ABORIGINAL INVOLVEMENT IN THE MANAGEMENT OF QUEENSLAND'S NATIONAL PARKS AND OTHER PROTECTED AREAS

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INTRODUCTION

For more than a century, national parks and other protected areas have been managed in Queensland to protect the natural environment from degrading human impact. Traditionally, responsibility for the management of such areas has been the exclusive right of the Crown. This has meant that throughout the history of protected area establishment, Aboriginal peoples have been systematically excluded from the control and use of conservation estates declared over their traditional lands. It is only in the past twenty years that governments and environmental organisations have begun to recognise that many protected areas are in fact 'cultural landscapes', shaped by Aboriginal people who desire to control and manage 'country' in accordance with their cultural obligations.

The increased recognition of Aboriginal peoples' right to participate in the management of Queensland's protected areas has been influenced by a number of factors. Firstly, the traditional knowledge and management practices of Aboriginal people have been recognised as a valuable resource in the achievement of conservation goals. Secondly, the recognition of indigenous land rights under statute and at common law has reinforced the view that Aboriginal peoples possess an inherent right to use and manage their traditional lands. Finally, developments in the international arena have encouraged governments to increase the level of indigenous involvement in the sustainable use and management of the natural environment. It is argued that the cumulative impact of these factors provides the impetus for the reconsideration of the proper role for Aboriginal people in the management of Queensland's conservation estate.

This paper will examine the extent to which Queensland's land rights and nature conservation legislation facilitates Aboriginal participation in contemporary protected area management. In this context, the paper will discuss the evolution of the national park concept and indigenous land rights, and the impact these factors have had on the exercise of Aboriginal responsibilities for land. The recent developments at international law on this issue will also be examined, as

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will the implications of common law native title for the use and management of Queensland's protected areas. The paper will conclude with an examination of recent national endorsements of indigenous rights and an analysis of the current mechanisms for Aboriginal participation in the management of Queensland's Wet Tropics World Heritage Area.

THE DEVELOPMENT OF THE NATIONAL PARK CONCEPT

The concept of protected areas evolved as a form of land use in the United States of America at the end of the nineteenth century when the world's first national park, Yellowstone National Park, was established in 1872.[1] The *Yellowstone Act* provided for the two essential components of the modern-day national park – nature preservation and public recreation. This dichotomy of national park purpose was later encapsulated within the *National*

Parks Service Act 1916 (US) which declared that national parks should:

> "conserve the scenery and historical objects and the wildlife therein and provide for the enjoyment of the same in such a manner and by such means as will leave them unimpaired for future generations".[2]

The 'Yellowstone' wilderness ideal also underpinned early international approach to national parks and other protected areas. In 1933, the colonial powers met in London to formulate the *Convention Relative to the Preservation of Fauna and Flora in their Natural State*. The objective of this agreement was to implement a framework for the establishment of a system of national parks and wildlife reserves in Africa. Similarly, in 1942, the Pan-American *Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere* was reached in Washington.[3] In 1969, the IUCN General Assembly in New Delhi adopted the Yellowstone philosophy as its official national park archetype. The Assembly supported the establishment of national parks in those areas of the world where:

> "one or several ecosystems are not materially altered by human exploitation and occupation" and "the highest competent authority of the country has taken steps to prevent or to eliminate as soon as possible exploitation or occupation in the whole area."[4]

However, the origin and development of the national park concept in Australia

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1 Runte, A. *National Parks: The American Experience* 2nd Edition, (USA: University of Nebraska Press, 1987) at 33:

2 A. MacEwen & M. MacEwen, *National Parks: Conservation or Cosmetics?*, (London: George Allen and Unwin (Publishers) Ltd, 1982) at 4.

3 R. Nash, *The American Environment: Readings in the History of Conservation*, (MA: Addison-Wesley), in: S. Stevens (Ed) 'The Legacy of Yellowstone' *Conservation Through Cultural Survival:Indigenous Peoples and Protected Areas* (Washington D.C: Island Press, 1997) at 31.

4 IUCN (International Union for the Conservation of Nature and Natural Resources) *Proceedings of the Tenth General Assembly* (Morges: IUCN Publications, 1970).

remains obscure.[5] With the exception of areas such as The (Royal) National Park near Sydney, many of the first parks in New South Wales, South Australia and Western Australia were all close to the main centres of population. These parks were 'urban parks', more likely to have been modelled on the large parks being created on the outskirts of metropolitan London than the remote wilderness of Yellowstone.[6] It has been suggested that public health, recreation and enjoyment, and the 'improvement' of nature were the prime motivations for the declaration of such areas.[7]

Early in the twentieth century, a transformation occurred in the Australian perception of national parks. There was a significant increase in both the favourable aesthetic responses to the landscape and the level of public concern for wildlife conservation.[8] The scientific community also began to encourage the retention of the environment's natural features rather than its 'improvement' or development. This resulted in a shift in the public's conservation ethic and the 'Yellowstone' model of strict nature preservation soon became the major impetus for national park creation within the States. This fact, combined with a persistent governmental and judicial refusal to recognise Aboriginal rights and interests in land, has meant that throughout much of Australia's history, Aboriginal people have been prevented from using and caring for country in accordance with their cultural ideals.

It was not until the mid 1970s that the Commonwealth Government enacted the first legislative scheme which recognised the rights of Aboriginal peoples in the Northern Territory to own and manage national park lands. This scheme recognised that a system of Aboriginal title combined with national park status and joint management would be conducive to the fulfilment of Aboriginal responsibilities for land and the improved protection of the natural environment.

COMMONWEALTH RECOGNITION OF ABORIGINAL LAND RIGHTS AND THE DEVELOPMENT OF NATIONAL PARK JOINT MANAGEMENT ARRANGEMENTS

EARLY JUDICIAL REASONING AND THE RECOGNITION OF ABORIGINAL LAND RIGHTS

Prior to 1970, English and Australian courts had refused to recognise the intrinsic

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5 K.J. Frawley, 'The history of conservation and the national park concept in Australia: a state of knowledge review' in: K.J. Frawley and N. Semple., *Australia's Ever Changing Forests: Proceedings of the First National Conference on Australian Forest History*, (Canberra: Department of Geography and Oceanography, University College, Australian Defence Force Academy, 1989) at 395-418.

6 K.J. Frawley, ' 'Cultural Landscapes' and National Parks: Philosophical and Planning Issues' (1989) 25 (3) *Australian Parks and Recreation* 16.

7 *Id.* at 17.

8 *Id.* At 17.

relationship which existed between Aboriginal people and the Australian landscape. This factual and legal denial of any indigenous interest in the land was sustained by a number of judicial decisions, the most instrumental of which was the 1889 decision of the Privy Council in *Cooper v Stuart*. The views expressed in this case embedded into Australian law the fiction that Australia was *terra nullius*, being a:

> colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions.[9]

This judgment had the effect of removing any claim for indigenous ownership of or responsibility for land, and provided the impetus for the 1971 Northern Territory Supreme Court decision in *Milirrpum v Nabalco Pty Ltd.*[10] In that case the Yirrkala clans from the Gove Peninsula claimed that their interest in land had been unlawfully impacted upon by the defendant, which had entered into certain agreements with the Commonwealth Government in relation to the mining of bauxite on the land. Blackburn J. found against the plaintiffs holding that their relationship with the land could not be described as "proprietary" in nature as it failed to satisfy the criterion of the right to exclude others,[11] and this, despite the fact that in his Honour's opinion, the plaintiffs did possess a system of social rules and customs that constituted a system of law.[12] While failing to acknowledge the plaintiffs' proprietary interest in the land, Blackburn J. did find that the group had established the existence of a "spiritual" relationship to the land:

> "the aboriginals have a more cogent feeling of obligation to the land than of ownership of it .... it seems easier on the evidence to say that the clan belongs to the land than that the land belongs to the clan."[13]

The *Milirrpum* decision was criticised by a number of commentators for its role in reiterating the *terra nullius* doctrine and for the Court's refusal to acknowledge the existence of indigenous proprietary interests in land prior to settlement.[14] The decision has also been criticised on the basis that the Court's focus on the spiritual dimension of indigenous peoples' relationship to the land has meant that non-indigenous environmental managers have sought to undervalue traditional management practices and knowledge of the natural environment.[15]

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9 (1889) 14 App Cas 286 at 291.

10 (1970) 17 FLR 141.

11 *Id.* at 273.

12 *Id.* at 267.

13 *Id.* at 270-1.

14 J. Hookey, 'The Gove Land Rights Case: A Judicial Dispensation for Taking of Aboriginal Lands in Australia?' (1972) 5 *Federal Law Review* 85; B. Hocking, 'Does Aboriginal Law now Run in Australia?' (1979) 10 *Federal Law Review* 161; L.J. Priestley, 'Communal Native Title and the Common Law: Further Thoughts on the Gove Land Rights Case' (1974) 6 *Federal Law Review* 150.

15 M. Tehan, 'Indigenous Peoples, Access to Land and Negotiated Agreements: Experiences

STATUTORY RECOGNITION OF ABORIGINAL RIGHTS TO OWN AND MANAGE NATIONAL PARK LAND

Subsequent to the decision in *Milirrpum v Nabalco Pty Ltd*, the incoming Whitlam ALP Government committed itself to recognizing Aboriginal land rights in the Northern Territory. In 1973, Justice Woodward, who had been senior counsel for the Yirrkala clans in *Milirrpum*, was appointed to inquire into and report upon the appropriate means to achieve this objective. In his First Report Justice Woodward addressed the issues of Aboriginal land rights and conservation reserves suggesting:

> "It may be that a scheme of Aboriginal title, combined with National Park status and joint management, would prove acceptable to all interests."[16]

This concept was further developed in the Second Report where Justice Woodward identified a number of principles by which Aboriginal interests were not to be unreasonably subordinated to those of conservation.[17]

The recommendations of these two reports provided the foundation for the introduction of a Bill that was later enacted by the Fraser Liberal/National Country Party Government as the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth).[18] This legislation had the effect of transferring ownership of Aboriginal reserves in the Northern Territory to Aboriginal land trusts. It also established a claims process whereby Aboriginal people could claim title to other areas of unalienated Crown land on the basis of being traditional owners of that land or being entitled by tradition to its occupation or use.[19] The traditional spiritual responsibilities, identified by Blackburn J, which Aboriginal people have for land are recognised under this legislation.[20] The Act defines "traditional Aboriginal owners" in relation to land to mean a local descent group of Aborigines who:

> a) have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land; and

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and Post-Mabo Possibilities for Environmental Management' (1997) *Environmental and Planning Law Journal* 114 at 118.

16 A.E. Woodward, *Aboriginal Land Rights Commission*. First Report, Parliamentary Paper No. 138 of 1973 (Canberra: The Government Printer of Australia) at 42.

17 A.E. Woodward, *Aboriginal Land Rights Commission*, Second Report, Parliamentary Paper No. 69 of 1974 (Canberra: The Government Printer of Australia) at 99.

18 G. Nettheim, 'Mabo and Legal Pluralism: the Australian Aboriginal Justice Experience', in: K. Hazelhurst (Ed) *Legal Pluralism and the Colonial Legacy – Indigenous Experiences of Justice in Canada, Australia and New Zealand*, (England: Avebury Ashgate Publishing Ltd, 1995) at 104.

19 s 4 *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth).

20 G. Neate, "Looking After Country: Legal Recognition of Traditional Rights to and Responsibilities for Land" (1993) 16 (1) *University of New South Wales Law Journal* 161at 187.

b) are entitled by Aboriginal tradition to forage as a right over that land[21]

The Act also provided for the Commission, established to conduct the Ranger Uranium Inquiry, to determine the merits of a claim to land lodged by the traditional owners of the

Alligator Rivers Region. The Final Report of the Commission recommended:

1. The granting of title to the area claimed to the Aboriginal claimants;
2. The establishment of a large national park to include the proposed Aboriginal land;
3. The resumption of two pastoral leases to enable Aboriginal land claims to be made over the area and the incorporation of the area in the national park; and
4. Preparation of a plan of management for the park and for the plan to ensure that Aboriginal views were strongly represented[22]

In response to the recommendations of the Inquiry the Commonwealth Government entered into an agreement with the Northern Land Council regarding the grant of land title to the traditional owners. This agreement was subject to the condition that the Northern Land Council lease-back the land to the Director of National Parks and Wildlife[23] to be managed as a national park.[24] Kakadu National Park (Stage 1) was subsequently established under the *National Parks and Wildlife Conservation Act* 1975 (Cth).

The first Kakadu Plan of Management addressed the Commonwealth Government's commitment to Aboriginal involvement in Park management in a very general manner.

The long-term management objectives included:

(i) "to maintain [the Park's] values for the Aboriginal people, give special protection for the Aboriginal art sites, sacred sites and other sites of significance, and have regard to the interests of the traditional Aboriginal owners of, and other Aboriginals interested in, the Park."; and

(ii) "to establish a program of management in which Aboriginals with traditional associations with the land in the Park plays a major role."[25]

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21 s 3.

22 R.W. Fox, G.G. Kelleher, & C.B. Kerr, *Ranger Environmental Inquiry Second Report* (Canberra: AGPS, 1977) at 328-329.

23 The Office of the Director of National Parks and Wildlife is a statutory corporation established in accordance with s 15 of the *National Parks and Wildlife Conservation Act* 1975 (Cth). The functions of the Director include the administration, management and control of nationals parks established under the Act: s 16 (1) (a).

24 s12 (2B) *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth)

25 Kakadu National Park Plan of Management 1980, Australian National Parks and Wildlife Service (1980) at 19, 268.

In 1991, the lease arrangements in respect of the Aboriginal land of Kakadu National Park were renegotiated to reflect the rights of the Aboriginal owners to use and *jointly* manage the area. The Kakadu Management Plan today acknowledges that:

> "it is the intention of ANPWS[26] that maintenance of the integrity of Aboriginal people's cultural relationship with their land shall be a primary management objective, a commitment which is reflected throughout this Plan of Management."[27]

In the case involving the claim of the Anangu, the provisions of the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) were invoked to claim Uluru (Ayers Rock-Mount Olga) National Park. The original claim of the traditional owners to an area of land that included the Park was unsuccessful as Mr Justice Toohey, the then Aboriginal Land Commissioner, had found that the Park was alienated Crown land and thus excluded from claim.[28] In 1985 the Commonwealth Government finally recognised the Anangu claim and enacted the *Aboriginal Land Rights (Northern Territory) Amendment Act* 1985 (Cth) and the *National Parks and Wildlife Conservation Amendment Act* 1985 (Cth). This amending legislation overcame the jurisdictional problems that had hampered the original land claim by providing for the area of Uluru National Park to be granted as inalienable freehold land to the Uluru-Kata Tjuta Land Trust.[29] In accordance with the legislation, the Anangu were then required to lease-back the area of Park land to the Director of National Parks and Wildlife.[30]

The amendments to the *National Parks and Wildlife Conservation Amendment Act* 1985 (Cth) also established new procedures for inaugurating Boards of Management for Aboriginal owned National Parks. The legislation now provides that where a national park is on indigenous land, the responsible federal Minister and the relevant Aboriginal land council must convene a Board of Management, the majority of which shall be indigenous and nominated by the traditional owners.[31] It is the function of the Board of Management:

a) to prepare, in conjunction with the Director, plans of management in respect of that park or reserve;

b) to make decisions, being decisions that are consistent with the plan of management in respect of that park or reserve, in relation to the

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26 Australian National Parks and Wildlife Service, known today as the Australian Nature Conservation Agency.

27 Kakadu National Park Plan of Management 1991, Australian Nature Conservation Agency.

28 J. Toohey, *Uluru (Ayers Rock) National Park and Lake Amadeus/Luritja Land Claim*, Report by the Aboriginal Land Commissioner to the Minister for Aboriginal Affairs and to the Minister for Home Affairs (Canberra: Australian Government Publishing Service, 1980) at 34-35.

29 s12 (2D) *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth).

30 s 12 (2C) *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth).

31 s 14 (C)(5).

management of that park;

c) to monitor, in conjunction with the Director, the management of that park; and

d) to give advice, in conjunction with the Director, to the Minster on all aspects of the future development of that park[32]

In preparing a plan of management for a National Park, the Board of Management must have regard to the following:

a) the encouragement and regulation of appropriate use,

b) appreciation and enjoyment of the park by the public;

c) the interests of the traditional Aboriginal owners and of other Aborigines;

d) the preservation of the park in its natural condition and the protection of its special features, including objects and sites of biological, historical, palaeontological, archaeological, geological and geographical interest;

e) the protection, conservation and management of wildlife within the park;

f) the protection of the park against damage[33]

The current Plan of Management that operates in Uluru National Park illustrates the commitment of all interested parties to managing the area as equal partners. In particular, it specifies the following objectives for the Park:

- to take into account Anangu religious interpretations of the landscape, or 'Tjukurpa', in all areas of park management
- to take into account Anangu ecosystem knowledge and understanding in the planning and implementation of land management within the Park
- to ensure that interpretative materials promote Anangu perceptions as the primary interpretation of the Park
- to support Anangu social and religious obligations to country[34]

As part of the condition of the handing-back of land to the Commonwealth Government, the traditional owners at Kakadu and Uluru National Parks also receive an annual rental payment and they are entitled to reside within the park boundaries and utilise its resources. These arrangements recognise that Aboriginal peoples' political, social and economic affiliations to land cannot be removed from the cultural obligations to care for and manage country.

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32 s 14D (1).

33 s 11 (8).

34 Uluru Kakta Tjuta Plan of Management 1991, Australian Nature Conservation Agency.

CONCLUSION

The Uluru/Kakadu model represents a blueprint for joint management arrangements that seek to promote Aboriginal land rights whilst ensuring the continued conservation of the natural environment.[35] While it should not be assumed that the model represents a flawless mechanism for the reconciliation of these issues,[36] it does symbolise the conception of a new national park ethic that acknowledges the rights and responsibilities of Aboriginal people to the land.

The success of this model relies upon the existence of two key contingencies. Firstly, acknowledgement by the Commonwealth Government of the right of Aboriginal people to own and occupy land and utilise its resources. Secondly, the establishment of management arrangements which elevate the status of traditional owners from mere advisors to equal partners in all aspects of park planning.[37] In this way, the model institutionalises indigenous and non-indigenous cooperation in both the long-term planning for the Park and in its day-to-day management and use.[38]

In the past two decades, these pre-conditions for the successful implementation of joint management arrangements have been increasingly acknowledged within the international conservation movement. This has lead to the development of a growing body of international law that seeks to reconcile indigenous land rights with sustainable management and use of the natural environment. These laws encourage state parties to facilitate the exercise of indigenous peoples' traditional rights to land and its resources. They also promote governmental recognition of the vital role that indigenous peoples have to play in environmental conservation as a result of their traditional knowledge and management practices.

INTERNATIONAL LAW AND INDIGENOUS RIGHTS TO USE AND

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35 S. Woenne-Green, R. Johnston, R. Sultan & A.Wallis, *Competing Interests: Aboriginal Participation in National Parks and Conservation Reserves in Australia*, (Melbourne: Australian Conservation Foundation, 1994) at 272.

36 The land grants are conditional upon immediate lease-back to the government, the traditional owners do not have the option of degazetting the National Park, they have limited control over tourist numbers and there are reduced options for economic development: B. Miller, 'Green Fingers Across Black Land' (1992) 2 (58) *Aboriginal Law Bulletin* 3 at 4; J. Cordell, 'Who Owns the Land? Indigenous Involvement in Australian Protected Areas', in: E. Kemf, (Ed) *Indigenous Peoples and Protected Areas: The Law of Mother Earth*, (San Franscisco: Sierra Club Books, 1993) at 109; P. Toyne & R. Johnston, "Reconciliation, or the New Dispossession? Aboriginal Land Rights and Nature Conservation" (1991) June *Habitat Australia* 8; P.C. West & S.R. Brechin, (Eds) *Resident Peoples and National Parks: Social Dilemmas and Strategies in International Conservation*, (Tuscon: University of Arizona Press, 1991).

37 *op. cit.* at 272-273.

38 T. De Lacy and B. Lawson, 'The Uluru/Kakadu Model: Joint Management of Aboriginal-Owned National Parks in Australia', in: S. Stevens (Ed), *Conservation Through Cultural Survival: Indigenous Peoples and Protected Areas* (Washington DC: Island Press, 1997) at 156.

MANAGE LAND

The role of international law in influencing the formulation of Australia's domestic law has assumed increased significance in recent years.[39] Notwithstanding the fact that the Commonwealth Government's land management policy during the 1970's was notably forward looking, international law has been the catalyst for the recognition of the nexus that exists between environmental management and indigenous people's aspirations in relation to land.

Unlike the States, which possess plenary legislative power, the Commonwealth Parliament possesses only those legislative powers conferred upon it by the Commonwealth Constitution. While the Constitution does not contain an express or specific power permitting the Commonwealth to make laws with respect to the environment, the Parliament has often invoked the external affairs power to enact into domestic legislation the provisions of international conventions to which it has acceded.[40]

The High Court has consistently held that the mere existence of an international treaty to which Australia has acceded is sufficient to attract the s51 (xxix) power.[41] There is no additional requirement that the subject matter of the treaty relate to a matter of international concern. Therefore, provided the domestic law is reasonably appropriate and adapted to the attainment of an international convention's objectives, it will be a valid exercise of Commonwealth legislative power.[42] This broad interpretation of the Commonwealth's legislative capacity under s51 (xxix) makes it possible for the Commonwealth Parliament to pass a wide range of valid laws in pursuance of its international treaty obligations. This has indirectly given the Commonwealth a major interest in environmental protection and management in Australia.[43]

EARLY INTERNATIONAL RECOGNITION OF INDIGENOUS RIGHTS

At the early stages of its conception international law was primarily concerned with the recognition of people's civil and political rights. Subsequent to the adoption of the *Charter of the United Nations*[44] in 1945, a series of human rights

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39 For a discussion of the impact of international law on Australian common law regarding the rights and interests of Aboriginal and Torres Strait Islander peoples see *Mabo v Queensland (No2)* (1992) 175 CLR 1 at 42, Brennan J., with whom Mason C.J. and McHugh J.

40 s51 (xxix) *The Commonwealth of Australia Constitution Act 1900.*

41 *Commonwealth v Tasmania (The Tasmanian Dams Case)* (1983) 158 CLR 1; *Richardson v The Forestry Commission* (1988) 164 CLR 261.

42 *Commonwealth v Tasmania (The Tasmanian Dams Case)* (1983) 158 CLR 1, per Deane J at 259-260.

43 Under s109 of the Commonwealth Constitution, if the Commonwealth implements domestic legislation in pursuance of its international obligations, the States will be bound to adhere to the spirit and objectives of such legislation.

44 This inaugurates the mandate of the United Nations to promote equal rights and self

treaties were adopted by the General Assembly in an attempt to develop a comprehensive international human rights system. These treaties included the *Universal Declaration of Human Rights* 1948, the *International Convention on the Elimination of All Forms of Racial Discrimination* 1965, the *International Covenant on Civil and Political Rights* 1966 and the *International Covenant on Economic, Social and Cultural Rights* 1966. [45]

During this period international organisations that were independent of the United Nations also began to develop standards for the protection of indigenous rights. In 1957, the International Labor Organisation adopted the *Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries* (No 107). Article 11 of this Convention states that indigenous peoples' right of ownership, collective or individual, over the lands that they traditionally occupy, shall be recognised. Article 12 qualifies the purview of Art 11 by allowing the removal of indigenous peoples from the lands they occupy in the interests of national security, development or their health.

The substantive strength of ILO *Convention No. 107* is weakened by the fact that it embodies an integrationist philosophy.[46] The central policy provision of the Convention gives governments "the primary responsibility for developing coordinated and systematic action for the protection of the populations concerned and their progressive integration into the life of their respective countries."[47] This assimilationist orientation resulted in a reduction in the number of ratifying states.[48] As a result, the Convention was revised and the ILO *Convention Concerning Indigenous and Tribal Peoples in Independent Countries (No 169)* was adopted in June 1989.[49] The focus of the Convention has been to give clearer recognition to indigenous people's desire to exercise control over their own institutions, culture and economic development. Thus, Article 7 (1) provides:

> The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or other-wise use, and to exercise control, to the greatest extent possible over their economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.

Part II of the Convention defines indigenous peoples rights in relation to land.

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determination.

45 Also G. Nettheim, "Indigenous Rights, Human Rights and Australia" (1987) 61 *Australian Law Journal* 291.

46 *Id.* at 478.

47 Art 2 (1).

48 S. Pritchard and C. Heindow-Dolman, 'Indigenous Peoples and International Law: A Critical Overview' (1998) 3 (4) *Australian Indigenous Law Reporter* 473 at 478.

49 The Convention entered into force on 5 September 1991.

Article 14 (1) provides that the "rights of ownership and possession of the peoples concerned over the lands they occupy shall be recognised." Articles 15-19 provide for the implementation of measures to safeguard "the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities" and the safeguarding of "the rights of the peoples concerned to the natural resources pertaining to their lands." Despite these strong provisions in favour of indigenous land and resource use rights, the Convention does not consider indigenous consent as a prerequisite for government action affecting such rights.[50] Therefore, like its predecessor, this Convention fails to grant indigenous peoples total control over the means by which resources on their land may be utilised.

INTERNATIONAL ENVIRONMENTAL LAW AND INDIGENOUS RIGHTS TO MANAGE LAND[51]

The 1980s saw an increase in awareness of the importance of protecting and conserving the world's biological diversity. This led a focussing of international attention to the protection of indigenous peoples' traditional lands. It also raised awareness of the important role that indigenous peoples' traditional knowledge and environmental management practices might play in biodiversity conservation.[52] At this time, indigenous peoples across the world were also seeking support for their settlement and land use rights.[53] Therefore, the possibility of exploring new alliances with conservationists offered the opportunity for such groups to assert their claims on the international stage.

The first United Nations Conference on the Human Environment held in Stockholm in 1972 highlighted the need for preservation of the natural environment as a means to ensure the continued protection of human life. The *Stockholm Declaration* recognises that the enjoyment of basic human rights can be jeopardised when communities do not enjoy a safe and healthy environment. That notwithstanding, the Declaration does not acknowledge the link between indigenous peoples and environmental issues when it recognises the "need for a common outlook and for common principles to inspire and guide the peoples of the world in the preservation and enhancement of the human environment."[54]

In 1980, the World Conservation Strategy created a blueprint for sustainable development placing particular emphasis on the status and rights of indigenous

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50 G. Clarke, "ILO Convention 107 – Revision or Reversion?" (1989) 2 (40) *Aboriginal Law Bulletin* 4.

51 See generally: S. Jackson & G.J Crough, "International Environmental Treaties and the Rights of Indigenous Peoples in Australia" (1995) 26 (1) *Australian Geographer* 44.

52 S. Stevens, *Conservation through Cultural Survival: Indigenous Peoples and Protected Areas*, (Washington DC: Island Press, 1997) at 3.

53 *Id.* at 4.

54 Preamble, United Nations Conference on the Human Environment. See: K. Bosselmann, 'The Right to Self-Determination and International Environmental Law: An Integrative Approach' (1997) 1 (1) *New Zealand Journal of Environmental Law* 1 at 21.

peoples.[55] Similarly, in 1987, the Brundtland Report (*Our Common Future*) acknowledged that indigenous peoples "can offer modern society many lessons in the management of resources." The Report also calls for "the recognition and protection of their [indigenous peoples] traditional rights to land and other resources that sustain their way of life."[56] The conservation principles embodied within these two documents set the stage for the 1992 United Nations Conference on Environment and Development. This Conference resulted in a number of agreements aimed at protecting the world's biological diversity and its ecosystems. These agreements comprise the *Rio Declaration*, *Agenda 21*, the *Climate Change Convention* and the *Biodiversity Convention*.

While the *Rio Declaration* and *Agenda 21* are not legally binding, they do exert a "moral force" for their implementation at regional and national levels.[57] For example, it is significant that the *Rio Declaration*, to which Australia is a signatory states:

> Indigenous people and their communities, and other communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognise and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.[58]

Agenda 21 provides measures for the implementation of the principles set out by the *Rio Declaration*. Chapter 26 recognises the interrelationship between the natural environment and its sustainable development and the cultural, social, economic and physical well being of indigenous peoples. It declares that national and international efforts to implement sustainable development should intimately involve indigenous peoples. The Chapter also outlines the following objectives for recognising the ability of indigenous peoples to fully participate in sustainable practices on their land:

- the strengthening of appropriate policies and/or legal instruments at the national level;
- recognition of the values, traditional knowledge and resource management practices of indigenous peoples with a view to promoting environmentally sound development;
- recognition that dependence on renewable resources and ecosystems, including sustainable harvesting, continues to be essential to the cultural, economic and physical well-being of indigenous people; and
- involvement of indigenous people and their communities at the

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55 This Strategy was jointly developed by the International Union for the Conservation of Nature, the World Wildlife Fund and the United Nations Environment Program.

56 World Commission on Environment and Development, *Our Common Future* (1987) at 114-116.

57 *Id.* at 29. See also H A Amankwah "Mabo and International Law" (1994) 35(4) *Race & Class* 56 at 60-62.

58 Principle 22.

> national and local levels in resource management and conservation strategies.[59]

In addition to these international principles, the *Convention on Biological Diversity*[60] emphasises indigenous peoples' traditional knowledge of the environment. Article 8 (j) provides that each state party must:

> Subject to its national legislation, 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 wide 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.

While this Article fails to provide indigenous peoples with an unqualified right to engage in the management of environmental resources, it can be seen as reinforcing indigenous demands for participation in national park and protected area management.

THE FUTURE OF INDIGENOUS RIGHTS TO MANAGE LAND AT INTERNATIONAL LAW

In addition to the support for indigenous management rights provided by the Brundtland Report and the United Nations Conference of Environment and Development, the United Nations has developed a *Draft Declaration on the Rights of Indigenous Peoples.*

In 1985, the Working Group on Indigenous Populations (WGIP), established by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities (the Sub-Commission), resolved to produce the draft declaration for adoption and proclamation by the United Nations General Assembly.[61] In 1993, the WGIP agreed upon the final text of the *Draft Declaration on the Rights of Indigenous Peoples.*[62]

Of particular relevance to these indigenous land management issues are Articles 19-20 of the *Draft Declaration* which are concerned with the participatory rights

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59 *Agenda 21*, Programme of Action for Sustainable Development – The Final Text of Agreements Negotiated by Governments at the United Nations Conference on Environment and Development 3-14 June 1992, Rio de Janeiro, Brazil (United Nations Department of Public Information) at 227-229.

60 This Convention was signed by 150 states at UNCED. It was ratified by Australia in June 1993 and entered into force on 29 December 1993.

61 n 48, 475 *supra*.

62 See generally: S. Pritchard, 'The United Nations and the Making of a Declaration on Indigenous Rights' (1997) 3 (89) *Aboriginal Law Bulletin* 4; C.J. Iorns, "Working Group on Indigenous Peoples: Twelfth Session" (1994) 3 (71) *Aboriginal Law Bulletin* 7; C.J. Iorns, "The Draft Declaration on the Rights of Indigenous Peoples" (1993) 3 (64) *Aboriginal Law Bulletin* 4.

of indigenous peoples. These Articles provide that indigenous peoples have the right to participate fully in all levels of decision-making, including law-making and policy, that affect their lives. In addition, Article 26 provides that indigenous peoples have the right to own, develop, control and use the lands, territories, waters and coastal seas, flora, fauna and other resources they have traditionally occupied or used. This includes the right to recognition of laws, customs, land tenure systems and institutions for the development and management of resources.

In 1994, the WGIP submitted the *Draft Declaration* to the Sub-Commission which presented the document to its parent body the Commission on Human Rights (CHR).[63] The CHR then established a working group to consider the text of the document. In 1997, at the working group's third session, two of the more acceptable provisions of the *Draft Declaration* were adopted.

In the event that the Draft as originally formulated is fully adopted it will not be binding upon state parties. It will, however, contribute to a growing body of international law concerned with the recognition of indigenous peoples' rights to own and manage their traditional lands.[64]

CONCLUSION

Within the past twenty years, an increasing body of international law dealing with the rights of indigenous peoples to own land and participate in the achievement of sustainable development has come into existence. As a signatory to these international conventions, the Commonwealth Government is under an international obligation to ensure that domestic legislation is implemented which facilitates the enjoyment of these rights by Australia's indigenous peoples.

While the States are not similarly bound to implement international conventions to which the Commonwealth has acceded, developments in the international arena may still impact upon the formulation of State laws and policies. The Queensland Government has not always provided unqualified support for international initiatives regarding the recognition of the indigenous rights.[65] However, in the past twenty years, the State Parliament has enacted a number of legislations that conform in part to the standards set by the international community on this matter.

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63 n 48, 476 *supra*.

64 n 48, 477 *supra*.

65 See for example *Koowarta v Bjelke-Pertersen* (1982) 153 CLR 168 where the Queensland government challenged the constitutional validity of the *Racial Discrimination Act* 1975 (Cth) which had been enacted by the Commonwealth Parliament in accordance with Australia's obligations as a signatory to the International Convention on the Elimination of All Forms of Racial Discrimination 1965.

STATUTORY RECOGNITION OF ABORIGINAL LAND MANAGEMENT RESPONSIBILITIES IN QUEENSLAND

STATUTORY ABORIGINAL LAND TITLE

In Queensland, a majority of land that is owned and managed by indigenous peoples is located in the Torres Strait, Cape York Peninsula and the Gulf of Carpentaria. Elected Community Councils hold most of this land under Deeds of Grant in Trust (DOGIT), although some is held under pastoral lease and freehold.[66] The DOGIT form of Aboriginal tenure was introduced under the *Aborigines and Torres Strait Islanders (Land Holding) Act* 1985 (Qld) and ammended by the *Land Act* 1962 (Qld).[67] These deeds granted fee simple estates in trust to many local Aboriginal Councils for the benefit of the Aboriginal and Torres Strait Islander inhabitants of former reserve areas. Management of these areas was also transferred to the Aboriginal Councils under the *Queensland Community Services (Aborigines) Act*1984-86 (Qld). Missions such as the Aurukun and Mornington Island shire leases, however, remained under the control and management of the Queensland Government pursuant to the *Local Government (Aboriginal Lands) Act* 1978.

Whilst these various pieces of land rights legislation recognised Aboriginal peoples' rights to own and manage their traditional lands, Aboriginal communities were not granted the right to own and manage those areas of land that formed part of Queensland's conservation estate. In 1991, however, the Queensland Parliament enacted the *Aboriginal Land Rights Act* (Qld), giving Aboriginal peoples the right to become involved in the management of protected ares declared over their traditional lands.

THE ABORIGINAL LAND ACT 1991 (QLD)[68]

In 1991, following the precedent set by the Commonwealth of restoring national park land to Aboriginal peoples, the Goss Labor Government passed the *Aboriginal Land Act* 1991 (Qld).[69] The preamble of this Act acknowledges the

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66 D. Smyth and J. Sutherland, *Indigenous Protected Areas: Conservation Partnerships with Indigenous Landholders*, (Canberra: Indigenous Protected Areas Unit, Biodiversity Group, Environment Australia, 1996) at 136.

67 F. Brennan, *Land Rights Queensland Style: The Struggle for Aboriginal Self-Development* (St Lucia: University of Queensland Press, 1992) at 80.

68 See generally: M.A. Stephenson, "Statutory Schemes of Native Title and Aboriginal Land in Queensland: The Relationship of the Queensland *Aboriginal Land Act* 1991 with the Commonwealth *Native Title Act1993* and the *Native Title (Queensland) Act1993*" (1995) 2 *James Cook University Law Review* 109; F. Selnes, "Aboriginal Land Rights in Queensland and their Impact on Natural Resources" (1993) *Environmental and Planning Law Journal* 423; G. Neate, "Looking After Country: Legal Recognition of Traditional Rights to and Responsibilities for Land" (1993) 16 (1) *University of New South Wales Law Journal* 161.

69 The Queensland Government also enacted the *Torres Strait Islander Act*1991 (Qld) at this time. The scheme under that Act is almost identical to that of the *Aboriginal Land Act*

need for:

> "Parliament to make provision for the adequate and appropriate recognition of the interests and responsibilities of Aboriginal people in relation to land and thereby to foster the capacity for self-development, and the self-reliance and cultural integrity, of the Aboriginal people of Queensland."70

The provisions of the Act stipulate that land may be granted to a group of Aboriginal people on the basis of traditional affiliation[71] or historical association[72] with a particular area of land or on the basis of economic or cultural viability.[73] If an Aboriginal group is unable to establish one of these bases, it will not be successful in claiming land under the legislation.

For the purposes of grants under the legislation, land is designated as either 'transferable' or 'claimable'.[74] Transferable land can be granted without the need for a claim being made under the Act. The Act defines such land to include DOGIT land, Aboriginal reserve land under the *Land Act* 1994 (Qld), shire lease land at Aurukun and Mornington Island and available Crown land declared by regulation to be transferable land. If 'transferable' land is granted, then a deed of grant in fee simple will be issued to the grantees, appointed by the Minister, as trustees for the Aboriginal people of the land.[75] Once transferable land becomes Aboriginal land it is referred to as 'transferred' land.

Claimable land is Crown land that is declared by regulation to be claimable or is 'transferred' land.[76] The Queensland Government is under no obligation under the Act to declare any land to be claimable, nor is there any provision for Aboriginal peoples to request that particular land be made available for claim.[77] Where land has been designated as 'claimable', Aboriginal people may apply to the Land Tribunal, which will make recommendations to the Minister

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1991 (Qld).

70 Preamble para. (10).

71 Claims based on traditional affiliation require the claimant group to show a common connection with the land based on spiritual and other associations with rights in relation to, and responsibilities for the land under Aboriginal tradition: s 53 (1).

72 To claim historical association, it must be shown that the claimants or their ancestors lived on, or used that land, or land in the district or region, for a substantial period: s 54 (1).

73 If the basis of the claim is economic or cultural viability, then it must be shown that the land will assist in restoring, maintaining or enhancing the capacity for self-development, and the self-reliance and cultural integrity of the claimant group. Regard must also be had for the proposed use of the land: s55.

74 ss 11 and 17.

75 ss 11, 12, 27-38.

76 ss 18, 24.

77 M. A. Stephenson, "Statutory Schemes of Native Title and Aboriginal Land in Queensland: The Relationship of the Queensland *Aboriginal Land Act* 1991 with the Commonwealth *Native Title Act1993* and the *Native Title (Queensland) Act1993*" (1995) 2 *James Cook University Law Review* 109 at 116.

regarding the grant of land title.[78] Where claimable, land is granted on the basis of traditional affiliation or historical association, it will be held in fee simple by the grantees as trustees for the Aboriginal people and their descendants;[79] and where the claim is established on the ground of economic or cultural viability the land will be granted by way of a lease.[80]

NATIONAL PARKS

As part of the grants process established under the *Aboriginal Land Act* 1991 (Qld), national parks may be declared as available for claim.[81] Such claims can be made on the basis of traditional affiliation or historical association.[82] Where granted land includes national park land then the grant will only be made upon agreement by the Aboriginal grantees to lease back the park, in perpetuity to the Governor-in-Council, for the purpose of management under the *Nature Conservation Act* 1992 (Qld).[83] In accordance with the provisions of the *Nature Conservation Act* 1992 (Qld), the park will then be dedicated as a national Park (Aboriginal land).[84] A Board of Management is to be established for each area of nation park land claimed under the *Aboriginal Land Act*1991 (Qld). This Board must be comprised of Aboriginal peoples "particularly concerned" with the area.[85] The Minister has the ultimate discretion on the issue of the number of Aboriginal representatives on the Board.[86]

The Minister is also required to prepare a plan of management for the park in consultation with the Aboriginal people "particularly concerned with the land", and must act in a manner consistent with any Aboriginal tradition of the area.[87] The plan of management must conform to the management principles prescribed for National Park (Aboriginal Land) under the *Nature Conservation* Act1992 (Qld).[88] This Act provides that all national parks must be managed to:

a) provide, to the greatest possible extent, for the permanent preservation of the area's natural condition and the protection of the area's cultural resources and values; and

b) present the area's cultural and natural resources and their values; and

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78 s 17.

79 ss 63, 65.

80 ss 63, 64.

81 s 24. As at 18 October 1999, fifteen national parks had been gazetted for claim under the legislation: Department of Natural Resources, 1999.

82 s 46 (2).

83 s 83 (1).

84 s 41.

85 s 83 (4).

86 s 83 (3).

87 s 83 (7).

88 s 83 (6).

c) ensure that the only use of the area is nature-based and ecologically sustainable[89]

Subject to these requirements, a National Park (Aboriginal Land) must also be managed in a way that is consistent with any Aboriginal tradition of area, including any tradition relating to activities in the area.[90] In light of the recent High Court decision in *Yanner v Eaton*,[91] it may be concluded that such activities will include the right to take, use or keep protected wildlife, in accordance with native title rights. This may be so in spite of the fact that the *Nature Conservation Act* 1992 (Qld) requires such activities to be conducted only in accordance with a permit or authority[92] and subject to the provisions of a conservation plan.[93]

Cultural Heritage

The provisions of the *Nature Conservation Act* 1992 (Qld) also regulate the ownership of natural and cultural resources located within national park land.[94] This is an issue of fundamental importance to many Aboriginal communities in Queensland, who view ownership and control of cultural heritage as inseparable from ownership and control of the land. [95] The *Nature Conservation Act* 1992 (Qld) fails to recognise this fundamental element of indigenous land ownership. Within all national parks, protected animals and plants are the property of the State.[96] Cultural resources are also the property of the State in National Parks (Scientific), National Parks, Conservation Parks or Resource Reserves.[97] The

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89 s 17.

90 s 18 (2).

91 [1999] HCA 53 (7 October 1999). This judgment will be discussed in greater detail in the section dealing with native title and its effect on Aboriginal management of protected areas.

92 s 93 (4) and s 62. The *Nature Conservation Regulations* 1994 provide that the chief executive may, in an Aboriginal tradition or Island custom authority, authorise an individual to take, use, keep or interfere with a cultural or natural resource of a protected area under Aboriginal tradition or Island custom: Reg. 29. The chief executive must not grant an Aboriginal tradition or Island custom authority for rare or threatened wildlife; or for other wildlife, if the taking of the wildlife will reduce its ability to maintain or recover its natural population levels in the area; or if the way the cultural or natural resource is to be taken involves the use of a weapon: Reg 33 (1). See also 32-37 and 123-126 regarding permits for indigenous people.

93 s 93 (2).

94 s7 defines 'cultural resources' as: 'places or objects that have anthropological, archaeological, historical, scientific, spiritual or sociological significance or value, including such significance or value under Aboriginal tradition or Island custom'; and 'natural resources' as: 'the natural and physical features of the area including wildlife, soil, water, minerals and air'.

95 n 35, 240 *supra*.

96 ss 83-86.

97 s 61.

legislation is, however, silent on the question of ownership and control of cultural resources in National Parks (Aboriginal land). In these circumstances mention must be made of the provisions of the *Cultural Record (Landscapes Queensland and Queensland Estate) Act* 1987 (Qld) which seek to vest ownership of cultural resources in the Crown.[98]

THE IMPACT OF LEGISLATIVE ARRANGEMENTS ON ABORIGINAL PARTICIPATION IN PROTECTED AREA MANAGEMENT

The land management regime established under the *Aboriginal Land Act* 1991 and the *Nature Conservation Act* 1992 (Qld) falls far short of the Uluru/Kakadu model of joint management.[99] Aboriginal claimants are required to lease-back successfully claimed land in perpetuity to the government; they possess no right of occupancy, there is no legal guarantee of Aboriginal majorities on Boards of Management and land owners will not be given ownership rights to cultural and natural resources located on national park lands. The overall legislative approach appears to suggest that the Queensland Government has given only superficial consideration to the rights of Aboriginal peoples to own and control the management of their traditional lands. It would appear that whilst the legislation does give Aboriginal peoples the opportunity to become involved in the management of successfully claimed national parks, the management role they will assume will be that of mere 'advisors' rather than equal partners to non-indigenous environmental managers. These deficiencies in the current regime have lead many Aboriginal communities to regard the legislation as providing only a token recognition of their rights and responsibilities for land.[100]

While it should not be assumed that all indigenous peoples are impeccable conservationists or that they even share the same conservation objectives as non-indigenous Australians,[101] this should not be used as a reason to exclude them from participation in contemporary protected area management. Indeed, Aboriginal peoples have much to contribute to conservation efforts because of their valuable ecological knowledge and traditional management practices. This knowledge should be harnessed by non-indigenous environmental managers as a means to ensuring the preservation of national park land in its current natural state. In addition, many Aboriginal communities continue to maintain spiritual and emotional attachments to the land and, therefore, desire to conserve the natural environment as a means of preserving their cultural integrity. It is on these bases that environmental management agencies must seek to negotiate new joint management arrangements with Queensland's Aboriginal peoples given the

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98 s 33 *Cultural Record (Landscapes Queensland and Queensland Estate) Act* 1987 (Qld). Section 34 of the Act does recognise indigenous property rights to burial remains in which familial or traditional links exist between the remains and an indigenous group.

99 B. Miller, 'Green Fingers Across Black Land' (1992) 2 (58) *Aboriginal Law Bulletin* 3 at 4.

100 n 35, 236 *supra*; M. Nutting, "Competing Interests or Common Ground? Aboriginal Participation in the Management of Protected Areas" (1994) *Habitat Australia* 30 at 36.

101 n 52, 2 *supra*.

deficiencies of the existing legislative framework.

The argument in favour of negotiating new joint management arrangements with Queensland's Aboriginal peoples has also gained considerable strength as a result of the recognition of native title rights at common law.[102] Indeed, the mere possibility that Aboriginal peoples may possess pre-existing rights and interests in land should provide a catalyst for the Government to become involved in genuine discourse with Aboriginal people regarding their rights to land and its resources. The full legal ramifications of native title rights and interests are yet to determined, so it remains unclear what impact they will have on existing land management regimes in Queensland. In light of this uncertainty, it would be prudent for government agencies to develop new management relationships with Aboriginal peoples prior to the settlement of outstanding native title claims.

THE RECOGNITION OF COMMON LAW NATIVE TITLE AND ITS IMPACT ON ABORIGINAL USE AND MANAGEMENT OF NATIONAL PARK LAND

In addition to the statutory grants of land available under the *Aboriginal Land Act* 1991 (Qld), indigenous people in Queensland may also be able to establish the existence of common law native title as a basis for ownership and management of national park land. Prior to the High Court decision in *Mabo v Queensland (No. 2)*[103], this avenue for negotiation had not existed as the courts had consistently held that the Crown had acquired full beneficial ownership of the land upon settlement as Australia was *terra nullius*.[104] The *Mabo* decision had the effect of removing any legal justification for the denial of indigenous interests in land, its use and management.

In *Mabo v Queensland (No. 2)*[105] the High Court rejected the doctrine of *terra nullius*, holding that the common law of Australia recognises "a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands."[106] It followed that native title had survived the Crown's acquisition of sovereignty as the Crown had only acquired radical title rather than full beneficial ownership of the land.[107] In the Court's opinion, the Crown's radical title would continue to be burdened by the rights and privileges conferred by native title unless it had been extinguished through abandonment

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102 D. Smyth, *Understanding Country: The Importance of Land and Sea in Aboriginal and Torres Strait Islander Societies*, Key Issues Paper No. 1, Council for Aboriginal Reconciliation, (Canberra: Australian Government Publishing Service, 1994) at 24.

103 (1992) 175 CLR 1.

104 *Cooper v Stuart* (1889) 14 App Cas 286; *Milirrpum v Nabalco Property Ltd* (1970) 17 FLR 141.

105 (1992) 175 CLR 1.

106 *Id.* at 217.

107 *Id.* at 57 per Brennan J; at 86-87 per Deane and Gaudron JJ; and at 180 per Toohey J.

by the traditional owners or surrender to the Crown.[108] The Court also held that native title may be extinguished by a legislative or executive act which reveals a clear and plain intention to extinguish native title, such as a valid grant of freehold.[109] Where where native title has been extinguished, full Crown title to the land resumes and native title will not revive if the land is later allocated for a use that is consistent with the existence of such title.[110]

The High Court also considered the question of whether compensation was payable to traditional owners whose native title rights had been extinguishment by an inconsistent Crown grant. In the opinion of the majority, compensation would not be payable for acts which extinguished native title prior to the enactment of the *Racial Discrimination Act* 1975 (Cth).[111] In relation to those acts which extinguished native title subsequent to the commencement of that Act, compensation would be payable to traditional owners unless other forms of title could be extinguished in similar circumstances.

THE *NATIVE TITLE ACT* 1993 (CTH)

Subsequent to the High Court decision in *Mabo*, the Commonwealth Government enacted the *Native Title Act* 1993 (Cth) to provide statutory recognition of common law native title rights.[112] In 1998, this Act was amended by the *Native Title (Amendment) Act* 1998 (Cth), to accommodate the High Court decision in *Wik Peoples v State of Queensland*.[113]

It is the purpose of the Commonwealth native title legislation to validate all titles and acts which might have been invalid because of the existence of native title and which were granted by the Commonwealth Government. The Commonwealth Act also permits the validation of State-granted titles or acts by the relevant State parliament.[114] Accordingly, in 1993, the Queensland

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108 *Id.* at 60, 70.

109 *Id.* at 80.

110 *Fejo v Northern Territory of Australia* (1998) 156 ALR 721.

111 *Id.* per Mason CJ and McHugh J at 15. Deane and Gaudron JJ at 119 held that native title rights that have been wrongfully extinguished without clear and unambiguous statutory authorisation, found proceedings for compensatory damages. Toohey J held that such extinguishment would be a breach of the fiduciary obligation owed by the Crown to the titleholders for which it would be liable to pay compensation or damages.

112 The constitutional validity of this legislation was confirmed in the case of *Western Australia v The Commonwealth* (1995) 128 ALR 1.

113 (1996) 187 CLR 1; 141 ALR129. In this case the High Court held that there was no necessary extinguishment of native title rights by reason of the grant of pastoral leases under the *Land Act* 1910 (Qld) or the *Land Act* 1962 (Qld). Native title rights and interests would only yield to the rights conferred under the statutory grants to the extent of any inconsistency. However, once the pastoral lease had ceased to exist, these rights would be revived. This decision necessitated the amendment of the *Native Title Act* 1993 (Cth) to validate pastoral leases that had been created by statute between 1/1/94 - 23/12/96: see Part 2 Div 2A *NTA* (Cth).

114 ss 19, 22F: *Native Title Act* 1993 (Cth).

Government enacted the *Native Title (Queensland) Act* (Qld) which complements and is generally consistent with the scheme and substance of the Commonwealth legislation. The Queensland Act is not intended to be comprehensive and where it is silent on a particular issue the provisions of the Commonwealth Act will apply.[115]

ESTABLISHING NATIVE TITLE TO NATIONAL PARK LANDS

A claimant who wishes to establish the existence of native title over an area of land declared to be a national park must prove a connection with the land or waters in accordance with the traditional laws and customs of the relevant Aboriginal group.[116] In *Mabo*, the High Court recognised that laws and customs can be those which are currently observed by members of a community provided there is continuity in the use of the land or resources.[117] A native title claimant must also conduct tenure searches of the land to which title is asserted in order to prove that there has been no prior extinguishment of native title rights as a result of inconsistent dealings with the land.

The extinguishment of native title over national park land may occur in any one of three stages[118]:

Extinguishment Prior to 1975

The common law as enunciated in *Mabo* governs extinguishment prior to 1975. On the matter of extinguishment, the High Court held that native title is subject to the powers of the Parliament to extinguish title by valid exercise of their respective powers, provided any exercise of those powers does not contravene the provisions of the *Racial Discrimination Act* 1975 (*RDA*).[119] It follows that acts done and grants made by the Commonwealth and States prior to the commencement of the *RDA* would not be invalid if their effect was to extinguish native title rights. The proper test for determining whether native title to land has been extinguished is whether a Crown act or grant indicates a clear and plain intention to extinguish such title.

In *Mabo*, Brennan J. was the only member of the Court to consider the question of whether or not native title would be extinguished by the appropriation of Crown land for use as a national park. In his Honour's opinion, if Crown land has been appropriated and used for a purpose that is consistent with the continuing concurrent enjoyment of native title over the land, such as national park land, native title to such land will not have been extinguished.[120]

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115 s 5 of the *Native Title (Queensland) Act* (Qld) provides that the words and expressions used in the *Native Title Act* (Cth) 1993 have the same meanings in the Queensland Act as they do in the Commonwealth Act, unless the context or the subject matter indicates otherwise or unless a different definition is given in s4 of the Queensland Act.

116 s 223.

117 per Brennan 58-63, per Deane and Gaudron JJ 88-90, 99-100, 109-110.

118 n 77, 117-121 *supra*.

119 *Id.* at 217.

120 *Id.* at 70.

Notwithstanding this dicta, it would be necessary to examine the provisions of the various pieces of legislation that have governed the management of national parks in Queensland for evidence of a clear and plain Parliamentary intention to extinguish native title.[121] While none of the Acts that have regulated the establishment and management of national parks in Queensland have expressly extinguished native title, the question arises whether such title may have been implicitly extinguished.[122] Such a determination would depend upon the restrictions imposed by the Acts, and the regulations established in accordance with the legislation and the management plans operating at each national park.

Extinguishment between 1975 and 1994

Both the *Native Title Act* 1993 (Cth) and the *Native Title (Queensland) Act* 1993 declare all 'past acts' attributable to the Crown to be valid.[123] In general, a 'past act' will be a Crown act that occurred prior to 1 January 1994.[124] The validation of such acts was necessary because they occurred subsequent to the commencement of the *Racial Discrimination Act*1975 (Cth), thereby placing their legal validity in doubt.[125] Both pieces of legislation recognise the entitlement to compensation of native title holders whose rights have been extinguished by a past act.[126]

'Past acts' are divided into four categories for the purpose of determining whether a particular act has extinguished native title. The category of past act applicable to the establishment of national parks is 'Category D'.[127] This category of past act does not extinguish native title.[128] However, if the establishment of a national park is considered to be wholly or partially inconsistent with the continued existence, enjoyment or exercise of particular native title rights, then those rights may not be enjoyed until the national park is de-gazetted.[129]

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121 This legislation includes the *State Forest and National Parks Act* 1906, the *National Parks and Wildlife Act* 1975 and the *Nature Conservation Act* 1992.

122 n 35, 12 *supra*.

123 ss 14 and 22A *NTA* (Cth); s 8 *NTA* (Qld).

124 s 228 *NTA* (Cth); s 7 *NTA* (Qld).

125 In accordance with s 9 of the *RDA*, actions which involve a distinction, exclusion, restriction or preference based on race which have the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise on an equal footing, of any human rights are unlawful. Section 10 makes it unlawful for a law of the Commonwealth or of a State or Territory to prevent a person of a particular race from enjoying a right that is enjoyed by persons of another race, and by operation of this section, persons of the first-mentioned race are entitled to enjoy that right to the same extent as persons of the other race.

126 s 17 *NTA* (Cth); s 15 *NTA* (Qld).

127 s 232 *NTA* (Cth); s 13(1) *NTA* (Qld).

128 s 15 (1)(d) *NTA* (Cth); s 13(2) *NTA* (Qld).

129 s 238 *NTA* (Cth).

Extinguishment after 1994

The *Native Title Act* 1993 (Cth) and the *Native Title (Queensland) Act* 1993 create a 'future act' regime to regulate Crown acts after 1 January 1994 which may affect native title rights and interests. Under the future act regime, native title rights over national park land may be extinguished, with the consent of the native title group, through entry into an indigenous land use agreement.[130] In any other case, valid future acts are subject to the non-extinguishment principle.[131]

It is the purpose of the future dealings regime to ensure that any proposed actions which will affect native title rights and interests should proceed only after negotiation and agreement with traditional owners. Therefore, if the Queensland Government declares a National Park after 1 January 1994, unless the 'future act' provisions of the legislation are complied with, this action will be invalid and will not extinguish any native title rights or interests subsisting in the land.[132] If a national park is declared over land that is subject to native title, the traditional owners may choose to negotiate a land use agreement that ensures the recognition of their interests in land use and management.[133] Such an agreement would be prudent given that the *Native Title Act*1993 (Cth) fails to provide for active participation by indigenous people in environmental decision-making.

Although native title rights and interests exist independently of any statutory acknowledgment of such rights, traditional owners are able to obtain approved determinations of their native title under both the State and Commonwealth

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130 ss 24BE and s 24CE of the *NTA* (Cth) provide that an area agreement or body corporate agreement may be entered subject to any conditions agreed by the parties. Under s 24DA, alternative procedure agreements must not provide for the extinguishment of any native title rights or interests.

131 s 24 AA (6).

132 s 24 AA (2).

133 This situation is similar to that which exists in Canada where it has been the policy of the Canadian government to negotiate regional land agreements with indigenous peoples who did not sign treaties but possess a continuing association with their traditional land. It is the purpose of these agreements to provide a legal framework for linking indigenous self-determination with social justice, economic development and environmental protection and management over large areas. In entering a regional agreement with the government , indigenous peoples must agree to surrender their indeterminate native title rights, subject to compensation, for a legislatively determined land tenure regime: K. McNeil, 'Co-existence of indigenous and non-indigenous land rights: Australia and Canada compared in light of the *Wik* decision' (1997) 4 (5) *Indigenous Law Bulletin* 4; B.J. Richardson, D. Craig, & B. Boer, 'Indigenous Peoples and Environmental Management: A Review of Canadian Regional Agreements and Their Potential Application to Australia – Part 1' (1994) *Environmental and Planning Law Journal* 320; B.J Richardson, D. Craig & B. Boer, 'Indigenous Peoples and Environmental Management: A Review of Canadian Regional Agreements and Their Potential Application to Australia – Part 2' (1994); *Ecopolitics IX: Perspectives on Indigenous Peoples Management of Environmental Resources*, Conference Papers and Resolutions, Northern Territory University, Darwin, Sept. 1-3 1995, Northern Land Council.

native title legislation.[134] The extent of the native title rights possessed by title holders are defined under s223 of the Commonwealth Act. This section states that native title rights and interests are those possessed under the traditional laws and customs of Aboriginal people who have a connection with land or waters.[135] It also provides that the native title rights and interests claimed by an individual or group must be recognised by the common law.[136] In this regard, the section expressly acknowledges the existence of native title rights such as hunting, fishing and gathering.[137] The recognition of such rights raises the question of the impact on native title rights of legislation that regulates the way in which individuals may use and exploit environmental resources.

REGULATION OF NATIVE TITLE RIGHTS BY ENVIRONMENTAL PROTECTION LEGISLATION

The courts have consistently held that legislation that regulates particular aspects of Aboriginal peoples usufructuary[138] relationship with land does not extinguish native title rights and interests. In *Mabo*, the High Court approved the Canadian Supreme Court decision of *R v Sparrow*[139] where it was held that the regulation of native title rights does not extinguish such rights due to the fact that a 'clear and plain intention' by the sovereign is required to extinguish an Aboriginal title or right. Similarly, in the recent High Court decision of *Yanner v Eaton*[140] the majority held that *"regulating* the way in which rights and interests may be exercised is not inconsistent with their continued existence."[141] The *Native Title Act* 1993 (Cth) also reflects the common law position by providing that the Act 'is not intended to affect the operation of any law of a State or Territory that is capable of operating concurrently with this Act.'[142] The effect of this section is that if a law is merely regulating native title rights, it will be capable of operating concurrently with native title.

Section 211 of the *Native Title Act* 1993 (Cth) governs the regulation of native title rights by Commonwealth, State or Territory laws that require individuals to

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134 s 13, Part 3 *NTA* (Cth).

135 s 223 (1) (a) and (b).

136 s223 (1) (c).

137 s 233 (2). However, as was previously noted, a person with native title rights to hunt and fish protected wildlife within a protected area, would not be entitled to ownership of that wildlife: ss 61 and 83-86 *Nature Conservation Act* 1992 (Qld). Section 17 of the *Native Title (Queensland) Act* confirms State ownership of fauna.

138 Usufructuary rights are possessed by a person who has the rights of reaping the fruits of things belonging to others, without destroying or wasting the subject over which such rights extend. This may comprise rights of access to land for the purpose of hunting, fishing or gathering. It follows that other people may also hold an interest in the same piece of land either concurrently or from time to time.

139 (1990) 1 SCR 1076.

140 [1999] HCA 53 (7 October 1999).

141 per Gleeson, CJ, Gaudron, Kirby and Hayne JJ at 11/47 (Austlii).

142 s 8.

possess a permit or authority prior to engaging in particular classes of activity. In essence, the effect of this section is that unless a law provides that a permit or licence is required to conduct a particular activity and that permit or licence is obtainable only by Aboriginal or Torres Strait Islander people, such regulation being for the benefit of indigenous people, then native title holders may ignore that law when conducting their traditional activities.

Applying this section to the provisions of the *Nature Conservation Act* 1992 (Qld) it may be argued that native title holders will be able to carry out their traditional activities within a national park without the need to obtain a permit or other authority. This is due to the fact that the *Nature Conservation Act* 1992 (Qld) does not confer the right to take, use or keep national park resources only on, or for the benefit of Aboriginal peoples. This conclusion is supported by the recent High Court decision in *Yanner v Eaton*. In that case the Court held that the appellant, a member of the Gangalidda tribe in the Gulf of Carpentaria, was entitled, under s 211 of the *Native Title Act* 1993 (Cth), to exercise his native title right to hunt or fish for crocodiles for the purposes of satisfying his personal, domestic or non-commercial needs. This was so despite the existence of provisions within the *Fauna Conservation Act* 1974 (Qld) that required persons to hold a permit in order to lawfully take or keep fauna of any kind[143] and vested property in such fauna in the Crown.[144] The majority of the Court found that the "property" which the legislation had vested in the Crown did not have the effect of extinguishing native title rights to fauna as it was no more than the aggregate of the various rights of control by the Executive to preserve and regulate the exploitation of an important resource.[145] It is submitted that the same conclusion would be reached in relation to ss 83-84 of the *Nature Conservation Act* 1992 (Qld), which vest property in protected plants and animals in the Crown, and s 62 which requires persons to obtain a permit or other authority in order to lawfully take, use, keep or interfere with a cultural or natural resource in a protected area. In this situation, traditional owners may choose whether or not to cooperate jointly with environmental managers to implement management regimes which advance the objectives of nature conservation while preserving the rights of Aboriginal owners to engage in subsistence activities.

CONCLUSION

The recognition of common law native title has the potential to provide many Aboriginal communities with the right to acquire increased responsibility for the control and management of their traditional country. By recognising Aboriginal people as the traditional owners of the Australian landscape, the common law has strengthened the right of indigenous people to manage Australia's land resources in accordance with their customary law. Therefore, even in those cases where native title to the land has been extinguished, Aboriginal people could reasonably expect to have a greater role in the use and management of

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143 s 54 (1)(a) *Fauna Conservation Act* 1974 (Qld).

144 s 7 *Fauna Conservation Act* 1974 (Qld).

145 per Gleeson CJ, Gaudron, Kirby, Hayne JJ at 10/47 (Austlii).

Queensland's natural and cultural resources.[146]

Whilst existing State legislation does permit Aboriginal ownership and use of national park lands, the right of the Aboriginal owners to control the management of these areas is highly qualified. Indeed, in the absence of proof of native title rights and interests in land, the role of Aboriginal people in protected area management is advisory at best. This situation is exemplified in those cases where national park land is not available for claim under the *Aboriginal Land Act* 1991 (Qld), and native title to the land has been extinguished. In such a case, government environmental agencies are under no legal obligation to actively seek Aboriginal participation in the control and management of such areas.

Given the inadequacies of Queensland's existing legislative framework, it would be desirable for the Commonwealth Government to seek to establish a national standard for Aboriginal participation in protected area management.[147] While it is unlikely that the Commonwealth will override existing State and Territory legislation on this matter, it could legislate to establish national criteria for the recognition of such rights. The need for Commonwealth intervention in this area has assumed increased significance in light of the recommendations made by a number of Commonwealth inquiries into the role of Aboriginal peoples in contemporary conservation management.

THE IMPACT OF RECENT COMMONWEALTH INQUIRIES INTO INDIGENOUS ISSUES

In the last decade the Commonwealth Government has initiated four major inquiries that have investigated the issue of Aboriginal and Torres Strait Islander involvement in the management of Australia's protected areas.[148])

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146 n 102, 24 *supra*.

147 Commonwealth Constitution: s 51 (xxvi) race power; s51 (xxix) external affairs power; s81 appropriation of revenue for the purposes of the Commonwealth; s96 granting of financial assistance to any State on such terms and conditions as the Commonwealth thinks fit eg. the provision of funding for programs which encourage Aboriginal participation in conservation management.

148 These include:

1. The Royal Commission Into Aboriginal Deaths in Custody - Commonwealth of Australia (1991).
2. Biodiversity: the Role of Protected Areas, House of Representatives Standing Committee on the Environment, Recreation and the Arts - HoRSCERA (1993) and the National Strategy for the Conservation of Australia's Biological Diversity – DEST (Department of Environment, Sport and Territories) and ANZEEC (1996) (Australia and New Zealand Environment and Conservation Council).
3. The Coastal Zone Inquiry - Resource Assessment Commission (1993).
4. Competing Interests: Aboriginal Participation in National Parks and Conservation Reserves in Australia - Australian Conservation Foundation (1994).

See generally: D. Smyth and J. Sutherland, *Indigenous Protected Areas: Conservation*

THE ROYAL COMMISSION INTO ABORIGINAL DEATHS IN CUSTODY

The Royal Commission into Aboriginal Deaths in Custody was established in 1987 to investigate the number of deaths in custody of Aboriginal and Torres Strait Islander peoples. The report found that the most significant reason for the high numbers in custody was the disadvantaged and unequal position of indigenous peoples in Australian society. To remedy this problem the report emphasised the need to empower Aboriginal and Torres Strait Islander peoples by returning them control of their lives and communities. Of particular relevance is the Royal Commission's Recommendation 315[149] which proposes:

a) the encouragement of joint management between identified and acknowledged representatives of Aboriginal people and the relevant State agency;

b) the involvement of Aboriginal people in the development of management plans for National Parks;

c) the excision of areas of land within National Parks for use by Aboriginal people as living areas;

d) the granting of access by Aboriginal people to National Parks and Nature Reserves for subsistence hunting, fishing and collection of material for cultural purposes (and the amendment of legislation to enable this);

e) facilitating the control of cultural heritage information by Aboriginal people;

f) affirmative action policies which give preference to Aboriginal people in employment as administrators, rangers, and in other positions within National Parks;

g) the negotiation of lease-back arrangements which enable title to land on which National Parks are situated to be transferred to Aboriginal owners, subject to the lease of the area to the relevant State or Commonwealth authority on payment of rent to the Aboriginal owners;

h) the charging of admission fees for entrance to National Parks by tourists;

i) the reservation of areas of land within National Parks to which Aboriginal people have access for ceremonial purposes; and

j) the establishment of mechanisms which enable relevant Aboriginal custodians to be in control of protection of and access to sites of significance to them

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Partnerships with Indigenous Landholders, (Canberra: Indigenous Protected Areas Unit, Biodiversity Group, Environment Australia, 1996) at 142-145.

149 This recommendation was submitted to the Conservation and Land Management meeting (held at Millstream on 6-8 August 1990) by representatives of Aboriginal communities and organisations.

Biodiversity: The Role of Protected Areas and The National Strategy for the Conservation of Australia's Biological Diversity

In 1992, the House of Representatives Standing Committee on the Environment, Recreation and the Arts conducted an inquiry into the role of protected areas for the purpose of preparing a strategy for the establishment of a comprehensive, representative system of nature conservation reserves. It recommended:

> .... that the Commonwealth seek the support of ANZECC to a policy framework for negotiations between indigenous people and conservation management agencies concerning the management of protected areas, based on Recommendation 315 of the Report of the Royal Commission into Aboriginal Deaths in Custody[150]

To date, no such framework has been formally adopted by ANZECC.

The HoRSCERA also recommended that management plans developed for national parks which formed "core protected areas" in a national system of ecologically representative areas include provision for the preservation of sites of significance to Aboriginal and Torres Strait Islander people. [151]

In recognition of Australia's international obligations under the Convention on Biological Diversity, the DEST and ANZECC formulated the National Strategy for the Conservation of Australia's Biological Diversity. The Strategy recognises that indigenous management practices have played an important role in the maintenance of biological diversity in Australia and that such practices should be integrated into existing management programs, with the consent of the indigenous people concerned.[152] The Strategy encourages the involvement of indigenous peoples in research programs relating to biological diversity and the management of lands and waters in which they have an interest. It further recommends that the application of indigenous peoples' ethnobiological knowledge should occur in a way that will ensure the equitable sharing of the benefits arising from its use.[153]

THE COASTAL ZONE INQUIRY

The Coastal Zone Inquiry conducted by the Resource Assessment Commission was the first national resource management inquiry to actively seek the views of Aboriginal and Torres Strait Islander people regarding their interests and concerns in coastal land and sea management.[154]

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150 *Biodiveristy: the role of protected areas*, Report of the House of Representatives Standing Committee on Environment, Recreation and the Arts, (Canberra: AGPS, 1993) at 70.

151 HoRSCERA, Recommendation 20.

152 *The National Strategy for the Conservation of Australia's Biological Diversity*, (Canberra: Department of Environment, Sport and Territories and Australian and New Zealand Environment and Conservation Council, 1996) at 14.

153 *Id.* at 35.

154 D. Smyth, *A Voice in All Places: Aboriginal and Torres Strait Islander Interests in Australia's Coastal Zone*, Revised Edition, Consultancy Report commissioned by the

The Final Coastal Zone Inquiry Report made a number of recommendations on how Aboriginal and Torres Strait Islander interests in land and sea management could be better represented. In particular, the Report recommended:

> The ANZECC, in conjunction with the Aboriginal and Torres Strait Islander Commission and representatives of Land Councils and other indigenous organisations, establish criteria for the participation of indigenous people in the management of conservation areas, including national parks, marine parks and World Heritage Areas[155]

COMPETING INTERESTS: ABORIGINAL PARTICIPATION IN NATIONAL PARKS AND CONSERVATION RESERVES IN AUSTRALIA

In 1992, the Australian Conservation Foundation (ACF), funded by the Commonwealth Department of Employment, Education and Training, prepared a report on the recognition of Aboriginal interests in the management of national parks and conservation reserves throughout the country. The recommendations that were made by this report included:

> The Department of the Prime Minister in Cabinet together with relevant Ministers and the ATSIC Commissioners investigate means by which negotiation processes may be established between governments and relevant Aboriginal groups with respect to the systematic identification of protected areas of traditional significance to Aboriginal people, and that these negotiations include provision for ensuring that Aboriginal people are party to the development of formalised consultative protocols when:
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> - new or amended legislation which will affect Aboriginal land or culture is anticipated
> - management plans for protected areas are being prepared, submitted for public comment, and finally gazetted
> - Aboriginal cultural information is utilised for management purposes[156]

Subsequent to this review, the Commonwealth Parliament legislated for the return of Jervis Bay National Park to its traditional owners, establishing joint management arrangements reflecting those that exist at Kakadu and Uluru National Parks.[157] While the negotiation of this arrangement indicated a willingness on the part of the Commonwealth Government to promote Aboriginal participation in the management of protected areas, it has not seen it fit to facilitate the formulation of such arrangements outside of its jurisdiction.

At present, no national guidelines have been adopted for the purpose of regulating indigenous involvement in the management of Australia's

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Resource Assessment Commission, Coastal Zone Inquiry, (Canberra: 1993).

155 *Coastal Zone Inquiry – Final Report*, Resource Assessment Commission (Canberra: AGPS, 1993), Recommendation 19.

156 n 35, 37 *supra*.

157 n 66, 144 *supra*.

conservation reserves. Indeed, there has been no serious consideration of the circumstances in which indigenous peoples could be involved in environmental management in general. Although it is clear that governments are making advancement in this area, in the absence of a national policy framework that implements the recommendations made by the various inquiries, indigenous involvement in protected area management will continue to proceed on an advisory and ad hoc basis. This would clearly negate the fulfillment of the Commonwealth's international obligations to ensure the effective participation of indigenous peoples in the sustainable use and management of the natural environment.

However, the existence of a policy framework *per se* will not ensure the increased involvement of Aboriginal peoples in protected area management. It is necessary that such a framework should be supported by a political will to address Aboriginal issues at more than a superficial level. Without governmental endorsement of indigenous rights to participate in environmental management, it will be difficult to achieve substantive advancement in this area. The management arrangements in the Wet Tropics World Heritage Area provide a poignant example of the way in which governments may stifle Aboriginal involvement in conservation management despite the existence of policies and legislations supporting such rights.

ABORIGINAL MANAGEMENT ARRANGEMENTS IN THE WET TROPICS WORLD HERITAGE AREA

Since time immemorial, Rainforest Aboriginal people have been the custodians of the Wet Tropics region of North Queensland.[158] This region is comprised of over sixteen Aboriginal language groups and associated communities that possess cultural connections to the land. The Rainforest Aboriginal people view the area as a 'living' cultural landscape where the natural features of the region are inseparable from their spirituality, economic use of the land and social organisation.[159] It is for this reason that Rainforest Aboriginal groups view involvement in the management of the Wet Tropics region as essential to their continuing cultural integrity and survival.

The Hawke Labor Government nominated the Wet Tropics region for inclusion on the natural properties World Heritage List in 1987. On 9 December 1988, listing was approved and the Wet Tropics of Queensland World Heritage Area was established.[160] In 1990, the Queensland and Commonwealth governments

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158 This group is comprised of tribes that have traditionally occupied the rainforest regions of far North Queensland. For example, the Jumbun, Jiddabul, Waragamay, Nwaigi, Warangnu, Banjin, Girramay and Tjapukai peoples.

159 L. Trott, S. Goosem, A. Reynolds, *Wet Tropics in Profile: a reference guide to the Wet Tropics of Queensland World Heritage Area*, Wet Tropics Management Authority (Cassowary Publications, 1996) at 39.

160 The Wet Tropics World Heritage Area was listed after meeting all four criteria for inclusion on the World Heritage list as a natural heritage property. Article 2 of the Convention provides that a property must:

agreed to jointly fund and manage the Wet Tropics World Heritage Area, signing an agreement that established the Wet Tropics Management Authority (WTMA) as the coordinating management body for the Area.[161] The day-to-day management of the Area is undertaken by various State government agencies including the Environmental Protection Agency, the Department of Natural Resources and the Department of Primary Industries. The management mechanisms implemented by these agencies are regulated under the *Wet Tropics World Heritage Protection and Management Act* 1993 (Qld), the *Wet Tropics of Queensland World Heritage Area Conservation Act* 1994 (Cth) and the *Wet Tropics Management Plan* 1998.

The Preamble to the *Wet Tropics World Heritage Protection and Management Act* 1993 (Qld) recognises Australia's obligation under the World Heritage Convention to protect, conserve, present and transmit to future generations the natural heritage of the Wet Tropics World Heritage Area.162 The Preamble also stipulates that it is the intention of Parliament to ensure that effective and active measures are taken in order to meet this obligation.163 In this context, the legislation confirms the importance of Aboriginal involvement in the management of the Area:

> "It is also the intention of the Parliament to acknowledge the significant contribution that Aboriginal people can make to the future management of cultural and natural heritage within the Area, particularly through joint management agreements."[164]

In accordance with these objectives it is the function of Wet Tropics Management Authority to co-ordinate and monitor management activities in the

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(1) be an outstanding example representing major stages of Earth's history, including the record of life, and significant ongoing geological processes in the development of landforms, or significant geomorphic or physiographic features; or

(2) be an outstanding example representing significant ongoing ecological and biological processes in the evolution and development of terrestrial, fresh water, coastal and marine ecosystems and communities of plants and animals; or

(3) contain superlative natural phenomena or areas of exceptional natural beauty and aesthetic importance; or

(4) contain the most important significant habitats for in situ conservation of biological diversity, including those containing threatened species of outstanding universal value from the point of view of science or conservation.

161 *op. cit.* at 6. The Authority was created by the Commonwealth and Queensland governments in accordance with the Wet Tropics World Heritage Area Management Scheme, 16 November 1990. This agreement is scheduled to the *Wet Tropics World Heritage Protection and Management Act* 1993 (Qld).

162 Preamble, paragraph 4.

163 Preamble, paragraph (7). This Parliamentary intention is consistent with the provisions of the World Heritage Convention which provide that in fulfilling their obligations under the Convention, state parties must do all that they can, to the utmost of their resources: Article 4.

164 Preamble, paragraph (8).

Area to ensure that they complement and fulfil Australia's obligations under the World Heritage Convention.[165] When performing its functions, the Authority must as far as practicable liase and cooperate with Aboriginal people and have regard to the tradition of Aboriginal people particularly concerned with land in the area.[166] In particular, the Authority must enter into, and facilitate the entering into of, cooperative management agreements (including joint management agreements) with Aboriginal people.[167] Such agreements may make provision for financial, scientific, technical or other assistance in relation to the management of the region.[168] The provisions of the *Wet Tropics Management Plan*[169] also support the negotiation of joint management agreements with the region's Rainforest Aboriginal peoples. This Plan recognises that in order to ensure the continued protection of the World Heritage Area's natural values, it will be necessary to procure the support of Aboriginal groups and communities particularly concerned with the Area.[170]

The Commonwealth *Wet Tropics of Queensland World Heritage Area Conservation Act* 1994 further seeks to provide mechanisms for increased Aboriginal involvement in management of the Area by requiring that there be an Aboriginal representative on the Management Authority's Board of Directors.[171] The Minister must also use his/her best endeavours to ensure Aboriginal representation on any advisory committees established by the Authority.[172]

In recognition of the contribution that Rainforest Aboriginal people can make to the management of the cultural and natural heritage values of the Wet Tropics region, the Authority has established the Aboriginal Resource Management Program. It is the purpose of this program to provide increased avenues for Aboriginal people to work with the Authority and to ensure that effective communication occurs between Aboriginal peoples and government land management agencies in the region. The Program contracts Aboriginal representative bodies, such as Bama Wabu[173] and the Girringun Elders and

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165 *Draft Wet Tropics Plan: Protection Through Partnerships*, (Cairns: Wet Tropics Management Authority, 1995) at 16.

166 s 10 (5).

167 s 10 (1)(f).

168 s 10 (3).

169 The Plan commenced operation on 1 September 1998.

170 *Protection Through Partnerships: Policies for Implementation of the Wet Tropics Plan*, (Cairns: Wet Tropics Management Authority, 1997) at 23.

171 s 6.

172 s 6.

173 Bama Wabu is a coalition of Aboriginal tribal and cultural corporation from the Wet Tropics region that works on the 'big picture' issues that are common to most Aboriginal groups. This includes issues such as the protection of native title rights and interests, cultural heritage management and walking track planning. Bama Wabu does not speck for tribes' traditional country. The group advises the WTMA on Aboriginal rights, issues and views.

Reference Group Aboriginal Corporation[174] to provide three Aboriginal Community Liaison Officers who work with Rainforest Aboriginal peoples in the planning and management of the World Heritage Area.[175]

Notwithstanding the existence of such procedures, a recent Review into Aboriginal involvement in the management of the Wet Tropics region has found that Aboriginal communities have been given limited opportunities to participate in existing management arrangements. The Review, titled *Which Way Our Cultural Survival?,* was initiated in 1996 and was completed in April 1998. It was commissioned by the Wet Tropics Ministerial Council and the Wet Tropics Management Authority after much lobbying by Rainforest Aboriginal groups who desired increased responsibility for the management of their traditional country.

The major finding of the Review was that on the whole, the Wet Tropics management agencies were not living up to their legislative obligations to promote increased levels of meaningful Aboriginal involvement in management processes. It was concluded that this situation was the result of a lack of commitment and political will to address Aboriginal issues at more than a superficial level.[176] The Review also found that the current Wet Tropics Management Plan gives inadequate attention to Aboriginal issues particularly in relation to the potential implications of native title for management arrangements. It concluded that in order to ensure that the World Heritage values of the region remain protected in accordance with Australia's international obligations, it would be prudent for management agencies to work more closely and actively with traditional owners.[177] The Review also identified and supported the desire of Rainforest Aboriginal peoples to meet their land management and religious obligations as defined in traditional law and custom. In this context, it was recognised that Aboriginal peoples are prepared to work collaboratively with Wet Tropics management agencies in order to achieve their management objectives.[178]

The recommendations of the Review were focussed at two levels of operation and implementation. The first level relates to changes that are capable of immediate implementation. They specifically relate to practical management issues at the day-to-day level of operation. The second level concentrates on fundamental issues associated with negotiated regional management agreements

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174 This Aboriginal Corporation represents the Jiddabul, Waragamay, Nwaigi, Warangnu, Banjin, Girramay and Gulnay people. The organisation works on behalf of these groups on issues such as the preparation of native title claims, cultural heritage management, employment and training, and negotiations concerning land use and protected area management with Shire Councils and government agencies.

175 *Building Bridges* (Cairns: Aboriginal Resource Management Program, Wet Tropics Management Authority, 1999).

176 *Which Way Our Cultural Survival?* , Selected extracts: a summary of *The Review of Aboriginal Involvement in the Management of the Wet Tropics World Heritage Area,* 1998 at 4.

177 *Id.* at 7.

178 *Id.* at 7-8.

between Rainforest Aboriginal people and government agencies that require ongoing development. Some of these issues include cultural heritage protection, traditional resource use, permit decision-making, employment and training, fire management, assessment of development proposals, and research, consultation and negotiation protocols. These key negotiating points are seen by the Review as forming the foundation for the development of an Interim Negotiating Forum and a Final (Regional Wet Tropics) Agreement.[179] It will be the function of these agreements to resolve existing barriers to meaningful management of the Area from both indigenous and non-indigenous perspectives.[180] They will also provide a framework for the implementation of the various recommendations made by the Review.

In addition to the development of the Final Agreement, the Review also supported the proposal for a detailed assessment of the cultural values of the region.[181] It was proposed that the results of such an assessment could serve to justify re-listing of the Wet Tropics as a cultural heritage property under the World Heritage Convention.[182] This proposal has been put forward by Rainforest Aboriginal people since the Wet Tropics was first listed as a natural heritage property. It is perceived that re-listing of the Area as a cultural heritage property would necessitate increased Aboriginal involvement in management of the region and ensure paramount protection for the Area's cultural values.[183]

CONCLUSION

In order to fulfil its international obligations under the World Heritage Convention the Commonwealth Government must protect and conserve the natural heritage values of the Wet Tropics Area to the utmost of its resources.

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179 The Wet Tropics Management Authority and Bama Wabu (the peak Rainforest Aboriginal organisation in the Wet Tropics World Heritage Area) are currently discussing the budget for the Interim Negotiating Forum. These two groups have also developed the *Interim Protocols for Aboriginal Participation in the Management of the Wet Tropics World Heritage Area*: Wet Tropics Management Authority, June 1999.

180 n 179, 8 *supra*.

181 *Id.* at 8. The Commonwealth government would fund this assessment.

182 Article 1 of the World Heritage Convention states that the following shall be considered as 'cultural heritage':

> monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art of science;
>
> groups of buildings: groups or separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;
>
> sites: works of man or the combined works of nature and of man, and areas including archaeological sites which are of outstanding universal value from the point of view of science, conservation or natural beauty.

183 See generally: S. Stevens (Ed), *Conservation Through Cultural Survival: Indigenous Peoples and Protected Areas* (Washington DC: Island Press, 1997) at 297.

This necessarily requires that the Wet Tropics Management Authority and State government environmental agencies seek to involve Rainforest Aboriginal peoples in all aspects of planning and management for the region. By seeking the joint involvement of Rainforest Aboriginal people in the development of management strategies and techniques, government management agencies will be able to harness the traditional knowledge and management practices that have contributed to the establishment of the area's natural heritage values. In this way,

The Commonwealth and Queensland governments will be taking effective measures to meet Australia's international environmental obligations whilst ensuring the continued preservation of indigenous cultural integrity.

The need for genuine involvement of the area's traditional owners becomes even more significant when one considers that more than 80 per cent of the Wet Tropics region could potentially be claimable under common law native title.[184] The uncertainties that surround the content of native title and the implications this may have for future conservation management could represent major challenges for the maintenance of the region's natural and cultural values. Therefore, it would be prudent for all levels of government to begin to engage in meaningful and genuine discourse with indigenous owners prior to the determination of native title applications. This process will require a genuine commitment by all interested parties to resolve areas of competing interests on the basis of mutual respect, power sharing and open communication.[185]

CONCLUSION

In Queensland, the negotiation of joint management arrangements over land of high conservation value has occurred only in those cases where land has been claimed under statutory or native title processes. In such cases, the granting of title to Aboriginal claimants has been subject to the requirement that the land be leased back to the government for management as a national park. The legislative arrangements established for this purpose have failed to build upon the precedent set by the Commonwealth

Government for the joint involvement of Aboriginal peoples in natural and cultural resource management. Aboriginal communities who successfully claim their traditional lands under State legislation have no legal assurance of majority representation on Boards of Management and they possess no rights of ownership in relation to the parks' cultural and natural resources. At best, Queensland's Aboriginal land owners may expect to participate in the management of their traditional land and cultural heritage as mere 'advisors' to government environmental agencies.

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184 *Wet Tropics Facts*: Aboriginal Resource Management Program, Wet Tropics Management Authority, 1999.

185 See generally: S. Stevens, 'Lessons and Directions' in: S. Stevens (Ed), *Conservation Through Cultural Survival* (Washington DC: Island Press, 1997) at 297.

In order to ensure that contemporary land management regimes give adequate attention to Aboriginal responsibilities for land, the Queensland Government must demonstrate a commitment to addressing indigenous issues at more than a superficial level. This will require the development of a policy framework that adequately addresses Aboriginal interests in conservation management and the improvement of existing mechanisms for the settlement of outstanding native title claims. The adoption of such an approach would be consistent with current international support for the recognition of indigenous rights to participate in the sustainable use and management of the natural environment. It would also build upon the various recommendations of Commonwealth Government inquiries that have identified the need for substantive involvement of indigenous peoples in the management and control of Australia's protected areas.

To date, indigenous input into this debate has been minimal, probably due to the fact that communities and individuals have had to focus on the more fundamental problems of self-determination, native title and general discrimination. But surely it is in the interests of reconciliation that the Queensland Government must take the initiative to recognise the right of indigenous peoples to participate in contemporary protected area management. The existence of a situation whereby Aboriginal peoples should be forced to engage in a legal and political struggle to gain recognition of every fundamental right to which they are entitled is clearly unacceptable, due to their position as the original owners and managers of the Australian landscape. It is for this reason that the process of negotiation must begin now, in both the spirit of reconciliation and the interests of environmental conservation.