.au/communications/s-scribe/eLetter_menu/e-letter_april_2006#Indigenous (viewed 12 January 2009).

99 Murray-Darling Basin Commission, *Murray-Darling Basin Commission – April 2006*, E-letter No 53. At: http://mdbc.gov.au/communications/s-scribe/eLetter_menu/e-letter_april_2006#Indigenous (viewed 12 January 2009).

Text Box 15: The purpose of the Memorandum of Understanding between Murray Lower Darling Rivers Indigenous Nations and Murray-Darling Basin Commission

The purpose of the MOU is to enable the parties to:

- recognise their shared interests and goals
- establish a collaboration framework
- develop dialogue processes with Indigenous nations
- ensure that Indigenous nations' traditions are part of policy development with regard to natural resource management in the Murray and Darling River valleys. The parties also agree to create mechanisms and processes for achieving the goals of the MOU.¹⁰⁰

(c) A Cooperation Agreement between Murray Lower Darling Rivers Indigenous Nations and Environmental Non-Government Organisations¹⁰¹

On 23 February 2007, the Murray Lower Darling Rivers Indigenous Nations entered a cooperation agreement with a number of Environmental Non-Government Organisations (eNGO's).¹⁰² The foundation for this agreement is the recognition and acceptance of the importance of looking after country to both the traditional owners and the environmental groups.

A core feature of this agreement is that the parties formally recognise the Wiradjuri, Yorta Yorta, Taungurung, Barapa Barapa, Wamba Wamba, Wadi Wadi, Mutti Mutti, Latji Latji, Wegaia and the Ngarrindjeri peoples as the traditional owners of the country centred on the Murray and Lower Darling River systems. This agreement also confirms a shared responsibility to ensure that this country is managed and maintained to the highest standard of ecological and cultural integrity for the benefit of future generations.¹⁰³

100 Agreements, Treaties and Negotiated Settlements Project, *Memorandum of Understanding between Murray Lower Darling Rivers Indigenous Nations and Murray-Darling Basin Commission*, Information Sheet. At: <http://www.atns.net.au/agreement.asp?EntityID=3661> (viewed 12 January 2009).

101 Cooperation Agreement between MLDRIN and eNGO's, 23 February 2007.

102 The eNGO's included: the Australian Conservation Foundation Inc, Environment Victoria Inc, Friends of the Earth Australia Inc, Friends of the Earth Melbourne Inc, National Parks Association of New South Wales Inc, Nature Conservation Council of New South Wales Inc, Victorian National Parks Association Inc, The Wilderness Society Inc, The Wilderness Society Victoria Inc, The Wilderness Society Sydney Inc, The Wilderness Society (South Australia Branch) Inc.

103 Cooperation Agreement between MLDRIN and eNGO's, 23 February 2007, p 2.

Text Box 16: The purpose of the Cooperation Agreement between Murray Lower Darling Rivers Indigenous Nations and Environmental Non-Government Organisations¹⁰⁴

The purpose of the Agreement is to support the protection of cultural and environmental values by:

- Working together to ensure country is managed and maintained to the highest standard of ecological and cultural integrity and that there is public and community support for this goal.
- Supporting inherent traditional owner land and water rights and aspirations to access and manage country according to traditions and customs across a range of tenures.
- Supporting fair and adequate resourcing for the management of natural and cultural values by Indigenous Nations, and the use of Indigenous knowledge.
- Supporting existing or new industries that are compatible with the maintenance of cultural and environmental values, and will provide a livelihood and socio-economic development for families, and communities, including the self determination of Indigenous Nations.

This agreement also includes innovative principles and engagement protocols that provide for the recognition of the unique rights and interests of Indigenous peoples to the country, and the protection of the Indigenous knowledge that underpins these rights and interests.¹⁰⁵

(d) Use and Occupancy Mapping¹⁰⁶

As part of the Indigenous Partnerships Project, the Murray-Darling Basin Commission (MDBC) has been working with the Murray Lower Darling River Indigenous Nations (MLDRIN) and other representatives of Traditional Owners on a pilot mapping project with an Indigenous community. Developed in Canada in the early 1970s, Use and Occupancy mapping is essentially a survey technique based on mapping an individual's relationship with the land.

These maps can help identify and record the spiritual, cultural, environmental, social and economic interests of Indigenous people for each icon site. This approach focuses on Indigenous people's contemporary connections to the land in a way that can be directly related and considered in developing icon site management activities.

As part of this pilot, use and occupancy maps have successfully been produced for several individuals at two of the icon sites. Indigenous input will be provided into each of the icon site environmental management plans. Indigenous Working Groups will ensure that Indigenous involvement is undertaken in culturally appropriate ways.

104 Cooperation Agreement between MLDRIN and eNGO's, 23 February 2007, p 4.

105 Cooperation Agreement between MLDRIN and eNGO's, 23 February 2007, pp 3-6.

106 Murray-Darling Basin Commission, *Indigenous Partnership*. At: http://www.mdbc.gov.au/subs/annual_reports/AR_2006-07/part1_1.htm, and The Living Murray, *Indigenous Partnerships*. At: <http://www.thelivingmurray.mdbc.gov.au/communities> (both viewed 1 October 2008).

Considerable effort has been invested in involving and informing Indigenous community members regarding use and occupancy mapping, which is now gaining strong support within the Indigenous community. Local Indigenous facilitators are planned to be employed at each of the icon sites to work with their communities.

Over time these communities will produce 'Use and Occupancy Maps' for each icon site. The maps can also be used as a basis for cultural heritage protection and management, and help monitor the impacts of The Living Murray. Use and occupancy mapping is sometimes referred to as the 'geography of oral tradition'.

The MDBC is working with Charles Sturt University to undertake a research and monitoring program to measure the impacts and benefits of use and occupancy mapping at the icon sites.

The MDBC is also closely involved in the development of the world's first textbook on use and occupancy mapping, currently being researched and written in Canada. This involvement will ensure that the textbook will be relevant to Australia and available for future training needs in the Murray-Darling Basin.¹⁰⁷

Text Box 17: Use and Occupancy Map – Yorta Yorta¹⁰⁸

Australia's first set of Use and Occupancy maps were produced in March 2008. With the support of the Yorta Yorta leadership, interviews were conducted in Echuca, Shepparton and Melbourne by an experienced Canadian team and the Manager of the Indigenous Partnerships Project. Utilising the Canadian team was the preferred way forward as it eliminated potential errors that would have occurred if a freshly trained and inexperienced Australian team had undertaken the research design, interviewing and mapping.

As could be expected, Yorta Yorta leaders had to deal with a general mistrust of government processes, scepticism regarding the ownership of the process and outcomes and therefore a reluctance to engage in the project.

A key component of overcoming this was to emphasise to the Yorta Yorta people that Use and Occupancy mapping was a tool for their purposes, either at the negotiating table or within their own communities. In addition, it was emphasised that all of the maps and associated intellectual property would belong to each of the respondents, legally, ethically and morally.

The role of government (that is, MDBC) was limited to facilitation through the provision of funds, and a commitment to Indigenous people gaining meaningful and respectful engagement in the management of the Murray-Darling Basin's natural resources.

107 Murray-Darling Basin Commission, *Indigenous Partnership*. At: http://www.mdbc.gov.au/subs/annual_reports/AR_2006-07/part1_1.htm, and The Living Murray, *Indigenous Partnerships*. At: <http://www.thelivingmurray.mdbc.gov.au/communities> (both viewed 1 October 2008).

108 N Ward (Murray-Darling Basin Commission), *Effective Indigenous Involvement In The Living Murray – Introducing A New Methodology*, Murray-Darling Basin Commission, Canberra, ACT, Australia. At: <http://www.riversymposium.com/index.php?element=WARD> (viewed 12 January 2009).

A total of 66 members of the Yorta Yorta nation completed map biographies for the 667 square kilometres of the Barmah-Millewa Forests. They were asked to map sites for 72 different categories, ranging from places where they had successfully hunted for kangaroo, fished for Murray Cod, and collected turtle eggs, to locations where they had camped overnight or repatriated ancestors' remains. This resulted in over 6,000 features being mapped. Without doubt, the respondents enjoyed their time working on their map biographies. Some individuals commented that they had been waiting for years for an opportunity to record the land, its animals and the places that were important in their lives.

This participation and data production was sufficient to reveal a tangible, impressive snapshot of the Yorta Yorta nation's contemporaneous connection to their country.

The map biographies produced from the Yorta Yorta nation's pilot mapping project are currently being digitised by Ecotrust Canada in Vancouver, British Columbia, Canada. The Yorta Yorta leadership felt more comfortable having their data handled by a distant non-government organisation with much experience in producing these types of maps.

A positive element of the Use and Occupancy mapping pilot project was that participation clearly created a common experience which has helped reinforce the notion of shared values and beliefs among the Yorta Yorta community about land and water. This strengthened the sense of community within the Yorta Yorta nation.

The Yorta Yorta nation intends using their thematic maps for a range of purposes, primarily to help them explain to natural resource managers how they use their Country and how management actions can provide for and enhance these on-going activities. It is this use that the MDBC hopes will create a dialogue at a practical level that will assist icon site managers to better understand the ways in which land and water is important to Indigenous people.¹⁰⁹

(e) Indigenous Action Plan (IAP)¹¹⁰

The Murray-Darling Basin Ministerial Council in 2002 resolved to develop an Indigenous Action Plan in response to its adoption of the COAG Reconciliation Commitment. In March 2006, the Murray-Darling Basin Commission endorsed the Murray-Darling Basin Indigenous Action Plan.¹¹¹ According to Monica Morgan, a Yorta Yorta woman, this was done without the consent of the Indigenous Nations concerned.¹¹²

The IAP seeks to implement the Council of Australian Governments' (COAG) Reconciliation Framework and integrate its principles into the management of the Murray-Darling Basin. In particular, the IAP aims to:

109 N Ward (Murray-Darling Basin Commission), *Effective Indigenous Involvement In The Living Murray – Introducing A New Methodology*, Murray-Darling Basin Commission, Canberra, ACT, Australia . At: <http://riversymposium.com/index.php?element=WARD> (viewed 12 January 2009).

110 Murray-Darling Basin Commission, *Natural Resource Management*. At: http://www.mdbc.gov.au/nrm/basin_communities/indigenous_communities (viewed 12 January 2009).

111 Murray-Darling Basin Commission, *Community Advisory Committee Annual Report 2005–06*, Murray-Darling Basin Commission 2006. At: http://www.mdbc.gov.au/subs/annual_reports/AR_2005-06/cac3.htm#indigenous (viewed 12 January 2009).

112 M Morgan, *Keeping the Status Quo, MDB Indigenous In-action Plan*, Yorta Yorta Nation Aboriginal Corporation. At: http://www.anu.edu.au/caepr/Publications/topical/Morgan_MDB.pdf (viewed 12 January 2009).

- establish a set of principles for the MDBC which guide behaviours and influence processes and ensure consistent and practical approaches to Indigenous involvement in Natural Resource Management decision making
- identify actions which are aimed at improving Indigenous engagement in natural resource management by the MDBC programs and projects.

While the final IAP document contained some substantive commitments, it was not considered to fully reflect the work undertaken in the consultative process, and as a result, was rejected by MLDRIN.¹¹³

6. What could be done?

As is evident from the discussion throughout this chapter, there is a significant amount of work to be done in the Murray-Darling Basin generally. However for Indigenous peoples this work is urgent and crucial to their physical and mental well-being.

A first step to improving the current situation for the Indigenous Nations of the Murray-Darling Basin is to ensure the rights based and process focused involvement of Indigenous interests rather than marginal inclusion that allows authorities to tick a box. Indigenous peoples across the country possess intimate knowledge of their environments. Through the imparting of this knowledge, not only revitalises and maintains their culture and connection to their lands and waters, but benefits non-Indigenous Australians as a nation.

Secondly, there is considerable research required within the Murray-Darling, including:

- specific research on the impacts of climate change on Indigenous peoples within the MDB, particularly in relation to access to the cultural economy.
- further research on the impacts of climate change and drought on the sustainability of the environment, particularly in relation to additional pressures on ecosystems including the wetlands and forests from logging, agriculture animals seeking refuge, impacts on threatened species and regionally significant fauna and flora, including the projection of movement of fauna and flora.
- research that examines world's best practice with regard to national parks and other conservation regimes including the implementation of the Ramsar Convention and the Convention on Biological Diversity.

Thirdly, the full and immediate implementation of Water Reform Plan including appropriate environmental flows is required. While the legislation currently provides for the recognition of environmental water, if Governments are serious about Closing the Gap for Indigenous health, the Authority must also have regard to social, cultural and Indigenous issues in the Basin Plan. This will require the inclusion of enforceable cultural water allocations.

113 M Morgan, L Strelein and J Weir, 'Authority, Knowledge and Values: Indigenous Nations Engagement in the Management of Natural Resources in the Murray-Darling Basin' in M Langton, O Mazel, L Palmer, K Shain and M Tehan (eds), *Settling with Indigenous Peoples: Modern treaty and agreement-making*, 2006, The Federation Press, Sydney.

If the Government is unwilling to provide for cultural water then compensation must be provided for the loss of traditional values.¹¹⁴

In addition, in order for the Indigenous peoples of the Murray-Darling Basin to effectively engage in decision-making that has a direct impact on their lives, amendments to the *Water Act 2007* will be required to provide for Indigenous representation on relevant Committees, as well as the development of an Indigenous Committee that provides advice and direction specific to Indigenous issues.

Text Box 18: Lesson to be Learned

Monica Morgan, Lisa Strelein and Jessica Weir have identified four key values that can be learned from the situation in the Murray-Darling Basin.¹¹⁵

1. The opportunity to prioritise shared values
 - Indigenous nations sought to establish relationships of repair and restoration
 - Shared vision of a healthy river
2. Recognition of shared authority
 - Recognition by government of traditional owners and the need to deal directly with traditional owners. This is remarkable for MLDRIN in a southern state
3. The potential of open and connected government
 - Where community plays a role
 - Great complexity in this area and potential for governments and agencies to reach stalemate
4. Certainty, process and outcomes.

The traditional owners do not have 'shared interests' in this work if it kills life. Without a healthy river country there is no point in sitting down at a table with government to discuss fishing rights or moving rocks to repair the fish traps. There is no point going fishing. Without this activity, land use and occupancy mapping becomes an exercise without content.¹¹⁶

114 Farley Consulting Group, *Report to the Murray-Darling Basin Commission – Indigenous Response to the Living Murray Initiative*, Report commissioned by the Murray-Darling Basin Commission to report to the Ministerial Council on community engagement, April 2003, p 7.

115 M Morgan, L Strelein and J Weir, 'Authority, Knowledge and Values: Indigenous Nations Engagement in the Management of Natural Resources in the Murray-Darling Basin' in M Langton, O Mazel, L Palmer, K Shain and M Tehan (eds), *Settling with Indigenous Peoples: Modern treaty and agreement-making*, 2006 The Federation Press, Sydney.

116 J Weir, *Murray River Country: An ecological dialogue with traditional owners*, PhD thesis, Australian National University, October 2007, p 238.

Appendix 1
Native Title Determinations

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Between 1 July 2007 and 30 June 2008, ten determinations of native title were made by the court. Nine of these were made by consent, and one was litigated.¹

Short name, case name and citation	Area	Legal process and outcome	Time from filing to determination date	Mediation in the NNTT?	Determination date
Newcastle Waters – Murrinji Determination ² King v Northern Territory of Australia [2007] FCA 1498	Various sites in and around the Town of Newcastle Waters, Northern Territory	Litigated determination, native title exists in parts of the determination area	6 years, 9 months, 14 days	Not referred to mediation	26 September 2007
Birilburu People (Part A) Billy Patch & Others on behalf of the Birilburu People v State of Western Australia and Others [2008] FCA 944	Approximately 200km north east of the town of Wiluna, Western Australia	Consent determination, native title exists in the entire determination area.	FCA: 9 years, 8 months, 22 days NNTT: 9 years, 8 months, 23 days	Referred to mediation 18/7/00	20 June 2008

1 The information in this appendix is sourced from J Eaton, Native Title Registrar, Federal Court of Australia, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, 21 August 2008 and the National Native Title Tribunal, <http://www.nntt.gov.au/Applications-And-Determinations/Search-Determinations/Pages/Search.aspx> (viewed 9 October 2008).

2 This determination was made up of six related applications.

Short name, case name and citation	Area	Legal process and outcome	Time from filing to determination date	Mediation in the NNTT?	Determination date
<p>Ngaanyatjarra Lands (Part B) Stanley Mervyn, Adrian Young, and Livingston West and Ors, on behalf of the Peoples of the Ngaanyatjarra Lands v The State of Western Australia and Ors (unreported, FCA, 3 June 2008, French J)</p>	<p>Central Desert, Western Australia</p>	<p>Consent determination, native title exists in the entire determination area</p>	<p>4 years, 1 month, 12 days</p>	<p>Referred to mediation 5/7/07</p>	<p>3 June 2008</p>
<p>Ngadjon-ji People Ngadjon-ji People v State of Queensland [2007] FCA 1937</p>	<p>Specific lots near Malanda and Bartle Frere in Far North Queensland</p>	<p>Consent determination, native title exists in the entire determination area</p>	<p>8 years, 7 months, 15 days</p>	<p>Referred to mediation 29/3/01</p>	<p>28 May 2008</p>
<p>Eastern Kuku Yalanji People Walker on behalf of the Eastern Kuku Yalanji People v State of Queensland [2007] FCA 1907</p>	<p>East Cape York Peninsula, South of Cooktown, Queensland</p>	<p>Consent determination, native title exists in the entire determination area</p>	<p>FCA: 9 years, 2 months, 10 days NNTT 13 years, 3 days</p>	<p>This matter was in mediation when it came to the Court on 30/9/98</p>	<p>9 December 2007</p>

Native Title Report 2008

Short name, case name and citation	Area	Legal process and outcome	Time from filing to determination date	Mediation in the NNTT?	Determination date
Githabul People Trevor Close on behalf of the Githabul People v Minister for Lands [2007] FCA 1847	Area of Crown land in north east of New South Wales around the town of Woodenbong	Consent determination, native title exists in the entire determination area	FCA: 9 years, 2 months NNTT: 12 years, 2 months, 25 days	Referred to mediation 16/8/00	29 November 2007
Ngururpa Payi Payi & Ors on behalf of the Ngururpa People and State of Western Australia [2007] FCA 2113	Great Sandy Desert, Western Australia	Consent determination, native title exists in the entire determination area	10 months, 11 days	By order of 3/5/07 the matter was referred to mediation upon completion of notification which was completed on 13/6/07	18 October 2007
Tennant Creek No. 2 Patta Warumungu People v Northern Territory of Australia [2007] FCA 1386	Tennant Creek Township and Region, Northern Territory	Consent determination, native title exists in parts of the determination area	1 year, 2 months, 24 days	Originally there were 3 Tennant Creek matters which were in mediation. The 3 matters were discontinued and a new application filed. The new matter went to consent determination without referral to mediation. It was as the result of an ILUA.	3 September 2007

Short name, case name and citation	Area	Legal process and outcome	Time from filing to determination date	Mediation in the NNTT?	Determination date
Strathgordon Claim Timothy James Malachi on behalf of the Strathgordon Mob v State of Queensland [2007] FCA 1084	Cape York Peninsula, Queensland	Consent determination, native title exists in the entire determination area	4 years, 1 month, 28 days	Referred to mediation on 18/5/04	26 July 2007
Ngurrara (unreported, FCA, 9 November 2008, Gilmour J)	Kimberley region, where the Kimberley and the Great Sandy Desert meet, Western Australia	Consent determination (determination takes effect on the determination of a PBC)	FCA: 9 years, 1 month, 11 days NNTT: 11 years, 7 months, 19 days	Referred to mediation on 23/4/01	9 November 2007

Appendix 2
Native Title Statistics
2007-08

1. Native Title Applications

1.1 Native Title applications made between 1 July 2007 and 30 June 2008¹

	ACT	NSW	NT	Qld	SA	Tas	Vic	WA	Total
Claimant	0	2	1	5	2	0	0	3	13
Non-claimant	0	12	0	0	0	0	0	0	12
Total	0	14	1	5	2	0	0	3	25

1.2 Native Title applications finalised between 1 July 2007 and 30 June 2008²

	ACT	NSW	NT	Qld	SA	Tas	Vic	WA	Total
Claimant	0	3	16	15	2	0	1	4	41
Non-claimant	0	13	0	1	0	0	0	1	15
Compensation	0	0	1	0	0	0	0	0	1
Total	0	16	17	16	2	0	1	5	57

1.3 Claims awaiting resolution at 30 June 2008³

Claimant	504
Non-claimant	30
Compensation	10
Total	544

1 G Neate, President, National Native Title Tribunal, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, 15 August 2008.

2 G Neate, President, National Native Title Tribunal, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, 15 August 2008.

3 National Native Title Tribunal, *National Report: Native Title*, June 2008 (2008), p 1.

1.4 Registration test decisions made between 1 July 2007 and 30 June 2008⁴

	ACT	NSW	NT	Qld	SA	Tas	Vic	WA	Total
Accepted	0	2	2	10	0	0	0	3	17
Accepted – section 190A(6A)	0	0	0	4	2	0	0	0	6
Not accepted	1	9	20	18	0	0	5	28	81
Total	1	11	22	32	2	0	5	31	104

2. Determinations

2.1 Native Title determinations made between 1 July 2007 and 30 June 2008⁵

	ACT	NSW	NT	Qld	SA	Tas	Vic	WA	Total
Determination by consent	0	1	1	3	0	0	0	4	9
Determination by litigation	0	0	1	0	0	0	0	0	1
Determination unopposed	0	0	0	0	0	0	0	0	0
Total	0	1	2	3	0	0	0	4	10

4 G Neate, President, National Native Title Tribunal, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, 15 August 2008.

5 J Eaton, Native Title Registrar, Federal Court of Australia, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, 21 August 2008. See appendix 1 for more information. See appendix 1 for more information.

2.2 Native Title claimant applications determined in full or in part since the Act began, up to 30 June 2008⁶

ACT	NSW	NT	Qld	SA	Tas	Vic	WA	Total
0	4	34	39	2	0	6	27	112

2.3 Native title claims resolved since the Act began, up to 30 June 2008⁷

ACT	NSW	NT	Qld	SA	Tas	Vic	WA	Total
5	146	56	296	22	4	55	379	963

2.4 Average time to resolve a native title application⁸

Determination by consent	69 months (5 years and 9 months)
Determination by litigation	84 months (7 years)
Determination unopposed	12 months (1 year)

3. Agreements

3.1 Indigenous Land Use Agreements made between 1 July 2007 and 30 June 2008⁹

	ACT	NSW	NT	Qld	SA	Tas	Vic	WA	Total
Fully concluded ILUA and use and access agreement negotiations	0	0	1	15	5	0	0	0	21

⁶ National Native Title Tribunal, *National Report: Native Title*, June 2008 (2008), p 1.

⁷ National Native Title Tribunal, *National Report: Native Title*, June 2008 (2008), p 4.

⁸ National Native Title Tribunal, *National Report: Native Title*, June 2008 (2008), pp 1-2.

⁹ G Neate, President, National Native Title Tribunal, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, 15 August 2008.

Milestone agreements in ILUA negotiation outside native title determination applications	0	0	0	0	105	0	0	1	106
Milestone agreements in ILUA negotiation within native title determination applications	0	6	3	36	74	0	0	0	119
Total	0	6	4	51	184	0	0	1	246

3.2 Future Act agreements made between 1 July 2007 and 30 June 2008¹⁰

	ACT	NSW	NT	Qld	SA	Tas	Vic	WA	Total
Agreements that fully resolve Future Act applications	0	0	0	0	0	0	1	71	72
Milestones in Future Act mediations	0	0	14	0	0	0	1	27	42
Total	0	0	14	0	0	0	2	98	114

¹⁰ G Neate, President, National Native Title Tribunal, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, 15 August 2008.

3.3 Determination application agreements made between 1 July 2007 and 30 June 2008¹¹

	ACT	NSW	NT	Qld	SA	Tas	Vic	WA	Total
Agreements that fully resolve native title determination applications	0	3	3	5	1	0	0	5	17
Agreements on issues, leading towards the resolution of native title determination applications	0	9	2	69	34	0	2	50	166
Process/framework agreements	0	19	4	140	30	0	18	123	334
Total	0	31	9	214	65	0	20	178	517

4. Future Acts

4.1 Future Act notices advertised between 1 July 2007 and 30 June 2008¹²

Those that asserted the expedited procedure under the Act	11,253
Those that did not assert the expedited procedure	1,927
Total	13,180

11 G Neate, President, National Native Title Tribunal, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, 15 August 2008.

12 National Native Title Tribunal, *National Report: Native Title*, June 2008 (2008), p 5.

4.2 Future Act objections lodged and finalised during the reporting period¹³

Tenement outcome	NT	Qld	WA	Total
Determination – expedited procedure applies	0	0	17	17
Determination – expedited procedure does not apply	0	0	6	6
Dismissed – s 148(a) no jurisdiction	0	2	27	29
Dismissed – s 148(a) tenement withdrawn	0	8	70	78
Dismissed – s 148(b)	0	0	222	222
Expedited procedure statement withdrawn	0	18	10	28
Expedited procedure statement withdrawn – s 31 agreement lodged	0	103	0	103
Objection not accepted	0	0	10	10
Objection withdrawn – agreement	3	27	702	732
Objection withdrawn – external factors	0	8	4	12
Objection withdrawn – no agreement	0	14	66	80
Objection withdrawn prior to acceptance	0	0	65	65
Tenement withdrawn	0	4	1	5
Tenement withdrawn prior to objection acceptance	0	3	4	7
Total	3	187	1,204	1,394

¹³ G Neate, President, National Native Title Tribunal, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, 15 August 2008.

Glossary of terms¹⁴

Claimant application means an application made by Aboriginal people or Torres Strait Islanders under the Native Title Act for a determination that native title exists over a particular area of land or waters (s 61(1) Native Title Act).

Non-claimant application means an application made by a person, who holds a non-native title interest in relation to an area, and is seeking a determination that native title does not exist in that area.

Compensation application means an application made by Aboriginal people or Torres Strait Islanders seeking compensation for loss or impairment of their native title (s 61 Native Title Act).

Determination by consent means an approved determination of native title by the Federal Court or the High Courts of Australia or a recognised body that native title does or does not exist in relation to a particular area of land and/or waters, which is made after the parties have reached agreement in relation to those issues.

Determination by litigation means a decision by the Federal Court or the High Court of Australia or a recognised body that native title does or does not exist in relation to a particular area or land or waters, which is made following a trial process.

Unopposed determination means a decision by the Federal Court or High Court of Australia or a recognised body that native title does or does not exist as a result of a native title application that is not contested by another party.

Expedited procedure means the fast-tracking process for future acts that might have minimal impact on native title, such as the grant of some exploration and prospecting licenses. If this procedure is used, and no objection is lodged, the future act can be done without the normal negotiations with the registered native title parties required by the Native Title Act.

¹⁴ The definitions in this glossary are sourced from National Native Title Tribunal, *Glossary*. At: <http://www.nntt.gov.au/Pages/Glossary.aspx> (viewed 17 September 2008).

Appendix 3

Social Justice Package – recommendations made in 1995

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1. Recognition, Rights and Reform: A report to government on native title social justice measures¹

The recommendations put forward in this report cover an extraordinarily wide spectrum. Many will require considerable detailed development and negotiation before they can be put into place.

There will have to be ongoing processes of consultation with the Aboriginal and Torres Strait Islander communities to ensure that what is done will indeed meet indigenous needs and aspirations. And there must be adequate mechanisms for managing the implementation processes and ensuring that the impetus for reform is sustained.

The proposals fall into six major themes:

- The rights of Aboriginal and Torres Strait Islander peoples as citizens
- Recognition of their special status and rights as indigenous Australians and the achievement of greater self determination for Aboriginal and Torres Strait Islander peoples
- Ensuring that indigenous Australians are able to exercise their rights and share equitably in the provision of Government programs and services
- The protection of the cultural integrity and heritage of indigenous Australians
- Measures to increase Aboriginal and Torres Strait Islander participation in Australia's economic life.

As a starting point the report recommends that Governments agree to and legislate a broad set of *Principles for Indigenous Social Justice and the Development of Relations between the Commonwealth Government and Aboriginal and Torres Strait Islander peoples*.

¹ Aboriginal and Torres Strait Islander Commission, *Recognition, Rights and Reform: A Report to Government on Native Title Social Justice Measures* (1995). Reproduced in [1996] *Australian Indigenous Law Reporter* 27. At: <http://www.austlii.edu.au/au/journals/AILR/1996/27.html>.

Adoption of this charter would underpin the further development and implementation of the specific proposals put forward in this report, guide all future relationships between the Commonwealth and indigenous peoples, and be capable of applying to the roles and responsibilities of other spheres of government as well.

Other proposals encompass:

- major institutional and structural change, including Constitutional reform and recognition, regional self-government and regional agreements, and the negotiation of a Treaty or comparable document
- overcoming inequities and inefficiencies in service delivery, including the achievement of genuine access and equity in Commonwealth mainstream programs and revised Commonwealth-State funding arrangements
- protection of rights through such means as recognition of customary laws, protection of intellectual and cultural property, and recognition of indigenous rights
- practical measures to enhance opportunities for economic development and to achieve other desirable objectives such as improved public awareness of indigenous cultures and indigenous issues.

Particular recommendations are made in respect of the following identified areas:

Rights

- the reinforcement of access and equity provisions through legislation to ensure indigenous people can better access their citizenship entitlements
- an increased commitment to supporting international instruments which reinforce indigenous rights
- support for measures to define, recognise and extend indigenous rights including new initiatives in areas such as communal title and assertion of coextensive rights.

Recognition and Empowerment

- promotion and advancement of the constitutional reform agenda
- indigenous representation in Parliament with interim arrangements for speaking rights by the ATSIC Chairperson
- processes to start work on compensation issues
- promotion of regional agreements as a means of settling social justice issues on a regional basis commencing with pilot studies
- recognition of a self government option for indigenous people within the framework of self determination
- support for initial work to develop a framework for a treaty and negotiation arrangements
- legislative recognition of the Aboriginal and Torres Strait Islander flags
- increased support for Public Awareness initiatives.

Citizenship Entitlements

- reforms in Commonwealth State funding arrangements to make the States more accountable for general revenue assistance and to provide for an increased emphasis on Specific Purpose Payments
- implementation of recommendations relating to major reviews of the Aboriginal Education Policy (AEP), the National Aboriginal Health Strategy (NAHS), the Aboriginal Economic Development Policy (AEDP) and the Royal Commission into Aboriginal Deaths in Custody (RCIADIC)
- a proposal for a national Aboriginal and Torres Strait Islander Housing and Infrastructure program.

Cultural Integrity and Heritage Protection

- legislative reforms to strengthen heritage protection legislation and protect indigenous rights to cultural property
- providing for greater involvement in environmental decision making
- implementing the report of the Law Reform Commission on Aboriginal customary law
- support for extension of language programs and broadcasting initiatives.

Economic Development

- fostering closer links with industry
- accessing Community Development Employment Projects (CDEP) Scheme as an entitlement and removing anomalies
- implementation of business training proposals of AEDP
- fostering regional economic development through inclusive involvement of Regional Councils
- further development of strategic business opportunities and resources for a stake in industry.

2. Chapter 4: Social Justice Report 1995²

Constitutional change

- That recognition of the unique place of Indigenous peoples in contemporary Australia be a fundamental principle in any national constitutional review and revision, and that this include recognising the right of Indigenous peoples to represent ourselves in negotiation of constitutional change with governments.
- That the Commonwealth Government, in consultation with the Council for Aboriginal Reconciliation, ATSIC, the Constitutional Centenary Foundation and the Aboriginal and Torres Strait Islander Social Justice Commissioner establish structures and processes of constitutional reform and national renewal which are building towards the new millennium and the centenary of the Constitution in 2001.

2 M Dodson, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2005*, Australian Human Rights Commission (1995), pp 96-135.

- That Indigenous constitutional structures and processes provide for access by all sections of the Indigenous community through consultations and public forums to the development of positions of negotiations with governments. This will require sufficient resources for the preparation of information and consultation materials, as well as the equitable funding of forums or groups for the expression of diverse views.
- That structures and processes for Indigenous constitutional recognition and reform be directed not only to achieving specific rights but to continuing processes for the renewal of relations between Indigenous and non-Indigenous Australians.

Regional agreements

- That the Australian Government endorses the option of regional agreements, where initiated by Australian Indigenous peoples, as a process for their greater recognition and empowerment through recognising land ownership and citizenship rights. Indigenous management, rights to lands, resources, seas and wildlife should be institutionally recognised in regional agreements—even where ‘ownership’ is not established.
- That extinguishment of native title should not be a pre-requisite for government negotiation and approval of a regional agreement. Regional agreements should be negotiated under section 21 of the *Native Title Act* or independently of that Act, at the option of the Indigenous regional negotiators.
- That the Australian Government funds trial projects in at least four regions—in northern and southern Australia—where communities resolve to pursue negotiated settlements on a regional basis.
- That the Australian Government funds a ‘Research and Resource Centre for Negotiating Indigenous Claims’ which monitors the trial projects and provides resource and research assistance to Australian Indigenous communities and organisations. This should include facilitation and training in negotiation and conflict resolution, encompassing conflict resolution with regions and organisations, cross-cultural conflicts and inter-governmental conflict.
- That the Australian Government report on political, financial and legal measures which can be used to facilitate State, Territory and local government involvement in regional agreements.
- That Commonwealth legislation be amended or enacted to allow and promote regional Indigenous corporations with the following functions:
 - represent regional organisations and communities in negotiating regional agreements
 - raise finances and hold government grants
 - hold communal title to land, assets and resources
 - hold non-communal title to land, assets and resources
 - engage in enterprises
 - participate in planning, environmental and resource management processes and land claims
 - participate in sustainable development strategies
 - provide regional services
 - engage in negotiating and providing self-government functions.

- That regional agreements must proceed on the basis that negotiations do not violate relevant international standards such as those articulated in the *Draft Declaration on the Rights of Indigenous Peoples*, *International Labour Organisation Convention 169* and the Biodiversity Convention and other human rights conventions. The Commonwealth Government should implement ‘bottom line’ conditions for negotiation based on such international standards.
- That, following trial projects, Indigenous organisations be funded for the negotiation of Agreements-in-Principle, and provided with interest free loans for the finalisation of agreements.
- That the Commonwealth Government and Aboriginal organisations investigate the expedited regional agreement processes being developed in British Columbia, Canada.
- That regional agreements be recognised through Commonwealth legislation. Constitutional reform proposals should provide constitutional recognition subject to clearly defined amendment processes.
- That the Commonwealth – and any involved State and Territory Governments – enter into implementation contracts, timetables and resource allocation to implement regional agreements.

Reform of the funding of citizenship services for Indigenous peoples

- That the Commonwealth Government affirm its commitment to establishing a direct fiscal relationship with Indigenous communities and organisations.
- That the Commonwealth Government initiate:
 - A comprehensive study by the Commonwealth Grants Commission of the potential application of the fiscal equalisation principle among Indigenous communities in Australia. Such a study to be undertaken in a manner which allows for the outcomes to be broken down into both States/Territories and regions
 - A specific reference to the Commonwealth Grants Commission to explore solutions to the enormous and inequitable capital infrastructure needs of Indigenous communities.

International connections

- The Parliament should establish a Human Rights Committee of members with relevant expertise and such a committee should conduct a public inquiry into the benefits to Aboriginal and Torres Strait Islander peoples and the wider Australian community of international Indigenous awareness and co-operation; and how to involve Australia and its citizens, especially Aboriginal and Torres Strait Islander peoples, in this burgeoning field of international relations. Subject to the establishment of a Human Rights Committee, the Joint Standing Committee on Foreign Affairs, Defence and Trade should conduct such an inquiry.

- That the Commonwealth Government provide the mandate and resources for an independent Aboriginal international Indigenous watch organisation. This could either take place through an expansion of the Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, or could be established as an independent specialist Non-Government Organisation.
- A workshop on Indigenous marine policy issues and needs bringing Torres Strait Islander and Aboriginal representatives together with Coastal Sami, Inuit, Indian First Nations of Canada's Pacific coast, and South Pacific peoples, should be held. The workshop would also consider the usefulness and feasibility of an ongoing international Indigenous marine network of peoples and organisations.
- The Aboriginal and Torres Strait Islander Commission, the Council for Aboriginal Reconciliation, and the Aboriginal and Torres Strait Islander Social Justice Commissioner should consult with Indigenous organisations to develop a priority list of urgently required international comparative studies on issues identified in this report and elsewhere including macro- and micro-constitutional reform; regional agreements; inter-governmental relations internal to nation-states in respect of Indigenous policy and programs; self-government; land and sea rights; and Indigenous management of territory and resources.
- In respect of [the] recommendation above, a fund should be established under the joint management of ATSIC, the Council for Aboriginal Reconciliation, and the Aboriginal and Torres Strait Islander Social Justice Commissioner to carry out international comparative research on these and other urgent Indigenous policy issues.

Appendix 4

The international framework for engagement of indigenous peoples in climate change policy

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The following international instruments¹ have been placed in tables according to topic area. Note, however, that many of the instruments are relevant to several topic areas. Clauses marked * are relevant to indigenous knowledge's.

1 The information in this appendix is a summary of information from various international mechanisms that contribute to the international framework for Indigenous engagement in climate change policy. For further information see the Office of the High Commissioner for Human Rights website. At: <http://www2.ohchr.org/english/law/index.htm#core>. For those mechanisms not available at this site, further information is provided.

1.1 Human rights

Name	Objective	Clauses of particular relevance to indigenous peoples ²	Relevant domestic federal legislation	Clauses of particular relevance
The Universal Declaration of Human Rights	Provides a common standard of achievement for <i>all peoples and nations</i> , to the end that every individual and every organ of society shall strive to promote respect for fundamental rights and freedoms, and to secure their universal and effective recognition and observance.	<ul style="list-style-type: none"> ▪ All articles are relevant to Indigenous people's rights ▪ Art 7: equality before the law ▪ Art 8: right to effective remedy for violations of rights ▪ Art 17: the right to own property individually and in association with others ▪ Art 25: the right to a standard of living adequate to health and well-being ▪ Art 27*: the right to participate in the cultural life of the community. 		

² Note that while the major human rights mechanisms (UNDHR, ICCPR, ICESCR, ICERD) are considered relevant to represent the rights of Indigenous peoples, other mechanisms which address more specific human rights may include specific articles concerning Indigenous Peoples rights. These are reflected throughout the table.

Name	Objective	Clauses of particular relevance to indigenous peoples	Relevant domestic federal legislation	Clauses of particular relevance
International Covenant on Civil and Political Rights	Contributes to the creation of conditions whereby everyone may enjoy their civil and political rights.	<ul style="list-style-type: none"> ▪ All articles are relevant to Indigenous people's rights. ▪ Art 1: self determination and the disposal of natural wealth and resources without prejudice ▪ Art 6: right to life and for that right to be protected by the law ▪ Art 25: to take part in the conduct of public affairs through representatives of choice and to have access to public service on general terms of equality ▪ Art 27: to enjoy their own culture and use their own languages. 		

Name	Objective	Clauses of particular relevance to indigenous peoples	Relevant domestic federal legislation	Clauses of particular relevance
<p>International Covenant on Economic, Social and Cultural Rights</p>	<p>Promotes the creation of conditions whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights, so that the ideal of free human beings enjoying freedom from fear and want may be achieved.</p>	<ul style="list-style-type: none"> ▪ All articles are relevant to Indigenous people's rights. ▪ Art 1: self determination and the disposal of natural wealth and resources without prejudice. ▪ Art 11: the right to a standard of living. ▪ Art 15*: the right to take part in cultural life, to enjoy the benefits of scientific progress and application, and the protection of the moral and material interests resulting from any scientific, literary or artistic production. 		
<p>International Convention on the Elimination of All Forms of Racial Discrimination</p>	<p>Promotes the implementation of the principles embodied in the United Nations Declaration on the Elimination of All Forms of Racial Discrimination and to secure the earliest adoption of practical measures to that end.</p>	<ul style="list-style-type: none"> ▪ All articles are relevant to Indigenous people's rights. ▪ Art 1: defines 'racial discrimination' and provides for special measures. ▪ Art 2: State legislation and policy prohibits racial discrimination. ▪ Art 5: outlines the rights which must be protected from racial discrimination. 		

Name	Objective	Clauses of particular relevance to indigenous peoples	Relevant domestic federal legislation	Clauses of particular relevance
<p>Convention on the Rights of the Child</p>	<p>Recognises and protects the rights of children, in recognition of the fact that childhood is entitled to special care and assistance.</p>	<ul style="list-style-type: none"> ▪ All articles are relevant to Indigenous children's' rights. ▪ Art 6: the need to ensure the survival and development of the child. ▪ Art 8: to preserve a child's identity, including nationality, name and family relations as recognized by law without unlawful interference. ▪ Art 20: special State protection and assistance for children who may be temporarily or permanently deprived of his or her family environment. ▪ Art 27: a standard of living adequate for the child's physical, mental, spiritual, moral and social development. ▪ Art 30: to enjoy their own culture, and use their own languages. 		
<p>Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief</p>	<p>Promotes understanding, tolerance and respect relating to freedom of religion and belief, ensures that the use of religion or belief for ends inconsistent with the Charter of the United Nations is inadmissible.</p>	<ul style="list-style-type: none"> ▪ Art 6: to freedom of thought, conscience, religion or belief including to make, acquire and use articles and materials related to the rites or customs of a religion or belief. 		

Name	Objective	Clauses of particular relevance to indigenous peoples	Relevant domestic federal legislation	Clauses of particular relevance
Declaration of the Principles of International Cultural Co-operation ³	Recognises that ignorance of the ways and customs of peoples still presents an obstacle to friendship amongst nations, peaceful co-operation and progress. ⁴	<ul style="list-style-type: none"> ▪ Art 1: to have the value and dignity of culture respected and preserved ▪ Art 6: to respect the distinctive character of each culture. 		
Declaration on the Right to Development	Confirms that the right to development is an inalienable human right and that equality of opportunity for development is a prerogative both of nations and of individuals who make up nations.	<ul style="list-style-type: none"> ▪ All articles are relevant to indigenous people's development. 		
Convention on the Protection and Promotion of the Diversity of Cultural Expressions ⁵	Protects and promotes the diversity of cultural expressions.	<ul style="list-style-type: none"> ▪ All articles are relevant to indigenous people's rights. 		

3 The Declaration of the Principles of International Cultural Co-operation was proclaimed by the General Conference of the United Nations Educational, Scientific and Cultural Organization at its fourteenth session on 4 November 1966. At: http://www.unhchr.ch/html/menu3/b/n_decl.htm.

4 At: http://www.hreoc.gov.au/social_Justice/nt_report/ntreport00/append5.html.

5 The Convention on the Protection and Promotion of the Diversity of Cultural Expressions was adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization, meeting in Paris from 3 to 21 October 2005 at its 33rd session. At: http://portal.unesco.org/en/ev.php-URL_ID=31038&URL_DO=DO_TOPIC&URL_SECTION=201.html.

1.2 Indigenous specific instruments

Name	Objective	Clauses of particular relevance to Indigenous peoples	Relevant domestic federal legislation	Clauses of particular relevance
Declaration on the Rights of Indigenous Peoples	To proclaim a standard of achievement on the rights of Indigenous Peoples to be pursued in a spirit of partnership and mutual respect.	<ul style="list-style-type: none"> ▪ All of the articles are relevant to the rights of Indigenous peoples. ▪ Art 1-6: the full enjoyment of all human rights, non-discrimination, self-determination and autonomy, maintenance of Indigenous institutions, and the right to a nationality. ▪ Art 7-10: freedom from genocide, forced assimilation or destruction of culture, forced relocation from land, right to integrity and security of the person, and right to belong to an indigenous community or nation. ▪ Art 11–13*: rights to practice and revitalize culture and the transmission of histories, languages etc; and the protection of traditions, sites, ceremonial objects and repatriation of remains. 		

Name	Objective	Clauses of particular relevance to indigenous peoples	Relevant domestic federal legislation	Clauses of particular relevance
		<ul style="list-style-type: none"> ▪ Art 18-24: rights to participation in decision-making, through representative bodies; rights to their own institutions to secure subsistence and development; special measures to be adopted to address indigenous disadvantage and ensure non-discriminatory enjoyment of rights; right to development; and access to traditional health practices and medicines. ▪ Art 25-32*: rights to maintain traditional connections to land and territories; for ownership of such lands and protection of lands by State; establishment of systems to recognize indigenous lands; rights to redress and compensation for lands that have been taken; conservation and protection of the environment and their cultural heritage and traditional knowledge; and the right to determine and develop priorities and strategies for the development or use of the lands or territories and other resources. 		

Name	Objective	Clauses of particular relevance to indigenous peoples	Relevant domestic federal legislation	Clauses of particular relevance
Declaration of Indigenous Peoples on Climate Change ⁶	Promotes the establishment of a United Nations working group on Indigenous Peoples to be present at future climate change conferences, as equal partners in negotiations. To make a statement of claim of the right of indigenous peoples to participate in negotiations.	<ul style="list-style-type: none"> ▪ All articles are relevant to Indigenous peoples and are concerned with the particular challenges of indigenous peoples in addressing climate change. 		
Third International Forum of Indigenous Peoples and Local Communities on Climate Change (Bonn Declaration) ⁷	Denounces the exclusion of indigenous peoples from debates under the UNFCCC and the Kyoto Protocol. Opposes measures to mitigate climate change that are based on a mercantilist and utilitarian vision of the forests, seas, territories and resources of indigenous peoples.	<ul style="list-style-type: none"> ▪ All articles are relevant to indigenous peoples and are concerned with the particular challenges of indigenous peoples in addressing climate change. 		

6 The Declaration of Indigenous Peoples on Climate Change was developed at the Second International Indigenous Forum on Climate Change, at the Hague, 15 November 2000. At: <http://www.austlii.edu.au/journals/AILR/2002/18.html>.

7 The Bonn Declaration Third International Forum of Indigenous Peoples and Local Communities on Climate Change was developed at Bonn, Germany on July 14-15, 2001, for the second session of the sixth Conference of Parties to the United Nations Framework Convention on Climate Change (COP6B), and reaffirms the Alburquerque Declaration, Quito Declaration, the Lyon Declaration of the First International Forum of Indigenous Peoples and Local Communities on Climate Change, and the Hague Declaration of the Second Forum.

Name	Objective	Clauses of particular relevance to indigenous peoples	Relevant domestic federal legislation	Clauses of particular relevance
<p>International Labour Organisation Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries⁸</p>	<p>In light of developments in international law since 1957, as well as developments in the situation of indigenous and tribal peoples in all regions of the world, to set out new international standards in relation to indigenous and tribal peoples, with a view to removing the assimilationist orientation of earlier standards.</p>	<ul style="list-style-type: none"> ▪ All of the articles are relevant to the rights of Indigenous peoples. ▪ Art 13-19: use, ownership and possession of traditional lands and the right to development, resolution of land claims, rights to use, management and conservation of natural resources, including to be consulted with on sub-surface resources and receive compensation for damages, the right to reside on traditional lands, and where relocation is necessary that lands or compensation be provided to them for future development. 		

8 The Indigenous and Tribal Peoples Convention, 1989 (No.169) was adopted on 27 June 1989 by the General Conference of the International Labour Organisation at its seventy-sixth session. The Convention entered into force on 5 September 1991. At: <http://www2.ohchr.org/english/law/indigenous.htm>.

Name	Objective	Clauses of particular relevance to indigenous peoples	Relevant domestic federal legislation	Clauses of particular relevance
Indigenous Peoples' Kyoto Water Declaration ⁹	To declare an indigenous position on the protection of water.	<ul style="list-style-type: none"> ▪ All of the articles are relevant to the rights of Indigenous peoples. ▪ Para 9-14*: right to self-determination and water, including protection of traditional knowledge. ▪ Para 15*: use and protection of traditional knowledge. ▪ Para 16: decision-making, free-prior and informed consent. ▪ Para 27*-28*: inter-generational transferral of knowledge. ▪ Para 32*: the conservation of traditional knowledge and ecosystems in accordance with the CBD. 		

9 The Indigenous and Tribal Peoples Convention, 1989 (No.169) was adopted on 27 June 1989 by the General Conference of the International Labour Organisation at its seventy-sixth session. The Convention entered into force on 5 September 1991. At: <http://www2.ohchr.org/english/law/indigenous.htm>.

1.3 Greenhouse

Name	Objective	Clauses of particular relevance to indigenous peoples	Relevant domestic federal legislation	Clauses of particular relevance
United Nations Framework Convention on Climate Change	Aims to achieve stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.	<ul style="list-style-type: none"> ▪ While the mechanism has particular relevance to addressing climate change, none of articles specifically refer to the rights of Indigenous people. 		
Kyoto Protocol to the United Nations Framework Convention on Climate Change	Aims to put in place measures in pursuit of the objective of the United Nations Framework Convention on Climate Change.	<ul style="list-style-type: none"> ▪ While the mechanism has particular relevance to addressing climate change, none of articles specifically refer to the rights of Indigenous people. 		

Name	Objective	Clauses of particular relevance to indigenous peoples	Relevant domestic federal legislation	Clauses of particular relevance
Vienna Convention for the Protection of the Ozone Layer	Provides for the protection of human health and the environment against adverse effects resulting from modifications of the ozone layer. To encourage the exchange of relevant scientific, technical, socio-economic, commercial and legal information. To cooperate in promoting the development and transfer of technology and knowledge.	<ul style="list-style-type: none"> ▪ None of articles are of particular relevance to Indigenous people. 	Ozone Protection and Synthetic Greenhouse Gas Management Act	
Montreal Protocol on Substances that Deplete the Ozone Layer	Promotes the introduction of control measures in order to affect the objectives of the Vienna Convention for the Protection of the Ozone Layer.	<ul style="list-style-type: none"> ▪ None of articles are of particular relevance to Indigenous people. 	Ozone Protection and Synthetic Greenhouse Gas Management Act	

1.4 Heritage

Name	Objective	Clauses of particular relevance to indigenous peoples	Relevant domestic federal legislation	Clauses of particular relevance
<p>Convention concerning the Protection of the World Cultural and Natural Heritage</p>	<p>Aims to maintain, increase, and diffuse knowledge by assuring the conservation and protection of the world's heritage. To safeguard and preserve the world's cultural and natural heritage. For the international community as a whole to participate in the protection of the cultural and natural heritage of outstanding universal value, by the granting of collective assistance.</p>	<ul style="list-style-type: none"> ▪ Art 4-6*: identification, protection, conservation, presentation, rehabilitation and transmission to future generations of the cultural and natural heritage. 	<p>Environment Protection and Biodiversity Conservation Act 1999</p> <p>Australian Heritage Council Act 2003</p> <p>Protection of Movable Cultural Heritage Act 1986</p> <p>World Heritage Properties Conservation Act 1983</p> <p>Aboriginal and Torres Strait Islander Heritage Protection Act 1984.</p>	<p>Various. Includes protections of World Heritage property and National Heritage places.</p> <p>Sections 5 and 7</p> <p>Sections 7 and 17</p> <p>Sections 8 and 11</p> <p>All</p>

Name	Objective	Clauses of particular relevance to indigenous peoples	Relevant domestic federal legislation	Clauses of particular relevance
<p>Convention for the Safeguarding of Intangible Cultural Heritage</p>	<p>Safeguards intangible cultural heritage; to ensure respect for the intangible cultural heritage of the communities, groups and individuals concerned; to raise awareness at the local, national and international levels of the importance of the intangible cultural heritage, and of ensuring mutual appreciation thereof; and to provide for international cooperation and assistance.</p>	<ul style="list-style-type: none"> ▪ Art 11-15* :safeguarding intangible cultural heritage at the national level including: <ul style="list-style-type: none"> – oral traditions and expressions including language – knowledge and practices concerning nature and the universe – recognition, respect and enhancement of intangible cultural heritage through education, awareness-raising and capacity-building – the participation of communities, groups and individuals in the creation, maintenance, transmittal and management of intangible cultural heritage. 	<p>Environment Protection and Biodiversity Conservation Act 1999</p> <p>Australian Heritage Council Act 2003</p> <p>Protection of Movable Cultural Heritage Act 1986</p> <p>World Heritage Properties Conservation Act 1983</p> <p>Aboriginal and Torres Strait Islander Heritage Protection Act 1984</p>	<p>Various. Includes protections of World Heritage property and National Heritage places.</p> <p>Sections 5 and 7</p> <p>Sections 7 and 17</p> <p>Sections 8 and 11</p> <p>All</p>

1.5 Environment and sustainable development

Name	Objective	Clauses of particular relevance to Indigenous peoples	Relevant domestic federal legislation	Clauses of particular relevance
Rio Declaration on Environment and Development	Aims to establish a new and equitable global partnership through the creation of new levels of cooperation among States, key sectors of societies and people. To work towards international agreements that respects the interests of all and protects the integrity of the global environmental and developmental system.	<ul style="list-style-type: none"> ▪ Principle 22*: recognises the vital role of Indigenous communities' knowledge and traditional practices in environmental management, and the identity, culture and interests of Indigenous peoples to enable their effective participation in the achievement of sustainable development. 	<p>National Environment Protection Council Act 1994</p> <p>National Environment Protection Measures (Implementation) Act 1998</p>	
Agenda 21 ¹⁰	Outlines actions that governments, international organisations, industries and the community can take to achieve sustainability. Aims to alleviate poverty, hunger, sickness and illiteracy worldwide while halting the deterioration of ecosystems which sustain life. Recognises the impacts of human behaviours on the environment and on the sustainability of systems of production.	<ul style="list-style-type: none"> ▪ Chapter 18: the right to enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. 		

10 United Nations Economic and social development, Agenda 21. At: <http://www.environment.gov.au/commitments/uncsd/publications/agenda21/index.html>.

Name	Objective	Clauses of particular relevance to indigenous peoples	Relevant domestic federal legislation	Clauses of particular relevance
United Nations Millennium Declaration	Aims to establish a just and lasting peace all over the world in accordance with the purposes and principles of the Charter of the United Nations. To ensure that globalisation becomes a positive force for all the world's people.	<ul style="list-style-type: none"> ▪ Chapter 26: provides for sustainable development strategies that recognise, accommodate, promote and strengthen the role of indigenous people and their communities, and the protection and management of natural resources recognising the effects that climate change will have on Indigenous peoples. ▪ While the mechanism has particular relevance to addressing human rights issues, none of articles specifically refer to the rights of Indigenous people. 		

1.6 Forests

Name	Objective	Clauses of particular relevance to indigenous peoples	Relevant domestic federal legislation	Clauses of particular relevance
<p>Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forest (Forest Principles)¹¹</p>	<p>Contributes to the management, conservation and sustainable development of forests and to provide for their multiple and complementary functions and uses.</p>	<ul style="list-style-type: none"> ▪ Preamble (c): the recognition of the traditional uses of forests. ▪ Art 2(d): the participation of indigenous peoples in the development, implementation and planning of national forest policies. ▪ Art 5(a): national forest policies that recognise and support for the identity, culture and the rights of indigenous people, and to have an economic stake in forest use, and maintain cultural identity through, inter alia, those land tenure arrangements that promote the sustainable management of forests. 	<p>Environment Protection and Biodiversity Conservation Act 1999</p>	<p>Various. Includes protections of listed threatened species, listed threatened ecological communities, and endangered and endangered communities.</p>

11 United Nations General Assembly, Report of the United Nations Conference on Environment And Development, Rio de Janeiro, 3-14 June 1992, Annex III, Non-Legally Binding Authoritative Statement Of Principles For A Global Consensus On The Management, Conservation and Sustainable Development of all types of Forests. At: <http://www.un.org/documents/ga/conf151/acomf15126-3annex3.htm>.

Name	Objective	Clauses of particular relevance to indigenous peoples	Relevant domestic federal legislation	Clauses of particular relevance
		<ul style="list-style-type: none"> ▪ Art 8(f): national policies and/or legislation aimed at the management, conservation, and sustainable development of forests that include protection of cultural, spiritual and historical values of forests of national importance. ▪ Art 12(d)*: indigenous capacity and local knowledge regarding the conservation and sustainable development of forests should be recognised, respected, recorded, developed and introduced in the implementation of programs, including access to benefits arising from the utilisation of Indigenous knowledge. 		

1.7 Wetlands

Name	Objective	Clauses of particular relevance to Indigenous peoples	Relevant domestic federal legislation	Clauses of particular relevance
Ramsar Convention on Wetlands of International Importance especially as Waterfowl Habitat ¹²	Aims to stem the progressive encroachment on and loss of wetlands. To conserve wetlands and their flora and fauna through a combination of far-sighted national policies and co-ordinated international action.	<ul style="list-style-type: none"> ▪ While the mechanism has particular relevance to addressing climate change, none of articles specifically refer to the rights of Indigenous people. 	Environment Protection and Biodiversity Conservation Act 1999	Various. Includes protections of declared Ramsar wetlands.

12 Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention). At: http://www.ramsar.org/key_conv_e.htm.

1.8 Biodiversity

Name	Objective	Clauses of particular relevance to indigenous peoples	Relevant domestic federal legislation	Clauses of particular relevance
Convention on Biological Diversity	Promotes the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources.	<ul style="list-style-type: none"> ▪ Art 8(j)*: respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities relevant for the conservation and sustainable use of biological diversity and promote their application with the approval and involvement of the holders of such knowledge, innovations and practices; encourage the equitable sharing of the benefits arising from the utilization of such knowledge innovations and practices. ▪ Art10(c): protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements. 	Environment Protection and Biodiversity Conservation Act 1999	Various. Includes protections of listed threatened species, listed threatened ecological communities, endangered communities, and listed migratory species.

Appendix 5

Government initiatives to address the impacts of climate change on Indigenous peoples¹

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1 Information in this Appendix is a collation of extracts from responses provided by various Federal, State and Territory Government Departments in Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, for the *Native Title Report 2008*.

Native Title Report 2008

Federal Government Department	Strategy	Indigenous Engagement in Climate Change Policy
Attorney-General's Department	Referred to the work being done by the Department of Environment, Water, Heritage and the Arts relating to Indigenous people and climate change	None advised
Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA)	<p>Advised that this is not a policy responsibility of FaHCSIA except where they are consulted by other government departments to assist with the development of Indigenous engagement strategies.</p> <p>Advised that the Green Paper will inform the Department's economic development strategy.</p> <p>Advised that as this is a new area of policy development, opportunities that may arise from climate change, including the sequestration of carbon as an alternative to emissions, will be considered.</p>	None advised
Department of Environment, Water, Heritage and the Arts	Advised that there has been considerable developments in the areas of climate change which may impact on, and potentially involve Indigenous communities, including:	

Federal Government Department	Strategy	Indigenous Engagement in Climate Change Policy
<p>Department of Environment, Water, Heritage and the Arts</p>	<p>Caring for our Country</p> <p>Caring for our Country is the Australian Government's new natural resource management initiative and it is an integrated package with one clear goal, a business approach to investment, clearly articulated outcomes and priorities and improved accountability.</p> <p>Caring for our country commenced on 1 July 2008 and will integrate delivery of the following Commonwealth's existing natural resource management programs – the:</p> <ul style="list-style-type: none"> ▪ Natural Heritage Trust ▪ National Action Plan for Salinity and Water Quality ▪ National Landcare program ▪ Environmental Stewardship program ▪ Working on Country program. <p>The following include the broader elements of the Caring for our Country initiative:</p>	<p>There are a number of elements of this initiative that engage Indigenous people in the development of climate change policy.</p>
	<p><i>Working on Country element</i></p> <ul style="list-style-type: none"> ▪ aims to build on Indigenous knowledge of protecting and managing land and sea country ▪ provides funding for Indigenous people to deliver environmental outcomes to the Australian Government ▪ fire management has become a strong component in large part due to its importance in mitigating some of the risks of climate change 	<p>The Working on Country element provides the Department with the opportunity to work with and engage Indigenous people to collaboratively develop broader policies and strategies with regard to climate change, such as implementing low intensity burning in some regions to increase resilience to climate change impacts.</p>

Federal Government Department	Strategy	Indigenous Engagement in Climate Change Policy
<p>Department of Environment, Water, Heritage and the Arts</p>	<ul style="list-style-type: none"> ▪ climate change is likely to impact on the way ecosystems respond to fire. Rangers must consider how fire management regimes can be developed, applied and reviewed in response to this 	
	<p><i>Indigenous Protected Areas element (IPA's)</i></p> <p>Australia's 25 declared IPAs range from the waters of the Dhimurru IPA in the Gulf of Carpentaria to Nantawarrina in South Australia.</p> <p>The government consider the IPA element an important component of their Indigenous policy relating to climate change for the following reasons:</p> <ul style="list-style-type: none"> ▪ IPAs are generally larger areas of land with high biodiversity and cultural heritage conservation values and therefore have a greater capacity to be able to withstand climate change impacts and allow for natural adaptation processes. ▪ IPAs are steadily increasing their resource base to actively manage fire regimes, feral animals and weeds to enhance biodiversity values and increase ecosystem health and counter the projected impacts of climate change. 	<p>There is a strong focus on engaging Indigenous communities who manage IPAs with regards to the issue of climate change.</p> <p>The Department convenes an IPA Advisory Committee which has cross representation on other bodies and which represents the views of IPA communities in relation to policy development.</p> <p>The IPA element assists Indigenous communities to develop a plan to manage their land's natural and cultural values and provides ongoing support for work to control threats such as weeds, feral animals and wildfire.</p>

Federal Government Department	Strategy	Indigenous Engagement in Climate Change Policy
<p>Department of Environment, Water, Heritage and the Arts</p>	<ul style="list-style-type: none"> ▪ IPAs are usually relatively intact areas of land and areas of high biodiversity that are actively managed through a combination of traditional and contemporary land management skills, to ensure healthy ecosystems that are resilient to change and more capable of withstanding climate change impacts. ▪ IPAs contribute to connectivity of the National Reserve System allowing for migration and movement of species in response to climate change issues. ▪ IPAs is an expanding program which is well supported by Government and the selection process has the potential to change focus to reflect new Government priorities around expected climate change outcomes. ▪ IPAs are taking on an increasing active contemporary management focus which means managing specifically for climate change if necessary and where it can be identified as requiring active management to achieve biodiversity outcomes. 	

Native Title Report 2008

Federal Government Department	Strategy	Indigenous Engagement in Climate Change Policy
<p>Department of Environment, Water, Heritage and the Arts</p>	<ul style="list-style-type: none"> ▪ All IPAs have plans of management which are reviewed regularly to allow for new management responses. They also have established monitoring and evaluation programs in place which can be adapted to incorporate climate change indicators and contribute to national monitoring and evaluation programs. ▪ IPAs have already set international benchmarks for innovative carbon abatement programs involving funding partnerships with industry to offset carbon emissions. The Western Arnhem Land Fire Abatement program with Conoco Phillips is one such initiative with the Maningrida (Djeld) IPA in preparation. ▪ IPA consultation projects have great potential to participate in the Carbon offsets/ abatement and biodiversity offset programs. ▪ Remote IPA communities are often eager participants in alternative, renewable energy programs. <p>The Department has developed Climate Change response information packages and conducted awareness raising programs in IPA communities regarding the projected impacts and potential responses and opportunities for IPA's to participate in various climate change programs.</p>	

Federal Government Department	Strategy	Indigenous Engagement in Climate Change Policy
<p>Department of Environment, Water, Heritage and the Arts</p>	<p>Through IPAs, the Government supports Indigenous communities to manage their land for conservation in line with international guidelines, so that its plants, animals and cultural sites are protected for the benefit of all Australians.</p>	
	<p><i>Indigenous emissions trading element</i></p> <p>On 5 October 2007, the Australian Government announced a commitment to provide \$10 million over five years as part of the Caring for our Country initiative, to provide opportunities for Indigenous participation in fledgling carbon markets by establishing the legal framework for the creation of carbon credits from altered fire management.</p> <ul style="list-style-type: none"> ▪ focuses on the opportunities for the purchase of carbon credit arising from fire management in northern Australia ▪ proposed that the initial focus will be in northern Australia where tropical savannas are subject to frequent and extensive fire. These fires produce substantial emissions of greenhouse gases contributing to around three percent of Australia's national greenhouse emissions. 	<p>Discussions are currently taking place with stakeholders (including Indigenous groups) in the delivery of this initiative.</p>

Native Title Report 2008

Federal Government Department	Strategy	Indigenous Engagement in Climate Change Policy
<p>Department of Environment, Water, Heritage and the Arts</p>	<p>Kakadu Climate Change Symposium 2008</p> <p>The Department is convening a Climate Change Symposium in Kakadu National Park in August 2008. This Symposium will be a fundamental contribution to Kakadu's Climate Change strategy and includes the participation of Indigenous people in the development and implementation of the strategy.</p> <p>The focus of the symposium will largely be on knowledge and adaptation, our understanding of the issues, how we prepare for emerging issues, including working with our partners and what we can realistically focus on in our management activities.</p> <p>The Department is also keen to explore possible options for minimising carbon loss through land management activities and has included fire and soil disturbance in workshop discussions.</p> <p>While the presentation of research and scientific knowledge will form the core of the symposium, the objective is to place this knowledge in a management context and pose questions to Park Managers and Traditional Owners in the region, regarding future management frameworks and research directions.</p>	<p>Kakadu National Park in the Northern Territory is jointly managed by the Australian Government and Traditional Owners.</p>

Federal Government Department	Strategy	Indigenous Engagement in Climate Change Policy
<p>Department of Environment, Water, Heritage and the Arts</p>	<p>Indigenous Advisory Committee (IAC)</p> <p>In recognition of the role of Indigenous people in the conservation and ecologically sustainable use of the Australia's biodiversity, and Indigenous Advisory Committee (IAC) was established in 2000 under the <i>Environment Protection and Biodiversity Conservation Act 1999</i> (EPBC Act).</p> <p>The Committee advises the Minister for the Environment, Heritage and the Arts on the operation of the EPBC Act, taking into account the significance of Indigenous peoples' knowledge of the management of land and the conservation and sustainable use of biodiversity.</p> <p>Membership of the Committee is based on expertise in Indigenous land management, conservation and cultural heritage management. All committee members are Indigenous Australians and are not chosen to represent particular regions or organisations. The members of the IAC have a wide range of skills and knowledge in fields such as park management, Indigenous land management, health, tertiary education and local, regional and state Indigenous affairs.</p>	<p>The IAC is a key body in engaging with Government on issues of climate change and how it is likely to impact on Indigenous communities, while also providing Indigenous perspectives on future policy directions of Government in response to this and other issues.</p>

Federal Government Department	Strategy	Indigenous Engagement in Climate Change Policy
<p>Department of Environment, Water, Heritage and the Arts</p>	<p>The Northern Australia Water Futures Assessment</p> <p>The Northern Australian Water Futures Assessment of which the Department is a joint delivery partner, has a strong Culture and Social program which aims to identify the key cultural and social assets across northern Australia and gain an understanding of their watering needs to enable future development proposals to take these needs into account in the context of a changing climate.</p>	
	<p>Murray-Darling Basin Reform</p> <p>Provisions of the <i>Water Act 2007</i>, requires the Murray-Darling Basin Authority to consult widely when developing, amending and reviewing the Basin Plan, including with Indigenous communities.</p>	<p>Section 21 (4) requires that the Basin Plan be developed with regard to the National Water Initiative; the consumptive and other economic uses of Basin water resources; social, cultural, Indigenous and other public benefit issues; and broader natural resource management planning processes.</p>
	<p>Economic Development</p> <p>Indigenous cultural and natural resource management on the Indigenous estate more broadly, has great capacity to general economic opportunity and outcomes for communities and individuals.</p>	<p>Indigenous land and sea management groups are increasingly undertaking commercial contract work for both government agencies and private business. The estimated value of commercial work undertaken by Indigenous land and sea management groups is around \$4-6 million per annum.</p>

Federal Government Department	Strategy	Indigenous Engagement in Climate Change Policy
<p>Department of Environment, Water, Heritage and the Arts</p>	<p>Through mitigating risk and managing issues of climate change more generally, there is not currently a large fee-for-service sector for Indigenous people. Climate Change and its associated pressures, particularly in northern Australia, will likely open economic opportunities for Indigenous land and sea management. This will apply more strongly to key areas of interest such as climate change monitoring in coastal wetlands.</p>	
	<p>Emissions Trading</p> <p>As part of the broader structural engagement between Indigenous land and sea management groups and governments, emissions' trading is identified as a key area of interest in the area of Indigenous economic development.</p> <p>Over 98 percent of large bushfires occur outside the populous south-east and south-west of Australia with over 70 percent occurring as environmentally destructive wildfires in the savannas of northern Australia. CSIRO research indicates that there are savanna management options which could significantly increase carbon sequestration.</p>	<p>West Arnhem communities are already benefiting from these opportunities. Under a 17 year agreement with Conoco Phillips, \$1 million will be invested each year to reduce emissions through altered fire management. The project is currently employing up to 30 Indigenous rangers.</p>

Native Title Report 2008

Federal Government Department	Strategy	Indigenous Engagement in Climate Change Policy
Department of Environment, Water, Heritage and the Arts	<p>There are 60 million hectares of Aboriginal land in the Northern Territory alone, representing one of the world's largest carbon bio-sequestration opportunities. This also presents an opportunity for northern Australia to become a producer and seller of carbon in the global carbon commodity market.</p>	
The Department of Climate Change and Water	<p>Facilitation of Indigenous participation in carbon markets (active)</p> <p>The Department is working closely with the Department of Environment, Water, Heritage and the Arts, which leads the Caring for our Country program to implement the initiative.</p> <p>The Australian Government has committed \$10m over five years as part of the Caring for our Country initiative to facilitate Indigenous land management participation in existing credible voluntary emissions reduction markets and position them for entry into emerging trading markets.</p>	<p>To date extensive scoping discussions have been held with stakeholders including the Indigenous Advisory Committee, the Northern Indigenous Land and Sea Management Alliance, and the Cooperative Research Centre for Tropical Savannas Management. Further consultation with Indigenous land management stakeholders, in particular in relation to the potential for participation in reforestation and offsets from reductions in emissions from savanna burning, is planned for the near future.</p>

Federal Government Department	Strategy	Indigenous Engagement in Climate Change Policy
<p>The Department of Climate Change and Water</p>	<p>International climate change negotiations (in planning)</p> <p>The Department has responsibility for developing Australia's international climate change negotiation position. One of the areas of significant interest to Australia is the treatment of the land use, land-use change and forestry (LULUCF) sector in a future climate change agreement under the United Nations Framework Convention on Climate Change (UNFCCC). International negotiations are currently underway and are expected to conclude in December 2009.</p>	<p>The Department is currently planning stakeholder meeting with interest groups, including Indigenous groups, to develop Australia's negotiation positions on a variety of land issues for the forthcoming UNFCCC Conferences of the Parties in Poland in December 2008.</p>
	<p>Scoping Study on impacts of climate change on Indigenous communities</p> <ul style="list-style-type: none"> ▪ currently undertaking a scoping study to identify impacts of climate change on Indigenous communities in the tropical north and assess the vulnerability of such communities using a multi-disciplinary approach ▪ current understanding of the resilience of Indigenous communities to the effects of climate change is relatively limited 	

Federal Government Department	Strategy	Indigenous Engagement in Climate Change Policy
<p>The Department of Climate Change and Water</p>	<ul style="list-style-type: none"> ▪ anticipated that the study will provide more comprehensive outcomes on the specific impacts currently being experienced and those likely to be experienced in a changing climate ▪ assist in identifying knowledge gaps and future research and on-ground priorities. <p>The main topic areas for the study will include Indigenous health, environmental impacts, infrastructure services, education and employment. The study will involve literature review and consultation with key stakeholders, including Indigenous stakeholders.</p> <p>This project forms an activity under the National Climate Change Adaptation Framework, which identifies both the tropical north and highly vulnerable settlements, including remote and Indigenous communities, as 'priority vulnerable regions' for integrated regional vulnerability assessments. Accelerated implementation of the Framework across all jurisdictions as part of a broader work program for the development of options for long-term adaptation to climate change will be considered at the COAG Meeting in October 2008.</p>	

Federal Government Department	Strategy	Indigenous Engagement in Climate Change Policy
<p>The Department of Climate Change and Water</p>	<p>Economic Development and Emissions Trading</p> <p>Developing adaptation responses to protect biodiversity and ecosystems, and implementing measures to transform Australia into a low-carbon society will create new markets and economic opportunities. The Government's emissions trading scheme, the Carbon Pollution Reduction Scheme, will be the primary vehicle to facilitate this transition.</p> <p>Realising emissions reduction market opportunities through fire management and other land management activities in northern Australia will deliver not only economic benefits, but also social, biodiversity and climate change benefits.</p> <p>The Department is currently planning consultations with Indigenous land managers on opportunities under the Scheme. However, it should be noted that the viability of the initiative will depend on the resolution of a number of issues, including emissions measurement and property rights for Indigenous lands.</p>	<p>The Australian Government commitment of \$10m over five years to facilitate Indigenous participation in emissions trading will provide opportunities for Indigenous people in existing and emerging carbon markets, including, through fire management.</p>

State/Territory Government Department	Strategy	Indigenous Engagement in Climate Change Policy
Queensland		
Office of Sustainability, Climate Change and Innovation	<p>ClimateSmart 2050 and ClimateSmart Adaptation 2007-12</p> <p>These strategies are currently being reviewed to take account of the latest science and significant developments in climate change policy on a national and international level.</p> <p>Other initiatives include:</p> <p><i>Climate change regional projections</i></p> <p>The Qld Climate Change Centre of Excellence is downscaling general climate circulation models to produce regional and local climate change projections.</p>	<p>Consultations will be conducted with representatives of Indigenous organisations as part of a public consultation process to ensure that Indigenous perspectives inform the development of future climate change policy for Qld.</p>
	<p><i>Torres Strait (TS) Coastal Management Committee</i></p> <p>The Committee coordinates and oversees a range of climate change projects including:</p> <ul style="list-style-type: none"> ▪ the investigation of sea erosion affecting communities and solution development ▪ sea level survey and land datum corrections ▪ sustainable land use planning ▪ climate impacts in Torres Strait and incorporation of traditional environmental knowledge ▪ development of a climate change strategy for Torres Strait ▪ a survey to develop a high resolution digital elevation model for low lying areas to assist in planning for sea level rise and storm tide inundation. 	<p>The Committee is chaired by the Torres Strait Regional Authority (TSRA) and includes representation of the Qld Government and the island communities. The committee is active in involving island communities in decision-making and project activities.</p>

State/Territory Government Department	Strategy	Indigenous Engagement in Climate Change Policy
Office of Sustainability, Climate Change and Innovation	<p><i>Storm Tide Mapping Project</i></p> <p>Storm tide maps are being progressively developed for populated areas of Qld most at risk from storm tides.</p>	Maps have been developed for Palm Island and a number of other population centres, including Cairns and Mackay.
	<p><i>Gulf of Carpentaria Storm Tide Study</i></p> <p>The study will provide inundation mapping for the Gulf of Carpentaria region.</p>	
	<p><i>Wetland mapping and classification</i></p> <p>The Qld Government Mapping and Classification project will deliver comprehensive maps of Qld's wetlands.</p>	
	<p><i>South East Qld Regional Plan Climate Change Strategy</i></p> <p>A climate change strategy is currently being developed to inform the review of the South East Qld Regional Plan. The strategy will identify those priority climate change issues of importance in the region and adaptation strategies to be integrated into the revised regional plan.</p>	
New South Wales		
Department of Lands	Referred the engagement of Indigenous people in the development of climate change policy to the Department of Environment and Climate Change.	None advised.

State/Territory Government Department	Strategy	Indigenous Engagement in Climate Change Policy
South Australia		
<p>Office of the Attorney-General</p>	<p>The Chief Executive of the Attorney-General's Department chairs a Chief Executives Task Force on Native Title Claim Resolution comprising the Chief Executive's of all major departments that have an interest in the settlement of native title claims and the benefits packages of those settlements. This is the forum for addressing issues such as this at a whole of government level.</p> <p>Climate Change is on the agenda for initial consideration and discussion at the next Task Force meeting in September 2008. The Task Force is aiming to concentrate on the immediate, urgent issues affecting the River Murray and its Lower Lakes. The Task Force is also in the process of developing specific measures for the close involvement of native title claim groups in addressing these issues.</p> <p>The object of the <i>Natural Resources Management Act 2004 (SA)</i> is to help achieve ecologically sustainable development in the State by establishing an integrated scheme to promote the use and management of natural resources. One of the principles to be taken into account in achieving ecologically sustainable development is the interests of the traditional owners of any land or other natural resources.</p>	<p>The Sustainability and Climate Change Division in the South Australian Department of Premier and Cabinet (DPC), which considers these issues from a State-wide and government-wide view, is represented by its Chief Executive on the Task Force and will be able to engage Indigenous people in forming the Government's policies on these issues.</p> <p>The Aboriginal Congress of South Australia (representing all but one of the State's native title claim groups) is an existing Aboriginal representative body through which the South Australian Government's consultation and engagement with Aborigines on this issue can take place under the auspices of the Main Table of the SA Native Title Resolution program.</p> <p>At a practical level, Aboriginal people are already being closely engaged on environmental and other issues about the River Murray drought response, and in National Parks and Reserves that are managed jointly by the State and local Aboriginal groups. Where those issues relate to climate change, the Aboriginal groups are already engaged.</p>

State/Territory Government Department	Strategy	Indigenous Engagement in Climate Change Policy
Office of the Attorney-General		<p>The Natural Resources Council and Natural Resource Management Boards set up to implement the Act regionally must include members who can represent Aboriginal interests in land.</p> <p>The Alinytjara Wilurara Natural Resources Management Board, which covers about 10 percent of the State, is wholly comprised of Aborigines. This means Aboriginal people are closely involved in plans and action for ensuring sustainable economic development in the State, including dealing with the effects of climate change.</p>
	<p><i>Impacts on Indigenous communities</i></p> <p>This issue is being considered by the Sustainability and Climate Change Division in the SA DPC and, from a native title perspective, will be taken through the Chief Executive's Task Force.</p>	

Native Title Report 2008

State/Territory Government Department	Strategy	Indigenous Engagement in Climate Change Policy
Office of the Attorney-General	<p><i>Economic Development</i></p> <p>There is no formal policy on climate change economic development and native title groups as yet. However, where Aborigines have interests in land, there may be scope for focussing economic development programs on activities that deal with climate change. Examples would include energy generation and water and other natural resource management.</p>	
Victoria		
Attorney-General's Department	<p>The Government's 2008 Green Paper <i>Land & Biodiversity at a Time of Climate Change</i> aims to promote discussion with Indigenous groups on the best way to respond to emerging climate change issues, particularly in relation to environmental sustainability and biodiversity. Feedback on suggested approaches and issues outlined in the Green Paper will inform the development of the White Paper to be released in 2009.</p> <p>The Green Paper highlights and acknowledges that Indigenous people bring different perspectives to natural resource management. The Victorian Government values the contributions Indigenous groups, including Traditional Owners, make towards protecting land and biodiversity values, as we face the challenges of climate change together.</p>	Indigenous consultation on the Government's Green Paper is presently underway.

State/Territory Government Department	Strategy	Indigenous Engagement in Climate Change Policy
<p>Attorney-General's Department</p>	<p>Topics raised in the Green Paper include:</p> <ul style="list-style-type: none"> ▪ increasing Indigenous involvement in the way knowledge is being collected ▪ investigating the feasibility of co-operative research centre to collect Indigenous knowledge ▪ improving the information flow between Government and Indigenous people ▪ considering options for jointly managing national parks and purchasing land through the Indigenous Land Corporation ▪ improving pathways for Indigenous employment in land management agencies ▪ exploring options for Indigenous involvement in land monitoring <p>Opportunities for Traditional Owner groups to engage in a future carbon emissions trading scheme has great potential to lift the economic base of Traditional Owner communities. As landholder and land managers with particular interests in the conservation and forestry estates an in Crown land more generally, Traditional Owners may be well-placed as players in a carbon emissions trading regime, for example, through carbon credited vegetation management programs.</p>	

Native Title Report 2008

State/Territory Government Department	Strategy	Indigenous Engagement in Climate Change Policy
Attorney-General's Department	As such climate change policy has the potential to generate innovative economic development opportunities for Victorian Traditional Owner groups in new industries that support climate change mitigation and adaptation strategies.	
Western Australia		
Department of Environment and Conservation	No response received.	None advised.
Tasmania		
Department of Premier and Cabinet	<p>Acknowledged that the effects of climate change are a high priority for the Tasmanian Government. Established the Tasmanian Climate Change Office and released the Tasmanian Climate Change Strategy.</p> <p>Work undertaken through these vehicles has been broadly based to date.</p>	It is envisaged that as the Strategy progresses, there will be engagement with the Tasmanian Aboriginal Community, particularly around issues of fishing rights and the impact of sea level rises on the Bass Strait Islands.

State/Territory Government Department	Strategy	Indigenous Engagement in Climate Change Policy
Australian Capital Territory		
<p>Department of Indigenous Affairs</p>	<p>Weathering the Change (WtC)</p> <p>There is nothing specific to Indigenous peoples in 'Weathering the Change' (WtC) – the ACT Government Climate Change Strategy – however the ACT is very conscious of the impact that climate change will have on all vulnerable groups.</p> <p>In response to Action 29 of WtC, the Chief Minister's Office has commissioned work on the 'Social Impacts on Climate Change in the ACT' which will also consider the possible impact on all vulnerable groups of people, however it does not say anything specific about Indigenous people.</p> <p>There will also be a national program to introduce a number of energy efficiency measures and consumer information that will help households reduce energy use and save on energy bills.</p>	<p>The ACT has not specifically engaged Indigenous people in the development of policy related to climate change.</p>

Native Title Report 2008

State/Territory Government Department	Strategy	Indigenous Engagement in Climate Change Policy
<p>Department of Indigenous Affairs</p>	<p>The recent Commonwealth Carbon Pollution Reduction Paper acknowledged that households are likely to be affected by increased energy costs related to the introduction of an Emissions Trading Scheme (ETS). Details about the national ETS are still be finalised but it is likely that there will be associated national programs that address these costs, particularly the effect on vulnerable groups.</p> <p>Action 8 of the WtC has provided \$20m over 10 years for energy efficiency improvements to government housing.</p> <p>Economic Development</p> <p>The ACT Natural Resource Management Plan (NRM) is currently under consultation and local Indigenous groups will be consulted. This plan will consider the impacts of the changing climate on natural resources, including land that is significant to local Indigenous people.</p>	

State/Territory Government Department	Strategy	Indigenous Engagement in Climate Change Policy
Northern Territory		
Office of the Minister for Indigenous Policy	<p><i>Engagement in climate change policy</i></p> <p>Indigenous people are closely engaged in formulating the NT's policy response to climate change which is to be completed by February 2009.</p>	<p>Consultation is occurring through a Climate Change Community Focus Group, which the Chief Minister established in February 2008 to represent the diverse range of interests across the Territory.</p> <p>Indigenous interests are represented on the Focus Group by the Northern, Central, Tiwi and Anindilyakwa Land Councils and the North Australian Land and Sea Management Alliance. Engagement with Indigenous stakeholders is also occurring through a series of targeted briefings.</p>

State/Territory Government Department	Strategy	Indigenous Engagement in Climate Change Policy
<p>Office of the Minister for Indigenous Policy</p>	<p><i>Impacts of climate change on Indigenous communities</i></p> <ul style="list-style-type: none"> ▪ building an evidence-base to better understand the specific impact that climate change will have on Indigenous communities ▪ develop appropriate strategies to address impacts as part of the climate change policy response. <p>A new climate change study co-funded by the Territory will assess the impacts of climate change on Indigenous communities in northern Australia, including impacts to health, the environment, infrastructure, education, and employment. The study will be conducted by the University of New South Wales, CSIRO, the North Australian Indigenous Land and Sea Management Alliance and other research organisations and is expected to be completed by April 2009.</p> <p>The Territory also co-sponsored the United Nations International Expert Group Meeting on Indigenous People and Climate Change, a major international forum held in Darwin in April 2008. The forum considered the effects of climate change on Indigenous people, what adaptation measures might be required, factors that enable or obstruct Indigenous peoples' participation in climate change processes, carbon projects and carbon trading. The forum promoted a full exchange of ideas and set an agenda for future training and research.</p>	

State/Territory Government Department	Strategy	Indigenous Engagement in Climate Change Policy
<p>Office of the Minister for Indigenous Policy</p>	<p>Research into how traditional knowledge might be used to respond to climate change is being funded by the Territory Government through the United Nations University Centre for Traditional Knowledge. The Centre was established in August 2007 with Territory funding of \$2.5 million over five years at Charles Darwin University to focus on the role of traditional knowledge in fields such as climate change, water, international policy making, biological resources and marine management.</p> <p>Nationally, the Territory is seeking to ensure that Indigenous communities are supported to adjust to the changes required under the national climate change policy agenda, including the introduction of an Australian emissions trading scheme. This is occurring through the Council of Australian Governments, and also through the Territory's response to the Australian Government Carbon Reduction Pollution Scheme Green Paper.</p>	

Native Title Report 2008

State/Territory Government Department	Strategy	Indigenous Engagement in Climate Change Policy
Office of the Minister for Indigenous Policy	<p><i>Furthering Indigenous Economic Development policy</i></p> <p>Economic constraints from part of the Territory's climate change policy response and work has commenced on the range of interactions between climate change, carbon property rights, and Indigenous land rights including native title, with the view to maximising economic opportunities for Indigenous landholders and communities arising from the climate change policy.</p> <p>The Territory will work with the Australian Government to examine national and international policy linkages under the Carbon Pollution Reduction Scheme and the Kyoto and post-Kyoto frameworks for climate change and Indigenous land rights. Particular areas of focus for the Northern Territory are savanna burning and land use, land use change and the forestry sectors, with opportunities to be explored for Indigenous economic development.</p>	

Appendix 6

Projected Climate Change Impacts and Potential Impacts on Indigenous Communities

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Regions	Projected climate change impacts ¹	Potential Impacts on Indigenous communities
Australia	<p>Environmental Impacts:</p> <ul style="list-style-type: none"> ▪ Increased temperature ▪ Increase in the severity and frequency of many natural disasters, such as bushfires, cyclones, hailstorms and floods ▪ Increase in extreme weather events ▪ Increased drought frequency and severity ▪ Coastal erosion and salt inundation. <p>Other Impacts:</p> <ul style="list-style-type: none"> ▪ Growth in peak summer energy demand ▪ Rise in heat-related illness and death over 65s ▪ Some adverse effects for agriculture. 	<ul style="list-style-type: none"> ▪ Increasing existing disadvantage for unemployment, health and land rights ▪ Remote Indigenous communities at increased risk of health issues and isolation and a low adaptive capacity ▪ Direct and indirect health related problems linked to environmental change including mental health ▪ Cultural impacts and separation if connection to country is lost from extreme weather events or sea level inundation ▪ Higher levels of disease and health issues ▪ Threats to housing and restrictions on housing options ▪ Necessary migration ▪ Loss of income from the tourist industry, employment opportunities cultural heritage and traditional food sources.

1 Australian Government, Department of Climate Change, Top End. At: <http://www.climatechange.gov.au/impacts/regions/te.html> (viewed 17 December 2008)

Regions	Projected climate change impacts	Potential Impacts on Indigenous communities
Top End	<p>Climate: Tropical</p> <p>Environmental Impacts:</p> <ul style="list-style-type: none"> ▪ More frequent and severe droughts ▪ More severe and extreme storm events ▪ Salt inundation and changes to mangrove ecology ▪ Urban water security may be threatened ▪ Coastal areas infrastructure and wetlands vulnerable to sea level rise. <p>Other Impacts:</p> <ul style="list-style-type: none"> ▪ Spread of vector-borne, water-borne and food-borne diseases ▪ Infrastructure damage ▪ Pressure on emergency services in remote communities ▪ Heat stress and injuries from storms. 	<ul style="list-style-type: none"> ▪ Increasing existing disadvantage for unemployment, health and land rights ▪ Remote Indigenous communities at increased risk of health issues and isolation and a low adaptive capacity ▪ Direct and indirect health related problems linked to environmental change including mental health ▪ Cultural impacts and separation if connection to country is lost from extreme weather events or sea level inundation ▪ Higher levels of disease and health issues ▪ Threats to housing and restrictions on housing options ▪ Necessary migration ▪ Loss of income from the tourist industry, employment opportunities cultural heritage and traditional food sources ▪ Indirect impact on species habitat can lead to reduction in protein intake, social dislocation and mental illness or grief due to inability to care for country in Indigenous peoples² ▪ Reintroduction of melioidosis.
Mid Northern Territory	<p>Climate: Grassland, Tropical</p> <p>Environmental Impacts:</p> <ul style="list-style-type: none"> ▪ Water supply likely to be stressed due to increased demand and climate-driven changes ▪ More frequent and severe droughts ▪ Extreme storm events; more flash flooding and fires. 	<ul style="list-style-type: none"> ▪ Rising sea levels, increased frequency of tropical cyclones and extreme weather events are likely to significantly impact on biodiversity, critical habitats, tourism, food and cultural values important to Indigenous communities

2 D Green, *Climate change impacts on remote Indigenous communities' health in northern Australia*, Climate Change Impacts and Risks CSIRO (2006), p 21. At: http://www.sharingknowledge.net.au/files/indigenoushealth_cc200606.pdf (viewed 17 December 2008).

Regions	Projected climate change impacts	Potential Impacts on Indigenous communities
Mid Northern Territory		<ul style="list-style-type: none"> ▪ Warmer temperatures and increased rainfall variation are likely to increase the intensity of food and water borne diseases. This will particularly affect remote Indigenous communities, eg. number of Aboriginal children being admitted to hospital with diarrhoea likely to increase by 10 per cent by 2050.³
Central Australia	<p>Climate: Grassland, Desert</p> <p>Environmental Impacts:</p> <ul style="list-style-type: none"> ▪ Urban water security may be threatened ▪ Decline in annual rainfall, higher evaporation ▪ Increases in extreme storm events. <p>Other Impacts:</p> <ul style="list-style-type: none"> ▪ Increase in vector-borne, water-borne and food-borne disease. 	<ul style="list-style-type: none"> ▪ Reintroduction of dengue, malaria, diarrhoea, Japanese encephalitis, Murray Valley encephalitis, Ross River fever⁴ ▪ Remote communities particularly vulnerable ▪ Limited access to energy and increased fuel prices resulting in reduced mobility to access country and cultural events and services ▪ Food security: increased food prices and loss of environment to secure bush tucker ▪ Water security: potential increased aridity and depletion of groundwater ▪ Increased risk of heat related illness and death from extreme heat and weather events ▪ Centres dependent upon vulnerable industries such as tourism may be adversely affected in warmer months ▪ Damage to infrastructure ▪ Pressure on medical and hospital services.

3 Australian Government, Department of Climate Change, *Climate Change – Potential Impacts and Costs: Northern Territory*, Fact Sheet. At: <http://www.climatechange.gov.au/impacts/publications/pubs/fs-nt.pdf> (viewed 18 December 2008).

4 D Green, *Climate change impacts on remote Indigenous communities' health in northern Australia*, Climate Change Impacts and Risks CSIRO (2006), p 21. At: http://www.sharingknowledge.net.au/files/indigenoushealth_cc200606.pdf (viewed 17 December 2008).

Native Title Report 2008

Regions	Projected climate change impacts	Potential Impacts on Indigenous communities
North Eastern Queensland	<p>Climate: Equatorial, Tropical, Subtropical, Grassland</p> <p>Environmental Impacts:</p> <ul style="list-style-type: none"> ▪ Decline in annual rainfall, higher evaporation ▪ Reduced run-off to rivers, including Fitzroy and Burnett ▪ Stress on water supply, more severe droughts ▪ Increase in extreme storms, cyclone damage, flash flooding ▪ Great Barrier Reef likely experience significant annual bleaching by 2030. <p>Other Impacts:</p> <ul style="list-style-type: none"> ▪ Vector-borne, water-borne and food-borne disease likely increase with predictions Dengue Fever mosquito reaching Rockhampton by 2050. 	<ul style="list-style-type: none"> ▪ More frequent extreme weather and flooding could make isolated Indigenous communities in the far north inaccessible more often. ▪ Significant water temperature rises and bleaching in the Great Barrier Reef could be devastating for coastal Aboriginal communities with strong links to the sea, particularly if the species affected included totemic animals such as turtles.⁵
Western Queensland	<p>Climate: Desert, Grassland, Subtropical</p> <p>Environmental Impacts:</p> <ul style="list-style-type: none"> ▪ Water supply likely to be stressed, higher evaporation, possible decline in annual rainfall ▪ Tendency more frequent and severe droughts ▪ Increase extreme storm events, more flash flooding and fires. <p>Other Impacts:</p> <ul style="list-style-type: none"> ▪ Possible spread vector-borne disease further south. 	<ul style="list-style-type: none"> ▪ Increasing temperatures result in greater risk of heat-related illness and allow mosquitoes to breed in new areas Indigenous peoples' exposure to new diseases ▪ Increasing temperatures will also affect the frequency and severity of bushfires, challenging fire management practices and potentially endangering lives of Indigenous communities.

5 Sharing Knowledge, *Climate Change Impacts in Northern Australia*. At: <http://www.sharingknowledge.net.au/> (viewed 17 December 2008).

Regions	Projected climate change impacts	Potential Impacts on Indigenous communities
<p>South Eastern Queensland</p>	<p>Climate: Subtropical, Temperate</p> <p>Environmental Impacts:</p> <ul style="list-style-type: none"> ▪ Increased stress on water supply ▪ More frequent and severe droughts, greater fire risk ▪ Increase in extreme storm events, flash flooding ▪ Coastal areas vulnerable to sea level rise and inundation. <p>Other Impacts:</p> <ul style="list-style-type: none"> ▪ Possible spread vector-borne disease further south ▪ Some adverse effects for agriculture. 	<p>Needs more research.</p>
<p>North Western Australia</p>	<p>Climate: Tropical, Grassland</p> <p>Environmental Impacts:</p> <ul style="list-style-type: none"> ▪ Coastal areas vulnerable to sea level rise and inundation ▪ Increased stress on water supply ▪ More frequent and severe droughts ▪ Increase in extreme storm events, flash flooding. <p>Other Impacts:</p> <ul style="list-style-type: none"> ▪ Some adverse effects for agriculture ▪ Increase in spread of vector-borne, water-borne and food-borne disease. Mosquito carries Dengue Fever possibly reach Port Hedland by 2050. 	<ul style="list-style-type: none"> ▪ Climate change will affect tourism in the Kimberley region, which will consequently affect the livelihood of many indigenous communities dependent on tourism ▪ Indigenous communities' traditional fishing practices will be affected when climate change causes fish populations to deplete substantially.⁶

6 Sharing Knowledge, *Climate Change Impacts in Northern Australia*. At: <http://www.sharingknowledge.net.au/> (viewed 17 December 2008).

Native Title Report 2008

Regions	Projected climate change impacts	Potential Impacts on Indigenous communities
Mid Western Australia	<p>Climate: Desert, Grassland</p> <p>Environment Impacts:</p> <ul style="list-style-type: none"> ▪ Coastal areas vulnerable to sea level rise and inundation ▪ Urban water security may be threatened ▪ More frequent and severe droughts ▪ Increase in extreme storm events, flash flooding. <p>Other Impacts:</p> <ul style="list-style-type: none"> ▪ Increase in spread of vector-borne, water-borne and food-borne disease. Mosquito carries Dengue Fever may reach Carnarvon by 2050. 	<ul style="list-style-type: none"> ▪ Increased risks of food and water-borne diseases in remote Indigenous communities due to rising temperatures.
South Western Australia	<p>Climate: Temperate, Subtropical, Grassland</p> <p>Environmental Impacts:</p> <ul style="list-style-type: none"> ▪ Coastal areas vulnerable to sea level rise and inundation ▪ Increased stress on water supply ▪ Possible decline in annual rainfall and highly evaporation, likely to reduce runoff to rivers including Canning and Thompson Brook by 2030 ▪ Possible 30 percent decline in runoff to Stirling catchment by 2050 ▪ More frequent and severe droughts ▪ Increases in extreme storm events. <p>Other Impacts:</p> <ul style="list-style-type: none"> ▪ Vector-borne, water-borne and food-borne disease may be spread further south ▪ Some adverse effects for agriculture. 	Needs more research.

Regions	Projected climate change impacts	Potential Impacts on Indigenous communities
South Eastern Western Australia	Climate: Desert, Grassland Environmental Impacts: <ul style="list-style-type: none"> ▪ Increased temperatures ▪ Increased stress on water supply ▪ More frequent and severe droughts ▪ Increases in extreme weather events, flash flooding ▪ Coastal areas vulnerable to sea level rise and inundation. Other Impacts: <ul style="list-style-type: none"> ▪ Spread of vector-borne, water-borne and food-borne disease. 	Needs more research.
Mid South Australia	Climate: Desert, Grassland Environmental Impacts: <ul style="list-style-type: none"> ▪ Increased stress on water supply ▪ More frequent and severe droughts ▪ Increase in extreme weather events. Other Impacts: <ul style="list-style-type: none"> ▪ Spread of vector-borne, water-borne and food-borne disease. 	Needs more research.
Southern South Australia	Climate: Grassland, Temperate Environmental Impacts: <ul style="list-style-type: none"> ▪ Urban water security may be threatened ▪ Decline in annual rainfall and higher evaporation, projected decline of 0-25 percent for Scott Creek by 2030 ▪ Increases in extreme storm events ▪ Coastal areas vulnerable to sea level rise and inundation ▪ CO₂ benefits experienced by forestry may be offset by decline in rainfall, more bushfires and changes in pests. Other Impacts: <ul style="list-style-type: none"> ▪ Spread of vector-borne, water-borne and food-borne disease ▪ Some adverse impacts for agriculture. 	Needs more research.

Native Title Report 2008

Regions	Projected climate change impacts	Potential Impacts on Indigenous communities
New South Wales	<p>Climate: Temperate, Subtropical, Grassland, Desert</p> <p>Environmental Impacts:</p> <ul style="list-style-type: none"> ▪ Threats to urban water security ▪ Less runoff in rivers in many catchments. Murray-Darling Basin decrease of 10-25 percent by 2050 ▪ More frequent and severe droughts, greater fire risk ▪ 10-40 percent reduction in snow cover by 2020: impact for ecosystems and alpine tourism ▪ CO₂ benefits experienced by forestry may be offset by decline in rainfall, more bushfires and changes in pests ▪ Increases in extreme storm events ▪ Coastal areas vulnerable to sea level rise and inundation. <p>Other Impacts:</p> <ul style="list-style-type: none"> ▪ Spread of vector-borne, water-borne and food-borne disease further south ▪ Some adverse impacts for agriculture. 	<ul style="list-style-type: none"> ▪ Despite the utilisation of wildlife for livelihood being more common in remote communities, the loss of access to agricultural resources and wildlife could also adversely affect economic development of Indigenous communities in settled coastal regions of New South Wales.⁷

⁷ Altman JC & Jordan K, *Impact of Climate Change on Indigenous Australians: Submission to the Garnaut Climate Change Review*, CAEPR Topical Issue No.3/2008, Centre for Aboriginal Policy Research, Australian National University (2008). At: http://www.anu.edu.au/caepr/Publications/topical/Altman_Jordan_Garnaut%20Review.pdf (viewed 18 December 2008).

Regions	Projected climate change impacts	Potential Impacts on Indigenous communities
Victoria	<p>Climate: Temperate, Grassland</p> <p>Environmental Impacts:</p> <ul style="list-style-type: none"> ▪ Threats to urban water security ▪ Decline in annual rainfall , higher evaporation likely reduce run-off to rivers by up to 45 percent ▪ 10-40 percent reduction in snow cover by 2020: impact for ecosystems and alpine tourism ▪ Increases in extreme storm events ▪ Coastal areas vulnerable to sea level rise and inundation ▪ CO₂ benefits experienced by forestry may be offset by decline in rainfall, more bushfires and changes in pests. <p>Other Impacts:</p> <ul style="list-style-type: none"> ▪ Spread of vector-borne, water-borne and food-borne disease further south ▪ Some adverse impacts for agriculture. 	<ul style="list-style-type: none"> ▪ Indigenous people living in remote communities are at increased risk with the number of Aboriginal children being admitted to hospital with diarrhea likely to increase by 10 per cent by 2050⁸ ▪ Decreased yields in agriculture would affect the economic development of Indigenous communities.
Tasmania	<p>Climate: Temperate</p> <p>Environmental Impacts:</p> <ul style="list-style-type: none"> ▪ Threats to urban water security ▪ Increase in annual rainfall, higher evaporation lead to uncertain effects on run-off into rivers ▪ 10-40 percent reduction in snow cover by 2020; impact for ecosystems and alpine tourism ▪ Increases extreme storm events ▪ CO₂ benefits experienced by forestry may be offset by decline in rainfall, more bushfires and changes in pests. <p>Other Impacts:</p> <ul style="list-style-type: none"> ▪ Spread of vector-borne, water-borne and food-borne disease further south ▪ Some adverse impacts for agriculture. 	Needs more research.

8 Australian Government, Department of Climate Change, *Climate Change – Potential Impacts and Costs*, Victoria Fact Sheet. At: <http://www.climatechange.gov.au/impacts/publications/fs-vic.html> (viewed 18 December 2008).

Appendix 7

Overview of Australian water sector legislation and policies¹

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1 Adapted from Jackson S, Indigenous Interests and the National Water Initiative: Water Management, Reform and Implementation, Background Paper and Literature Review, Report for the IWPG (2007), p 42. At: http://www.nailsma.org.au/nailsma/publications/downloads/NAILSMA_NWI_Review_UPDATEDec07.pdf (viewed 17 December 2008).

Jurisdiction	Organisation Responsible	Key responsibilities	Key policy documents and legislation	Summary of policy objectives
Commonwealth	Department of Environment, Water, Heritage and the Arts	National heritage Water policy and resources (if negotiated with states)	National Water Initiative <i>Water Act 2007</i> commenced on 3 March 2008 (mainly for the Murray-Darling Basin) <i>Environmental Protection and Biodiversity Conservation Act 1999</i> Living Murray Snowy Initiatives	To implement national water reform focussing on water security, ecosystem health, efficiency and conservation. Provides a basin plan for the Murray-Darling water trading, establishes Murray-Darling Basin Authority to optimise economic, social and environmental outcomes and to ensure sustainable use of water. To protect the environment, especially matters of national significance in line with the World Heritage Convention and Ramsar wetlands.
Queensland	Department of Natural Resources and Water	Responsible for water planning and management	<i>Water Act 2000</i> , Qld Water Plan 2005-2010, Qld Smart State Strategy 2005-2015 <i>Wild Rivers Act 2005</i> <i>Cape York Peninsula Heritage Act 2007</i>	A strategy for improving sustainable water management, ensuring a secure future water supply for communities, farmers, industries and rivers. Preserve natural values of rivers that are almost untouched. Provides for the identification of the significant natural and cultural values of Cape York Peninsula and joint management of national parks.

Jurisdiction	Organisation Responsible	Key responsibilities	Key policy documents and legislation	Summary of policy objectives
New South Wales	Department of Water and Energy Department of Environment and Climate Change	Water responsibility is shared between two departments responsibility for water extraction in terms of planning and licensing protection and management.	<i>Water Management Act 2000</i> Water Sharing Plans (statutory object prepared under Water Management Act) ² <i>Murray-Darling Basin Act 1992</i>	Provide for the sustainable and integrated management of the water sources s 3. Protect water for the environment while also securing the rights of water users. Provide to carry out intergovernmental agreement.
Victoria	Department of Sustainability and Environment	Water management.	<i>Water Act 1989</i> Green Paper: Securing our water future ³ <i>Our Water Our Future: The White Paper</i> ⁴	Sustainably manage water resources.

2 NSW Department of Natural Resources, *Water Sharing Plans*. At: http://www.naturalresources.nsw.gov.au/water/sharing_plans.shtml (viewed 17 December 2008).

3 Department of Sustainability and Environment, Victoria, *Our Water, Our Future*, <http://www.ourwater.vic.gov.au/programs/owof> (viewed 17 December 2008)

4 Department of Sustainability and Environment, Victoria, *Our Water, Our Future*, <http://www.ourwater.vic.gov.au/programs/owof> (viewed 17 December 2008)

Jurisdiction	Organisation Responsible	Key responsibilities	Key policy documents and legislation	Summary of policy objectives
South Australia	Department of Water Land and Biodiversity Conservation Department for Environment and Heritage	Improve sustainability through the integration and management of all of the State's natural resources. Achieve improved health and productivity of our biodiversity, water, land and marine resources.	<i>Natural Resource Management Act 2004</i> <i>Water Resources Act 1997</i> <i>Murray-Darling Basin Act 1993</i> <i>River Murray Act 2003</i>	Promote sustainable and integrated management of the state's natural resources including water. Provide to carry out intergovernmental agreement. Protection and enhancement of the River Murray and related areas and eco-systems.
Western Australia	Department of Water Department of Environment and Conservation	Responsible for water planning and management	Rights in Water and Irrigation Act 1914 (under review) State Water Plan Implementation Plan for the NWI Government Response to the Blueprint for Water Reform	Water managed and developed to maintain and enhance natural environment, cultural and spiritual values, quality of life and economic development. WA's Environmental Water Provisions Policy affirms Government commitment to protecting water dependent eco-systems.
Tasmania	Department of Environment, Parks, Heritage and the Arts Department of Primary Industries and Water	Water pollution Manage natural resources	Water Management Act 1999 (undergoing review)	Promote sustainable development and water use and ecological processes.

Appendix 7 | Overview of Australian water sector legislation and policies

Jurisdiction	Organisation Responsible	Key responsibilities	Key policy documents and legislation	Summary of policy objectives
Australian Capital Territory	Department of Territory and Municipal Services		<p><i>Water Resources Act 2007</i></p> <p><i>Think water, act water – a strategy for sustainable water resource management 2004</i></p> <p><i>Water ACT 2003</i></p>	<p>Maintain human needs whilst protecting eco-systems.</p> <p>Water conservation and efficiency.</p>
Northern Territory	Department of Natural Resources, Environment and the Arts Landcare Council	Responsible for ensuring achievement of resource management outcomes	<p><i>Water Act 2000</i></p> <p>Water Regulations 2002 is the subordinate legislation providing rules pertaining to issuance of water licences and permit.</p> <p>Living Rivers Policy</p>	No formal policy documents.

Summary of reported progress on implementing Indigenous access provisions of the NWI by each Australian jurisdiction⁵

Jurisdiction	Indigenous access to water resources	Inclusion of Indigenous representation	Water plans to incorporate Indigenous objectives	Take account of native title	Account for water allocated to 'traditional cultural purposes'
Australian Government	No specific Indigenous provisions. <i>Water Act 2007</i> s 29 – Authority to consult holders and managers of environmental water in implementing environmental watering plan – this could arguably apply to Indigenous peoples.	Australian Government will continue to work through the Advancing Reconciliation Working Group of the NRM Ministerial Council for water-related Indigenous issues.	Most native title issues relating to NWI will be the responsibility of the relevant state or territory government department. The Australian Government will provide advice to other Australian Government departments on water planning processes and native title implications. <i>Water Act 2007</i> s 13 – the <i>Native Title Act 1993</i> not affected.		

5 Adapted from Jackson S, *Indigenous Interests and the National Water Initiative: Water Management, Reform and Implementation*, Background Paper and Literature Review, Report for the IWPG (2007), pp 104-109. At: http://www.nailsma.org.au/nailsma/publications/downloads/NAILSMA_NWI_Review_UPDATEDec07.pdf (viewed 17 December 2008).

Jurisdiction	Indigenous access to water resources	Inclusion of Indigenous representation	Water plans to incorporate Indigenous objectives	Take account of native title	Account for water allocated to 'traditional cultural purposes'
Queensland	<p>Include Indigenous representatives on water management advisory structures.</p> <p>Achieved through representation and consultation in development of water resource plans.</p>	<p>Representatives involved in development of water resource plans (s 41 of the <i>Water Act 2000</i> requires a community reference panel (CRP) with representatives of, inter alia, cultural interests).</p> <p>May also have Indigenous Working Groups to complement a CRP.</p> <p>Consultation through NRM bodies.</p>	<p>Traditional Indigenous uses generally provided for by ensuring there are sufficient environmental flows. Their purpose is to mimic natural flow patterns.</p> <p>Provides for maintenance of water levels in water holes of identified significance.</p> <p>Special issues papers prepared for Diamantina and Georgina WRPs.</p>	<p>As native title rights to water have not been legally recognised, Qld has not been able to make any specific legislative or Water Resource Plan provisions.</p> <p>However, water allocated to protect ecosystem processes acts to protect traditional uses associated with water.</p>	<p>Wild rivers</p> <p>The wild river declaration or water resource plan must provide for a reserve of water in the area to which the declaration or plan relates for the purpose of helping indigenous communities in the area achieve their economic and social aspirations. This only applies to a small area in Cape York.</p>

Jurisdiction	Indigenous access to water resources	Inclusion of Indigenous representation	Water plans to incorporate Indigenous objectives	Take account of native title	Account for water allocated to 'traditional cultural purposes'
<p>New South Wales</p> <p><i>Water Management Act</i></p>	<p>Commitment to Aboriginal peoples <i>benefits to the Aboriginal people in relation to their spiritual, social, customary and economic use of land and water, (s 3(c)(iv))</i> in the objects of the act.</p> <p>Each Water Sharing Plan (WSP) provides for access in the form of Aboriginal cultural access licences. Fees for such licences have been waived.</p> <p>Certain WSPs provide for commercial access licences (North Coast Rivers). Future WSPS will provide for these types of licence.</p>	<p>Each WSP Management committee included 2 reps from the local Aboriginal community (s 11-14).</p> <p>Their responsibility to convey information discussed at meeting to community for comment.</p> <p>CMAs are establishing Aboriginal Reference Groups to be used for ongoing consultations on future WSPs.</p>	<p>Many plans have general aspirational statements. To evaluate this component would require more direct research.</p> <p>From conversations this has not really happened.</p>	<p>Native Title recognised s 55</p> <p>Native title rights provided for under the Basic Landholder Rights provisions of the WMA, allowing a native title holder to take and use water without a licence or approval in the exercise of native title rights.⁶</p> <p>Native title claimants are notified of applications for consents under the WMA (eg. new grants of water).</p> <p>Applications for new/ amended works will be assessed to avoid impacts on Aboriginal heritage.</p>	<p>Each of the WSP recognise that extractions as part of a native title right may increase over the term of the WSP, if native title is granted in NSW.</p>

6 M Durette, *Indigenous Legal Rights to Freshwater: Australia in the International Context* CAEPR Working Paper No. 42/2008 (2008), p 27. At: <http://www.anu.edu.au/caepr/Publications/WP/CAEPRWP42.pdf> (viewed 17 December 2008).

Jurisdiction	Indigenous access to water resources	Inclusion of Indigenous representation	Water plans to incorporate Indigenous objectives	Take account of native title	Account for water allocated to 'traditional cultural purposes'
<p>New South Wales</p> <p><i>Water Management Act</i></p>		<p>An Aboriginal Water Trust is now established under the WMA as a strict commercial program.</p> <p>Supports participation in the water economy. \$5m is available for the first 2 years of operation.</p> <p>A performance evaluation in 2007 will determine continuity.</p> <p>The Water Trust has not led to significant outcomes for Indigenous people.⁷</p>			

7 M Durette, *Indigenous Legal Rights to Freshwater: Australia in the International Context* CAEPR Working Paper No. 42/2008 (2008), p.20. At: <http://www.anu.edu.au/caepr/Publications/WP/CAEPRWP42.pdf> (viewed 17 December 2009).

Jurisdiction	Indigenous access to water resources	Inclusion of Indigenous representation	Water plans to incorporate Indigenous objectives	Take account of native title	Account for water allocated to 'traditional cultural purposes'
Victoria	<i>Water Act 1989</i> currently incorporates public processes into water allocation decisions	2001 – Indigenous Partnership Strategy including NRM. A framework (ILMF) is being developed. Regional Indigenous Facilitators undertaking information sessions with environmental agency. By mid 2007 formal agreements will be established with groups involved in NRM issues.	Victorian River Health Strategy (2002) highlights the importance of protecting rivers of high community value, including those with sites of significance 'for Indigenous culture'. Indigenous consultation must occur during the development of river health strategies (eg. Geneig Hopkins River). A key objective of bulk entitlements consultative processes is to ensure that water is provided to the rivers and floodplains in a way that 'ensures continuation of indigenous spiritual and cultural practice (eg. Yorta Yorta Cooperative Management Agreement and Lake Condah Sustainable Development Strategy).	Since 2000 all affected Indigenous groups are invited to participate in bulk entitlement consultative processes. No native title has been awarded in Victoria. One native title consent order was granted involving Wotjobaluk people around the Wimmera River. There is no provision relating to the allocation of water for traditional cultural purposes.	In the event that water is legally allocated to native title holders for traditional cultural purposes, it will be accounted for within the relevant water account.

<p>Jurisdiction</p> <p>South Australia <i>Natural Resource Management Act 2004</i></p>	<p>Indigenous access to water resources</p> <p>Water allocation plans must take into account those water users who are dependent on the water source [s76]. Could be applied to Indigenous peoples.</p>	<p>Inclusion of Indigenous representation</p> <p>One member suitable to represent Indigenous interests – Natural Resources Management Council [s 13 (2)(9)(e)]. Minister must give notice to Aboriginal people of Board appointment (s 25). Initial discussions have commenced with Indigenous groups to ascertain likely issues. Said to be an intrinsic part of the review of all WAPs. 2005 – established an Aboriginal Statewide Advisory Committee to advise on Indigenous issues.</p>	<p>Water plans to incorporate Indigenous objectives</p> <p>Natural Resources Management Act 2004 provides for consideration of traditional owner interests in any natural resource. This includes water allocation plans (s 7).</p>	<p>Take account of native title</p> <p>ILUAs have been used 'in relation to access to and for a range of purposes. It is likely a similar approach may be adopted for indigenous access to water resources especially given Aboriginal cultural practices which integrate management of land, water and cultural practices'.</p>	<p>Account for water allocated to 'traditional cultural purposes'</p> <p>Undergoing review.</p>
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Jurisdiction	Indigenous access to water resources	Inclusion of Indigenous representation	Water plans to incorporate Indigenous objectives	Take account of native title	Account for water allocated to 'traditional cultural purposes'
<p>WA</p> <p>Undergoing reform process</p>	<p>Water allocation planning processes provide for Indigenous access to water resources; specifically for nonconsumptive cultural uses.</p>	<p>State NRM Council held a 2 day forum on facilitating Indigenous engagement. Forum inc. the NWI.</p> <p>National NRM meeting agreed to improve reporting on Indigenous interests and water management.</p> <p>Establishment of water resources management. Committee must include as far as practicable a person who has knowledge and experience relating to the water needs and practices of local communities, including Aboriginal communities (s 26GK, s 26GL).</p>	<p>Indigenous ecological knowledge is also sought to assist in making appropriate water allocations for the environment.</p> <p>Indigenous engagement is especially sought in development plans eg. Gnarara Mound near Perth.</p>	<p>DOW to liaise with Office of Native Title regarding the current process for dealing with Indigenous interests in water management plans.</p> <p>By Jan 07, obtain legal advice on Indigenous access and entitlements and the requirements under the NTA and Aboriginal Heritage Act 1972.</p>	<p>Policy position papers finalised.</p>

Jurisdiction	Indigenous access to water resources	Inclusion of Indigenous representation	Water plans to incorporate Indigenous objectives	Take account of native title	Account for water allocated to 'traditional cultural purposes'
Tasmania	Review of Water Act only takes into account Aboriginal heritage				
ACT	No available data				
Northern Territory Undergoing reform process	NT water allocation planning processes provide access for non-consumptive cultural beneficial uses and for access to the consumptive pool for agricultural, aquaculture, public water supply, industry or rural stock and domestic uses.	Indigenous engagement is especially sought in developing WAPs and as members of Water Advisory Committees. Water Act provides for water resources review panel where 8 people appointed with experience in Aboriginal affairs one of considerations (s 24(3)).	Indigenous ecological knowledge is sought in allocating water to the Environment.	Implications of rights under the NTA have not been considered or legally tested. Legal opinion should be sought to clarify this issue in the context of water allocation planning and management.	Competent monitoring systems exist and all access to water in WCD is controlled through permits.

Appendix 8

Desert Knowledge CRC:
Aboriginal Intellectual
Property Protocol

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Desert Knowledge CRC Protocol for Aboriginal Knowledge and Intellectual Property

Attachment A: Definitions

Attachment B: Reference sources mentioned in the text

1 PREAMBLE

The DKCRC is dedicated to improving conditions for all desert Australians and it recognises that there have been past instances of Aboriginal people's knowledge and intellectual property being misappropriated and exploited. The DKCRC Board also recognises that the DKCRC's objectives will only be achieved by working in equitable partnership with Aboriginal people. Such partnerships include knowledge sharing in research and potentially the creation of new intellectual property. The DKCRC acknowledges that Aboriginal communities and groups have their own protocols and that these must be observed, understood, respected and engaged with as an essential, ongoing part of the research process. The philosophy of working together in partnership is important to Aboriginal people and is reflected in the commitments of the Board structure in the Centre Agreement's Clause 9 (web site link shown in Attachment B) and enacted through shared Board and committee memberships.

It is a requirement of the DKCRC Centre Agreement that all participants be aware of this Protocol as a working document. It should be used together with other DKCRC resources:

Guides for researchers:

- Aboriginal Research Engagement Protocol
- Free Prior Informed Consent procedures
- Schedule of rates of pay for Aboriginal workers in research
- Good manners guide to working with Aboriginal people in research
- Guide to Intellectual Property in the DKCRC
- DKCRC Guide to Agreements
- DKCRC Centre Agreement

Guides for Aboriginal communities and organisations:

- Community guide to this Protocol (forthcoming)
- Plain language briefing papers on Intellectual Property laws

Internal research management tools:

- IP register
- Ethics register
- Audit and Risk management sub-committee of the Board
- Commercialisation and Utilisation Plan



2 PURPOSE

This Protocol is a resource to guide researchers toward best practice in ethics, confidentiality, equitable benefit sharing and in managing research information. It sets out the ways in which DKCRC research with Aboriginal people should be conducted and how Aboriginal knowledge and intellectual property will be managed throughout the research process.

The DKCRC recognises that working in a cross-cultural context is complex. In particular, where research projects involve Aboriginal knowledge and intellectual property, special attention is needed to ensure that these are handled appropriately.

This protocol also needs to be read in conjunction with the Guide to Intellectual Property in the DKCRC, as this outlines the ways in which Centre IP and Commercial Project IP are managed (see Attachment B for the URL).

3 DEFINITIONS

For definitions of terms used in this Protocol refer to Attachment A, Definitions of Terms

4 GUIDING PRINCIPLES

This Protocol will be developed to ensure its consistency with best practice in existing and emerging standards, including internationally and within Australia. It will have reference to such international standards as the UN Declaration on the Rights of Indigenous Peoples, the International Society of Ethnobiology Code of Ethics, and the Bonn Guidelines on Access to Genetic Resources and Benefit Sharing.

4.1 Ethics

Researchers must respect local Aboriginal ethical protocols.

All projects in which Aboriginal people participate, and that involve Aboriginal knowledge, Aboriginal intellectual property, and other intellectual property, will only be carried out if they have received ethical clearance from the relevant committees (such as university ethics committees). They should also meet appropriate ethical standards, consistent with those such as the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) *Guidelines for Ethical Research in Indigenous Studies* (2000), the *National Statement on Ethical Conduct in Human Research* (2007), and any others developed, and subsequently adopted by the DKCRC Board. [Centre Agreement Clause 24]

4.2 Confidentiality

Where requested by Aboriginal knowledge holders and/or owners, researchers, including students, will observe confidentiality of this knowledge and/or of Aboriginal intellectual property. This is an over-riding requirement to all other clauses in this Protocol and is supported by the Centre Agreement [Clauses 32, 35]. All researchers must be made aware of and accept this requirement before engaging in any activity in the DKCRC. Any breach of confidentiality will be handled by the appropriate DKCRC mechanisms and processes.

4.3 Free Prior Informed Consent

All projects that involve Aboriginal people, and Aboriginal knowledge and practices, must ensure that free prior informed consent processes have been carried through. This means that:



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- Aboriginal participants in the project have been fully informed about the project, and have a clear understanding of the purpose, methodology, and intended outcomes of the research, including potential risks, uses and possible commercialisation options
- Adequate opportunities and timeframes have been provided for Aboriginal participants to make their own decisions about the research and whether they will participate. This may be either as individuals or through their communities and organisations
- Consent is an ongoing engagement between the community and the researcher. Subject to local circumstances, it can be suspended or withdrawn.

4.4 Benefit-sharing

Research must produce direct benefits to Aboriginal people and reinforce Aboriginal peoples' self-determination through their full and ongoing active participation and negotiation in the decision-making process for research planning and implementation according to local priorities. Benefit sharing is an ongoing process of negotiation and must be embedded in the processes of free prior informed consent.

5 PRACTICES

5.1 Survey, scoping and collection

Any Aboriginal knowledge and/or other types of information collected or disclosed to researchers in the course of a research project will not be published or commercialised or used in any other way without:

- Ensuring the free prior informed consent of Aboriginal participants
- Ensuring that this knowledge and information is surveyed, documented and recorded and/or collected in accordance with the wishes of, and full participation of the relevant Aboriginal persons, communities and organisations
- In the case of publications, ensuring the Board, as delegated to the Executive Management Team, has provided prior written approval for the proposed publication
- In the case of commercialisation, ensuring the Board has provided prior written approval for the proposed commercialisation activities.

5.2 Storage, access, and publication

Data relating to Aboriginal intellectual knowledge and practices, Aboriginal intellectual property, and personal and other information relating to Aboriginal individuals, and communities and/or organisations provided to, and/or collected or created by researchers in the course of projects:

- Will be held in accordance with relevant legal, ethical, and Aboriginal community and cultural guidelines, including the Information Privacy Principles contained in the Privacy Act 1988 (Cth) (see Attachment B)
- Will recognise local keeping places and knowledge centres. Subject to negotiation and consultation, research products will be deposited with communities, and stored and retrieved in accordance with community protocols
- Will be stored and/or archived in appropriate and sensitive ways, in consultation with, and with the free prior informed consent of relevant Aboriginal people
- If stored and/or archived, must be appropriately and clearly documented, indexed and catalogued, in consultation with the relevant Aboriginal people
- Once stored and/or archived, must be accessible upon request by Aboriginal people with interests and rights in the data
- Subject to legal or ethical requirements, must be destroyed on the request of the providers of the information or on the request of those who according to traditional law have the authority to make that decision or when specifically required to do so by the Board or by a properly constituted Ethics Committee



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- Will not be published in any form that allows for identification of the Aboriginal persons or communities involved without the specific written approval of the Aboriginal persons or communities involved
- Will not be used for any purpose other than for which it was collected without the free prior informed consent of the Aboriginal persons who originally provided the information or of those persons authorised by the relevant communities to make that decision
- Will not be used or published in a manner that is likely to adversely affect the interests of the particular research participants, particular Aboriginal communities or of Aboriginal people generally
- May be published in a form that does not allow for identification of the Aboriginal persons or communities involved if the initial informed consent obtained from such persons or communities permitted such publication
- Efforts will be made to co-author publications with Aboriginal participants and other researchers who are authors, and/or who have contributed in other ways to the project.

5.3 Return and feedback

Researchers should ensure that there is appropriate and relevant feedback of, plans, knowledge and research products, including all intellectual property to all Aboriginal people with interests in the project. In returning and depositing final products of research to communities, researchers will recognise local keeping places and knowledge centres, and store and retrieve materials in accordance with community protocols. Feedback and return of results and project information will be provided to all Aboriginal participants in ways that are relevant, accessible and meaningful.

5.4 Use, including commercialisation

The Board will ensure that no commercialisation takes place until they have ensured that the Aboriginal people and communities who have rights and interests in such material have had opportunities to decide whether to provide their free prior informed consent to such commercialisation. Implicit within this Board approval is that appropriate ethical, confidentiality and free prior informed consent procedures have been followed, as outlined at 4.1, 4.2, 4.3 and 4.4.

6 EQUITABLE BENEFIT-SHARING

Aboriginal people have a right to expect that research conducted on their lands and in their communities will be of benefit to them. See the Aboriginal Research Engagement Protocol for an outline for negotiating equitable benefit sharing, as this also may extend to non-monetary benefits. The precise terms of benefit-sharing will be determined by negotiation, in accordance with the principles of free prior informed consent by all participants on mutually agreed terms initially and as the research develops.

6.1 Benefit-sharing and commercialisation

The DKCRC acknowledges the complexities and the ethical concerns with regard to evaluating Aboriginal knowledge and practices, and Aboriginal intellectual property, especially in the engagement process with Aboriginal and other researchers. Benefit sharing with Aboriginal people based on their knowledge contribution to projects that have the potential to yield revenue streams will be negotiated on a project-by-project basis with the starting arrangement being equitable sharing of net benefits for both DKCRC and Aboriginal parties. Revenue from any commercialisation by the DKCRC that becomes the Company's Participating Share (after other equity partners of the DKCRC have been paid their share) will be allocated into a separate account (currently managed through Ninti One Ltd), which will be used to fund research of a priority to Desert Aboriginal interests within the general aims of the DKCRC. [Centre Agreement Clause 28.5]



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6.2 Aboriginal Trustees

When commercial revenue funds have accumulated from the Company's Participating Share payments, the Aboriginal members of the Board will establish an Aboriginal Trustees group to manage and distribute these funds. The Board will establish, or cause to be established, a charter of operation of the Trustees group. The Aboriginal Trustees group, in consultation with the Board, will determine the research priorities for which the funds will be used.

7 MONITORING, REPORTING AND IMPLEMENTATION

It is a requirement that effective measures are taken to ensure this Protocol is properly implemented in all research projects. Ongoing monitoring and reporting will be conducted throughout the duration of the project through milestone and annual review reports. The DKCRC will ensure that any breach in ethics and confidentiality is handled appropriately using relevant processes.

8 BREACHES OF THE PROTOCOL

The DKCRC will ensure that any breach in ethics and confidentiality is handled appropriately using fair and equitable processes, currently through referral to the management of the DKCRC.

Potential penalties and sanctions are:

- Withdrawal of research funding
- Written censure with consequent damage to credibility of researchers
- Suspension of contracts or permission to conduct research
- Withdrawal of communities and families from the research.

Breaches of ethics and confidentiality will be referred to the Board for appropriate action.

9 CONTINUAL IMPROVEMENT

With the full participation of Aboriginal people involved in research projects, research within the DKCRC will be informed by ongoing developments in ethical standards for defining and handling Aboriginal knowledge and IP. A continual improvement process in research projects will ensure ongoing ways to integrate formal scientific methods with local Aboriginal knowledge/s. The DKCRC will examine new relevant models that are consistent with international standards, such as articulated in the United Nations Convention on Biological Diversity (see Attachment B). The Board may update this Protocol to reflect these improvements.



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ATTACHMENT A – DEFINITIONS OF TERMS USED IN THIS PROTOCOL

Aboriginal Knowledge

Refers to the totality of cultural heritage of Aboriginal people, as this is defined by Aboriginal people. This is an inclusive and dynamic body of practices and traditions, encompassing both tangible and intangible elements. It allows for a diversity of situations, uses and meanings. It is based on collective rights and interests, is passed on through generations, and is closely linked to land and identity.

Background Intellectual Property

This is the intellectual property that all participants bring to a project at the start. The actual nature of this IP will be described in schedules to a Project Agreement. In general, background IP refers to notes, documents, reports and other materials relating to a project that are in existence prior to the commencement of a project. In practical terms, background IP may be said to include Aboriginal knowledge as defined above, as this is the property of Aboriginal people that is in existence prior to the commencement of a project.

Intellectual Property

Refers to products, works and inventive processes that result from DKCRC research projects, that are subject to, or potentially subject to protection under conventional intellectual property rights laws. These laws include the Copyright Act (1968), Patents Act (1990), Plant Breeders Rights Act (1994), Trade Marks Act (1995) and the Designs Act (2003).

Confidentiality

Refers to the privacy of the individual with whom the researcher is working. Any information imparted by an individual will be kept between the researcher and that individual, unless it is clear that it is public and open information. The participant in a research project should be told at the start of the project that the researcher will protect their privacy and confidentiality.

Ethics

The key principles that guide ethics are respect, equality, responsibility, research merit and integrity, justice, reciprocity, free prior informed consent and collaboration. The two important documents that researchers working with Aboriginal people in Australia follow are the *National Statement on Ethical Conduct in Human Research* (2007), and the *Guidelines for Ethical Research in Indigenous Studies* by the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS, 2000).

Free Prior Informed Consent

Refers to the process of providing full and relevant information to Aboriginal people about the risks and benefits of research projects prior to the commencement of the project, in order to allow Aboriginal people to make informed decisions whether or not to consent to the project. This consent can be withdrawn at any time without penalty.

Centre Agreement

The contractual agreement that establishes the Unincorporated Joint Venture (UJV) of DKCRC, as well as empowering the formation of a company (Ninti One Limited) to hold the Intellectual Property produced by the Centre's activities and to provide administrative services to the Centre. The Centre Agreement is signed by all the Partners and such other partners as wished to be part of it ('Supporting Partners').

Commonwealth Agreement

This contractual agreement commits the Core Partners to deliver DKCRC's obligations in return for Commonwealth funding and is signed by the Core Partners and the Australian Government.



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Company's Participating Share

The Centre Agreement sets out that the Company (DKCRC) receives commercialisation revenue as determined in accordance with clauses 33.6 and 33.7. These clauses state that the Company's share of revenue is calculated in proportion to the total value of Centre resources (other than Participant contributions) divided by the total value of Centre and Participants' contributions.



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ATTACHMENT B – WEB SITE LINKS REFERRED TO IN TEXT

Aboriginal Research Engagement Protocol

<http://www.desertknowledgecrc.com.au/socialscience/socialscience.html>

Prior Informed Consent Form

<http://www.desertknowledgecrc.com.au/socialscience/socialscience.html>

Schedule of rates for Aboriginal workers in research

<http://www.desertknowledgecrc.com.au/socialscience/socialscience.html>

DKCRC Good Manners Guide to working with Aboriginal people in research

<http://www.desertknowledgecrc.com.au/socialscience/socialscience.html>

DKCRC Centre Agreement:

<http://www.desertknowledgecrc.com.au/aboutus/crcprogramme.html>

Guide to Intellectual Property in the DKCRC:

<http://www.desertknowledgecrc.com.au/partners/>

DKCRC Guide to Agreements:

<http://www.desertknowledgecrc.com.au/partners/>

UN Declaration on the Rights of Indigenous Peoples:

<http://daccessdds.un.org/doc/UNDOC/GEN/N06/512/07/PDF/N0651207.pdf?OpenElement>

UN Convention on Biological Diversity:

<http://www.cbd.int/convention/convention.shtml>

Bonn Guidelines on Access to Genetic Resources and Benefit Sharing:

<http://www.cbd.int/doc/publications/cbd-bonn-gdls-en.pdf>

Privacy Act 1988:

<http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/6C64656791B702DBCA25725C00825E2A?OpenDocument>

Plain English reference material for Aboriginal communities and groups (IP laws, etc):

<http://www.desertknowledgecrc.com.au/socialscience/managingaboriginalknowledge.html>



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Appendix 9

Acronyms/Abbreviations List

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AIATSIS:	Australian Institute of Aboriginal and Torres Strait Islander Studies
ACT:	Australian Capital Territory
AHA:	<i>Aboriginal Heritage Act 2006 (Vic)</i>
ALRA:	<i>Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)</i>
BOM:	Bureau of Meteorology
CAT:	Centre for Appropriate Technology
CATSI Act:	<i>Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth)</i>
CBD:	Convention on Biodiversity
CDM:	Clean Development Mechanism
CEDAW:	<i>Convention on the Elimination of All Forms of Discrimination against Women</i>
CERD:	<i>International Covenant on the Elimination of All Forms of Racial Discrimination</i>
CEPM:	Community Energy Planning Model
CLA:	<i>Crown Lands Act 1989 (NT)</i>
COAG:	Council of Australian Governments
COP:	Conference of the Parties
CPRS:	Carbon Pollution Reduction Scheme
CRC:	<i>Convention on the Rights of the Child</i>
CSIRO:	Commonwealth Scientific and Industrial Research Organisation
Cth:	Commonwealth
Desert Knowledge CRC:	Desert Knowledge Cooperative Research Centre
eNGO:	Environmental Non-Government Organisation
EPBCA:	<i>Environmental Protection and Biodiversity Conservation Act 1999 (Cth)</i>
EPC:	<i>Environment Protection Act 1994 (Qld)</i>
FaHCSIA:	Department of Families, Housing, Community Services and Indigenous Affairs
FARM:	Riverina Financial and Rural Management
GLSC:	Goldfields Land and Sea Council
IAC:	Indigenous Advisory Committee
ICC:	Indigenous Coordination Centre

ICCPR:	<i>International Covenant on Civil and Political Rights</i>
ICERD:	<i>Convention on the Elimination of All Forms of Racial Discrimination</i>
ICESCR:	<i>International Covenant on Economic, Social and Cultural Rights</i>
ICSU:	International Council for Science
ICWFN:	Indigenous Community Water Facilitator Network
IEDS:	Indigenous Economic Development Strategy
IFaMP:	Indigenous Facilitation and Mediation Project
IGC:	Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore
ILC:	Indigenous Land Corporation
ILUA:	Indigenous Land Use Agreement
IMA:	Indigenous Management Agreement
IPA:	Indigenous Protected Area
IPCC:	Intergovernmental Panel on Climate Change
IPO:	Indigenous Peoples Organisation
IPP:	Indigenous Partnerships Programme
IUCN:	International Union for Conservation of Nature
IWPG:	Indigenous Water Policy Group
Jl:	Joint Implementation
LAA:	<i>Lands Acquisition Act 1989</i> (NT)
MDB:	Murray-Darling Basin
MDBA:	Murray-Darling Basin Authority
MDBC:	Murray-Darling Basin Commission
MDG:	Millennium Development Goals
MLDRIN:	Murray Lower Darling Rivers Indigenous Nations
MOU:	Memorandum of Understanding
NAILSMA:	North Australian Indigenous Land and Sea Management Alliance
NGISG:	Northern Gulf Indigenous Savannah Group
NGO:	Non-Government Organisation
NICC:	National Indigenous Climate Change
NNTT:	National Native Title Tribunal
NQLC:	North Queensland Land Council

NSW:	New South Wales
NSWALC:	New South Wales Aboriginal Land Council
NT:	Northern Territory
NTA:	<i>Native Title Act 1993 (Cth)</i>
NTRB:	Native Title Representative Body
NWC:	National Water Commission
NWI:	National Water Initiative
ORIC:	Office of Indigenous Policy Coordination
PBC:	Prescribed body corporate
PEG:	Policy Engagement Group
Qld:	Queensland
REDD:	Reduced Emissions from Deforestation and Degradation in Developing Countries
RNTBC:	Registered Native Title Body Corporate
SA:	South Australia
SWALSC:	South West Aboriginal Land and Sea Council
TKRP:	Traditional Knowledge Revival Pathways
TRaCK:	Tropical Rivers and Coastal Knowledge
TSRA:	Torres Strait Regional Authority
UDHR:	Universal Declaration of Human Rights
UN:	United Nations
UNEP:	United Nations Environment Programme
UNDP:	United Nations Development Programme
UNESCO:	United Nations Educational, Scientific and Cultural Organisation
UNFCCC:	United Nations Framework Convention on Climate Change
UNPFII:	United Nations Permanent Forum on Indigenous Issues
Vic:	Victoria
WA:	Western Australia
WAFIC:	Western Australian Fishing Industry Council
WALFA:	Western Arnhem Land Fire Abatement
WHO:	World Health Organisation
WIPO:	World Intellectual Property Organisation
WSP:	Water Sharing Plans

