

LOOKING AFTER COUNTRY: LEGAL RECOGNITION OF TRADITIONAL RIGHTS TO AND RESPONSIBILITIES FOR LAND

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... today we have the paradox of Aboriginal land use and tenure being examined more closely than ever before. The reasons for this surprising turn of events are political and legal as well as scholarly. Argument and legislation over land rights are giving fresh relevance to old studies. Anthropologists are assuming an extra role by preparing land claims. Empty woods and wilds are being occupied once more as a back-to-the-land movement gathers momentum. And all this is happening in a climate of opinion troubled by man's responsibility for nature and the settler's duty to the native.¹

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1 K Maddock *The Australian Aborigines: A Portrait of their Society* (2nd ed, 1982) p 29.

I. INTRODUCTION

This article considers some recent legislative and judicial developments in Australia concerning the legal recognition of the rights and responsibilities of Aborigines and Torres Strait Islanders for land, particularly as those developments are relevant to environmental matters. The developments include:

- enactment by the Queensland Parliament of the *Aboriginal Land Act 1991* (Qld) and the *Torres Strait Islander Land Act 1991* (Qld) under which land may be granted, or claimed by and granted, to Aborigines and Torres Strait Islanders (the legislation facilitates claims to and joint management of national park land, and contains a number of references to responsibilities for land); and
- the handing down in June 1992 of the High Court of Australia's decision in *Mabo v Queensland (No 2)*,² in which the Court formulated the common law recognition of native title in Australia and, in doing so, looked to developments in international law and in the domestic law of other countries.

The article considers those developments in light of international actions which have had an impact on the standards by which domestic laws and governmental policies are assessed. Recent international actions include:

- the release of the *Rio Declaration on Environment and Development* following the United Nations Conference on Environment and Development in Rio de Janeiro in June 1992, which Declaration included a statement that indigenous people have a vital role in environmental management and development; and
- the work undertaken in the period preceding 1993 (the United Nations Year of the World's Indigenous Peoples) on the development of an international declaration of the rights of indigenous peoples. That work continues, and it is likely that any such instrument will include provisions about the rights of indigenous peoples to own and use land and natural resources.

Reference will be made first to aspects of international law that are influencing the development of environmental law and Aboriginal land rights law in Australia. Second, domestic legislation providing for the grant of land to Aborigines and Torres Strait Islanders will be summarised, with particular emphasis being given to the 1991 Queensland legislation. Third, closer attention will be given to traditional Aboriginal notions of responsibility for land and the recognition which has been given to those notions in some legislation, primarily in the Northern Territory and Queensland. That feature of the legislation and judicial discussions of traditional

2 (1992) 175 CLR 1, 66 ALJR 408, 107 ALR 1.

responsibilities for land are relevant to the general debate about preserving and managing the environment.

II. INTERNATIONAL LAW AND AUSTRALIAN LAW

International law is influencing a number of aspects of Australian domestic law. It is increasingly relevant to Australian environmental law because, as a member of the international community, Australia implements international conventions to which it has acceded. Federal environmental laws are made primarily in reliance on the power to make laws with respect to external affairs because the legislative powers under the Australian Constitution contain no express and specific power to make laws with respect to the environment.

Of the legislative powers conferred on it by the Constitution,³ the power to make laws with respect to external affairs has proved to be a broad and controversial source of legislative power.⁴ According to the High Court, the existence of an international treaty obligation is sufficient (though not always necessary) to give rise to an external affair. There is no additional, independent requirement that the subject matter of the treaty be of international concern. On that basis it may be possible for the Federal Parliament to pass a range of valid laws, so long as they are in faithful pursuit of an obligation imposed by the international agreement and they are not in breach of other constitutional limitations.⁵

There are various international agreements dealing with the preservation of world cultural and natural heritage, reflecting international concern about the environment and its resources. This has indirectly given the Commonwealth a major interest in environmental protection in Australia, particularly in areas on the world heritage list with respect to which it has legislated.⁶

The influence of international law on environmental law in Australia has parallels in the development of some laws dealing with race relations in Australia.

3 Examples of other powers on which the Federal Parliament may rely are the powers to make laws with respect to trade and commerce (s 51(i)); foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth (s 51(xx)); taxation, bounties, customs and excise (ss 51(ii), 51(xii), 90 and 99); external affairs (s 51 (xxix)); the people of any race (s 51(xxvi)); territories (s 122); defence (s 51(iv)); fisheries (s 51(x)); Commonwealth places (s 52(i)), as well as the power to make specific purpose grants (s 96) and the national implied power. For a discussion of how these powers have been used see Australian Government Printing service *Final Report of the Constitutional Commission* (1988) vol 2 pp 757-67.

4 The best known judicial exposition of the exercise of the power to make federal laws about the environment in recent years was in the Tasmanian Dams Case: *Commonwealth v Tasmania* (1983) 158 CLR 1; see also *Richardson v The Forestry Commission* (1988) 164 CLR 261.

5 For example, s 92 and the need to preserve the existence of the states in their functioning as independent units.

6 Chief Justice Mason has observed, "Entry of a property in the World Heritage List supported by the protection given by the Act, constitutes perhaps the strongest means of environment protection recognised by Australian law." *Queensland v Commonwealth* (1988) 77 ALR 291 at 296; 62 ALJR 143 at 146.

After Australia had become a party to the *International Convention on the Elimination of All Forms of Racial Discrimination*,⁷ the Federal Parliament enacted the *Racial Discrimination Act 1975* (Cth) (the Racial Discrimination Act). The Parliament relied on its constitutional power to make laws with respect to external affairs. Three of the leading cases brought before the High Court under that Act involved Aboriginal or Torres Strait Islander land issues.

*Koowarta v Bjelke-Petersen*⁸ arose out of an action brought by an Aboriginal man who alleged that the Queensland Minister for Lands had refused to grant consent to the transfer of a lease which had been bought by the Aboriginal Land Fund Commission for use by the man's group. The State Government at that time did not view favourably proposals to acquire large areas of land for separate development by Aborigines. In that case the High Court held that certain sections of the Racial Discrimination Act were valid laws with respect to external affairs within s 51(xxix) of the Australian Constitution.

In *Gerhardy v Brown*,⁹ the High Court held that a certain section of the *Pitjantjatjara Land Rights Act 1981* (SA) was inconsistent with sections of the Racial Discrimination Act, but that the section was valid because the land rights legislation was a 'special measure' of the type contemplated by the Racial Discrimination Act.

In *Mabo v Queensland*¹⁰ (*Mabo (No 1)*), a majority of the High Court held that the *Queensland Coast Islands Declaratory Act 1985* (Qld) was inconsistent with the Racial Discrimination Act. The 1985 Act declared, among other things, that when islands became part of the Colony of Queensland in 1879 they were vested in the Crown in right of Queensland freed from all other rights, interests and claims of any kind whatsoever. The Court held, by majority, that (assuming the plaintiffs could establish legally recognisable rights in respect of the islands) the Queensland legislation would have extinguished those rights and so was inconsistent with s 10(1) of the Racial Discrimination Act and so, by reason of s 109 of the Australian Constitution was invalid or inoperative.¹¹

Each of those cases involved issues about land in which Aborigines or Torres Strait Islanders had an interest. In each case it was the High Court of Australia which was deciding on the operation of Australian legislation. But the federal legislation had its origins in an international convention, and the Federal Parliament's power to enact that legislation was the constitutional power to make laws with respect to external affairs.

7 Australia ratified the Convention on 30 September 1975.

8 (1982) 153 CLR 168.

9 (1985) 159 CLR 70.

10 (1988) 166 CLR 186.

11 *Ibid* at 233 per Deane J, at 214, 219 per Brennan, Toohy and Gaudron JJ.

Where the Federal Parliament relies on the external affairs power to make laws about the environment or race-related matters, then the Parliament is subject to constitutional constraints peculiar to the exercise of that power. There are no such constraints on the Parliament's power to make laws with respect to Aborigines and Torres Strait Islanders under s 51(xxvi) of the Australian Constitution. The Federal Parliament has concurrent power with the states to make laws concerning Aboriginal and Torres Strait Islander land matters and the protection of indigenous cultural heritage.¹²

Such matters are the subject of domestic legislation and are developed in accordance with local circumstances. The legislation need not rely on or be derived from international treaties or other international instruments. But that does not mean that international law and international standards are irrelevant, or that the external affairs power has no significance.

As part of the international debate about environmental issues attention has been given to indigenous peoples' links to land. In its report *Our Common Future*,¹³ the World Commission on Environment and Development argued that tribal and indigenous peoples will need special attention as the forces of economic development disrupt their traditional lifestyles. According to the Commission, those lifestyles can offer modern societies many lessons in the management of resources in complex forest, mountain, and dryland ecosystems. The traditional rights of those people should be recognised and they should be given a decisive voice in formulating policies about resource development in their areas.¹⁴

The starting point for a just and humane policy for such groups is the recognition and protection of their traditional rights to land and the other resources that sustain their way of life - rights they may define in terms that do not fit into standard legal systems. These groups' own institutions to regulate rights and obligations are crucial for maintaining the harmony with nature and the environmental awareness characteristic of the traditional way of life.¹⁵

The *Rio Declaration on Environment and Development* (the Rio Declaration), released after the United Nations Conference on Environment and Development in Rio de Janeiro in June 1992, contained a statement of 27 principles on general rights and obligations. Principle 22 states:

Indigenous people and their communities, and other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognise and duly support their

12 See *Commonwealth v Tasmania* note 4 *supra* at 158-60 per Mason J, at 180-1 per Murphy J, at 244-6 per Brennan J, at 274-6 per Deane J; see also 110-11 per Gibbs CJ at 202-3 per Wilson J at 321 per Dawson J. For more recent references to s 51(xxvi) see *Mabo v Queensland (No 2)* note 4 *supra* CLR at 106 per Deane and Gaudron JJ; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 56-57 per Gaudron J.

13 World Commission on Environment and Development *Our Common Future* (1987).

14 *Ibid* pp 12, 114-116.

15 *Ibid* p 115.

identity, culture and interests and enable their effective participation in the achievement of sustainable development.

Our Common Future and the Rio Declaration do not stand alone in calling for recognition of the interests of indigenous people in land and their role in environmental matters. More such statements are anticipated.

There is an international expectation that an international convention on the rights of indigenous people will be produced in the near future. Since the early 1980s the United Nations Working Group on Indigenous Populations (WGIP) has met annually in Geneva to prepare such an instrument. It is likely that, among other things, the instrument will contain provisions concerning rights with respect to land.¹⁶

The 1992 draft of *The Declaration on the Rights of Indigenous Peoples* (the Draft Declaration)¹⁷ contains a number of direct references to land and the environment. In particular, clauses 15-20 proclaim the following rights:

15. Indigenous peoples have the right to recognition of their distinctive and profound relationship with the total environment of the lands, territories and resources which they have traditionally occupied or otherwise used;
16. Indigenous peoples have the collective and individual right to own, control and use the lands and territories they have traditionally occupied or otherwise used. This includes the right to the full recognition of their own laws and customs, land-tenure systems and institutions for the management of resources, and the right to effective measures by States to prevent any interference with or encroachment upon these rights. Nothing in the foregoing shall be interpreted as restricting the development of self-government and self-management arrangements not tied to indigenous territories and resources;
17. Indigenous peoples have the right to the restitution or, where this is not possible, to just and fair compensation for lands and territories which have been confiscated, occupied, used or damaged without their free and informed consent. Unless otherwise freely agreed upon by the peoples concerned,

16 For articles on the work of the United Nations Working Group on Indigenous Populations and the participation of Australians in support of it see the following articles in the *Aboriginal Law Bulletin* (ALB): D Weisbrot "Indigenous Populations" (1985) 13 ALB 12; "UN Action on Aboriginal Rights" (1985) 15 ALB 1; D Weisbrot "Indigenous Workings: The Geneva Story Continued" (1985) 16 ALB 10; T Simpson "UN Action on Aboriginal Rights: An Australian Perspective" (1985) 16 ALB 11; T Simpson "On the Track to Geneva" (1986) 19 ALB 8; T Simpson "Geneva, September '86" (1987) 24 ALB 7; T Simpson "Indigenous Rights - Finding a Voice at the UN" (1987) 28 ALB 9; T Simpson "Geneva - Indigenous Rights in International Forums" (1988) 34 ALB 10; S Houston "Capturing the Clouds" (1989) 40 ALB 6; C Huntsman "Experiencing the United Nations" (1989) 40 ALB 7; Department of Aboriginal Affairs "The Australian Government and Indigenous Peoples' Issues" (1989) 40 ALB 9; S Pritchard "UN Working Group on Indigenous Populations" (1992) 54 ALB 13.

17 This is the draft which was the basis of discussion at the Working Group on Indigenous Populations (WGIP 10) meeting in July 1992. It does not include changes suggested during the WGIP 10 meeting or subsequently by governments, indigenous peoples' organisations and other interested parties.

- compensation shall preferably take the forms of lands and territories of quality, quantity and legal status at least equal to those which were lost;
18. Indigenous peoples have the right to the protection and, where appropriate, the rehabilitation of the total environment and productive capacity of their lands and territories, and the right to adequate assistance including international co-operation to this end. Unless otherwise freely agreed upon by the peoples concerned, military activities and the storage or disposal of hazardous materials shall not take place in their lands and territories;
 19. Indigenous peoples have the right to special measures for protection, as intellectual property, of their traditional cultural manifestations, such as literature, designs, visual and performing arts, seeds, genetic resources, medicine and knowledge of the useful properties of fauna and flora.
 20. The right to maintain and develop within their areas of lands and other territories their traditional economic structures, institutions and ways of life, to be secure in the traditional economic structures and ways of life, to be secure in the enjoyment of their own traditional means of subsistence, and to engage freely in their traditional and other economic activities, including hunting, fresh- and salt-water fishing, herding, gathering, lumbering and cultivation, without adverse discrimination. In no case may an indigenous people be deprived of its means of subsistence. The right to just and fair compensation if they have been so deprived.

The preamble to the Draft Declaration recites such things as:

- the recognition of the need to respect and promote the rights and characteristics of indigenous peoples, especially their rights to their lands, territories and resources, which stem from their history, philosophy, cultures and spiritual and other traditions, as well as from their political, economic and social structures; and
- endorsement of efforts to revitalise and strengthen the societies, cultures and traditions of indigenous peoples, through their control over development affecting them on their lands, territories and resources, as well as to promote their future development in accordance with their aspirations and needs.

Other provisions in the Draft Declaration also relate to the rights of indigenous people concerning land and environmental matters.¹⁸

The provisions of any such declaration will not be without precedent. *International Labor Organisation Convention 169 Concerning Indigenous and*

18 Clause 25 for example refers to the "collective right to autonomy in matters relating to their own internal and local affairs, including...traditional and other economic and management activities, land and resources administration and the environment, as well as internal taxation for financing these autonomous functions". See also references to the right of indigenous peoples to "revive and practise their cultural identity and traditions" (cl 8) and to "manifest, practise and teach their own spiritual and religious traditions, customs and ceremonies" (cl 9). For a discussion of the antecedents of the Draft Declaration see the documents quoted by Professor Brownlie in *Treaties and Indigenous Peoples: The Robb Lectures* (1992) especially ch 3.

Tribal Peoples in Independent Countries (ILO Convention 169), which revises the *Indigenous and Tribal Populations Convention 1957* (ILO Convention 107), contains a statement about certain rights with respect to land and natural resources.¹⁹ It contains numerous references to 'rights' and to 'fundamental freedoms'. Part II (Arts 13-19) deals with land and provides, among other things, for the recognition and protection of the "rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy", the taking 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", the safeguarding of "the rights of the peoples concerned to the natural resources pertaining to their lands", and the respecting of "procedures established by the peoples concerned for the transmission of land rights among members of these peoples". The Convention provides: "Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned".

In applying the provisions of Part II of ILO Convention 169, governments shall "respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands...which they occupy or otherwise use, and in particular the collective aspects of this relationship" (Art 13). In more general terms, the Convention provides for the recognition and protection of the "social, cultural, religious and spiritual values and practices of these peoples" (Art 5(a)) and for "due regard" to be had to "their customs or customary laws" when national laws are applied to those people (Art 8.1). Australia has been represented by Federal Government Ministers and officials at meetings of the WGIP and at meetings for the preparation of ILO Convention 169. Aborigines have also been actively involved in these processes, particularly at WGIP meetings.

Australia has not yet ratified the ILO Convention 169, but Australia's domestic performance in the recognition of the rights of indigenous people to land is, and will continue to be, the subject of regular scrutiny.²⁰ The adoption of international

19 For articles on the revision of ILO Convention 107 and the preparation of ILO Convention 169 see the following articles in the *Aboriginal Law Bulletin* (ALB): E Lucas "Towards An International Declaration on Land Rights" (1985) *ALB* 10; T Simpson "ILO 107 - A Licence to Rights" (1987) 24 *ALB* 10; T Simpson "Indigenous Rights: Finding a Voice at the UN" (1987) 28 *ALB* 9; G Nettheim "Geneva: Revision of ILO Convention No 107 1988" (1988) 34 *ALB* 12; G Clarke "National Coalition of Aboriginal Organisations of Australia: Statement During the ILO Conference 1988" (1988) 34 *ALB* 13; G Clarke "ILO Convention 107 - Revision or Reversion" (1989) 40 *ALB* 4. See also "ILO: Convention on Tribal and Indigenous Populations" *Australian Foreign Affairs Record*, June 1987, 232.

20 On the international aspects of Aboriginal issues see AE Woodward *Aboriginal Land Rights Commission Second Report* (1974) p 2; AE Woodward "Land Rights and Land Use: A View from the Sidelines" (1985) 59 *Australian Law Journal* 413; G Nettheim "The Relevance of International Law" in P Hanks and B Keon-Cohen (eds) *Aborigines and the Law* (1984) pp 50-73; G Nettheim "Indigenous Rights, Human Rights and Australia" (1987) 61 *Australian Law Journal* 291; G Bennett "The Developing Law of Aboriginal Rights"

instruments has been and will continue to be a means by which such performance can be measured. It is conceivable, though by no means inevitable, that domestic legislation will adopt or adapt the language of such instruments for local purposes. In any case, as Mason CJ has recognised, broad concepts of human rights as expressed in international instruments "are the subject of infinite variation throughout the world. ...Although there may be universal agreement that a right is a universal right, there may be no universal or even general agreement on the content of that right".²¹ It is in the working out of that content that legislators (and, to a lesser extent, judges) have to come to grips with the competing interests of different groups within the general Australian community.²²

Before considering some of the domestic legislation concerning indigenous land matters, however, it is instructive to consider how international law has influenced the Australian common law about the interests of Aborigines and Torres Strait Islanders in land. When developing that part of the common law, our superior courts have looked outside Australia for guidance. The recent judgment of the full High Court *Mabo v Queensland (No 2)*,²³ and the judgment of Blackburn J in the *Gove Land Rights* case 21 years earlier,²⁴ disclose that courts have had considerable regard for Privy Council decisions and decisions of various Supreme Courts dealing with the land interests of indigenous peoples in New Zealand, Canada, the United States of America and various countries in Africa. Although those decisions were decisions of domestic courts, they provide an international context in which the common law of Australia has developed. Some judges have also looked expressly to international law, including a decision of the International Court of Justice, for guidance. In the *Mabo (No 2)* case, for example, Brennan J, with whom Mason CJ and McHugh J agreed, wrote:

(1979) 22 *ICJ The Review* 37; C Holding "UN Working Group on Indigenous Populations: Australian Statement" *Australian Foreign Affairs Record*, vol 55 no 7, July 1984, 790-3; G Evans "Australia's Approach to Human Rights" Speech to 41st Session of UN Commission on Human Rights, Geneva, *Australian Foreign Affairs Record*, vol 56 no 2, Feb 1985, 82-7; EG Whitlam "Australia's International Obligations on Aborigines" (1981) 53 *Australian Quarterly* 433; EG Whitlam *The Whitlam Government 1972-1975* (1985) ch 12; M Costello "Racial Discrimination and Self-Determination" *Australian Foreign Affairs Record*, October 1988, 425-7; G Evans "Australia and the United Nations" *Australian Foreign Affairs Record*, October 1988, 294-8; "Aboriginal Issues Must be Addressed, UN Told" *The Monthly Record*, August 1990, 577; "United Nations Welcomes Human Rights Stand" *The Monthly Record*, August 1992, 495; H McRae, G Nettheim, L Beacroft *Aboriginal Legal Issues: Commentary and Materials* (1991); B Hocking (ed) *International Law and Aboriginal Rights* (1988).

21 *Gerhardy v Brown* note 9 *supra* at 102. See also M Kirby "Domestic Application of International Human Rights Standards" *Australian Foreign Affairs Record*, May 1988, 186-8.

22 See statements on the balancing of competing interests in Aboriginal land issues in *Gerhardy v Brown*, *ibid* at 151 per Deane J and *The Queen v Kearney; Ex parte Northern Land Council* (1984) 158 CLR 365 at 383 per Wilson J. See also *Mabo v Queensland (No 2)* note 2 *supra*.

23 Note 2 *supra*.

24 *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141.

Whatever the justification advanced in earlier days for refusing to recognise the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights²⁵ brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organisation of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.²⁶

The significance of international standards for the development of the common law of Australia is not confined to matters such as the special rights which indigenous people may have in respect of land. In a 1992 case concerning the content of the right of an accused person to a fair trial,²⁷ the High Court had regard to various international instruments which have attempted to define some of the attributes of a fair trial.²⁸ Chief Justice Mason and McHugh J cited the view previously expressed by Kirby P that, where the inherited common law is uncertain, Australian judges may look to an international treaty which Australia has ratified as an aid to the explication and development of the common law.²⁹ Their Honours noted that English courts may have resort to international obligations in order to help resolve uncertainty or ambiguity in judge-made law.³⁰ Their Honours were willing to assume, without deciding, that "Australian courts should adopt a similar, common-sense approach".³¹ Justice Brennan, while acknowledging that a particular provision of the *International Covenant on Civil*

25 See Communication 78/1980 in *Selected Decisions of the Human Rights Committee under the Optional Protocol*, vol 2 p 23. Australia acceded to the Optional Protocol on 18 December 1991.

26 *Mabo v Queensland (No 2)* note 2 *supra* CLR at 42; ALJR at 422; ALR at 29. See also discussion of international standards of human rights in *Gerhardy v Brown* (1985) note 9 *supra*.

27 *Dietrich v The Queen* (1992) 67 ALJR 1.

28 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Art 6; *International Covenant on Civil and Political Rights*, Art 14; also the Canadian Charter of Rights and Freedoms, s11, and United States Constitution, Fifth and Fourteenth Amendments.

29 *Jago v Judges of the District Court of NSW* (1988) 12 NSWLR 558 at 569.

30 Note 27 *supra* at 7 citing *Derbyshire County Council v Times Newspapers Ltd* [1992] 3 WLR 28, at 44 per Balcombe LJ. See also note 27 *supra* at 37 per Toohey J; but compare Dawson J at 31 also citing *Attorney-General v Guardian Newspapers (No 2)* [1990] 1 AC 109 at 283.

31 *Id.*

and Political Rights (to which Australia is a party) is not part of the municipal law of Australia, said that it is "a legitimate influence on the development of the common law".³²

Although international instruments ratified by Australia are not part of domestic law unless there is domestic legislation to that effect,³³ there may be scope for courts to have regard to such instruments when interpreting some domestic legislation. Professor Brownlie has observed that the use of treaty standards is difficult in the absence of express statutory incorporation, but New Zealand and English courts have shown an ability to take treaty obligations into account in the process of statutory interpretation even in the absence of incorporation. In both the United Kingdom and in New Zealand there is a presumption that the intention of the parliament was to avoid collision with the international obligations of the Crown.³⁴ Chief Justice Mason and McHugh J have noted that, if domestic legislation conflicted with the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, English courts would be required to enforce the legislation. However, it is "well settled" that, in construing domestic legislation which is ambiguous, English courts will presume that parliament intended to legislate in accordance with its international obligations.³⁵ Australian courts may be convinced to take that approach if Australia were to ratify conventions such as ILO Convention 169 and there was some ambiguity about the content of federal legislation dealing with matters contained in the Convention.

In summary, there is an increasing body of international law and standards dealing with the rights of indigenous people with respect to land, including their role in sustaining the environment. The common law of Australia can and does look to international law and international standards in the course of its development, and it is increasingly likely that federal, state and territorial legislation concerning the land rights and responsibilities of Aborigines and Torres Strait Islanders will be the subject of assessment by reference to those international standards.³⁶

32 *Ibid* at 15 citing *Mabo v Queensland (No 2)* note 2 *supra* CLR at 41-3 per Brennan J; see also *ibid* at 24 per Deane J.

33 *Bradley v The Commonwealth* (1973) 128 CLR 557 at 582; *Simsek v MacPhee* (1982) 148 CLR 636 at 641-4; *Kioa v West* (1985) 159 CLR 550 at 570-1; *Dietrich v The Queen* *ibid* at 6.

34 I Brownlie *Treaties and Indigenous Peoples: The Robb Lectures* (1992) pp 22, 92 citing *Post Office v Estuary Radio* [1967] 1 WLR 1396 at 1404 (Diplock LJ delivering judgment of the Court of Appeal); *Van Gorkom v A-G* [1977] 1 NZLR 535; *Ashby v Minister of Immigration* [1981] 1 NZLR 222.

35 *Dietrich v The Queen* note 27 *supra* at 6-7 citing *R v Home Secretary*; *Ex parte Brind* [1991] 1 AC 696 at 747-8 per Lord Bridge of Harwich.

36 For example, the lodgment with the United Nations in January 1993 of declarations under arts 21 and 22 of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, art 41 of the *International Covenant on Civil and Political Rights* and art 14 of the *International Convention on the*

III. AUSTRALIAN LEGISLATION ABOUT ABORIGINES' AND TORRES STRAIT ISLANDERS' INTERESTS IN LAND

Against that international background it is appropriate to consider what has been done legislatively within Australia to recognise or grant interests in land to Aborigines and Torres Strait Islanders. This part of the article describes in general terms the range of statutory provisions in Australia, then discusses in more detail the 1991 Queensland legislation.

A. NATIONAL OVERVIEW

Between 1966 and 1992 some 20 Acts were passed (or significantly amended) by federal and state parliaments to provide for Aborigines and Torres Strait Islanders to obtain legally recognisable interests in land in all states and territories except Tasmania.³⁷ Some, such as the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and the *Aboriginal Land Rights Act 1983* (NSW), the *Aboriginal Land Act 1991* (Qld) and the *Torres Strait Islander Land Act 1991* (Qld) provide processes for claims to land to be made and determined and for freehold title to be granted. Other Acts provide for grants of title to be made to specific groups without the requirement of a claims process. In the absence of Aboriginal land legislation, some more general land legislation has been administered in a way which enables interests in land (such as long term leases) to be granted to Aboriginal groups.

The various legislative provisions have been described in some detail elsewhere³⁸ and for present purposes it is necessary only to sketch the main

Elimination of All Forms of Racial Discrimination has expanded the range of venues at which concerns about the treatment of Aborigines and Torres Strait Islanders may be examined by international bodies.

- 37 The main Acts providing for Aboriginal or Torres Strait Islander interests in land are: Australian Capital Territory: *Aboriginal Land Grant (Jervis Bay Territory) Act 1976* (Cth). Northern Territory: *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth); *Crown Lands Act 1931* (NT) (as amended by the *Miscellaneous Acts Amendment (Aboriginal Community Living Areas) Act 1989* (NT)); *Cobourg Peninsula Aboriginal Land and Sanctuary Act 1981* (NT); *Nitmiluk (Katherine Gorge) National Park Act 1989* (NT). New South Wales: *Aboriginal Land Rights Act 1983* (NSW). See also *Crown Lands (Validation of Revocations) Act 1983* (NSW). Queensland: *Land Act 1962* (Qld) (as amended); *Aborigines and Torres Strait Islanders (Land Holding) Act 1985* (Qld); *Local Government (Aboriginal Lands) Act 1978* (Qld); *Aboriginal Land Act 1991* (Qld), *Torres Strait Islander Land Act 1991* (Qld). South Australia: *Aboriginal Lands Trust Act 1966* (SA); *Pitjantjatjara Land Rights Act 1981* (SA); *Maralinga Tjarutja Land Rights Act 1984* (SA). Victoria: *Aboriginal Lands Act 1970* (Vic); *Aboriginal Land (Northcote Land) Act 1989* (Vic); *Aboriginal Lands Act 1991* (Vic); *Aboriginal Land (Lake Condah and Farningham Forest) Act 1987* (Cth); *Aboriginal Land (Manatunga Land) Act 1992* (Vic). Western Australia: *Aboriginal Affairs Planning Authority Act 1972* (WA); see also *Land Act 1933* (WA).
- 38 For details of the legislation see *Halsbury's Laws of Australia* vol 1. For a discussion of the law in particular jurisdictions see M Wilkie *Aboriginal Land Rights in NSW* (1985); G Neate *Aboriginal Land Rights Law in the Northern Territory Volume 1* (1989); F Brennan *Land Rights Queensland Style* (1992).

features of the major Acts. A comparison of the Acts reveals a range of answers to basic questions such as:

- What land can be claimed or acquired by grant?
- On what basis is land claimed or granted?
- What is the grant or land claim process?
- What form of title is granted?
- What are the reservations (if any) from title?
- Who holds the title?
- What special conditions (if any) apply to access to Aboriginal land?
- What restrictions (if any) apply to dealings with title to Aboriginal land?
- What special conditions (if any) apply to exploration and mining on Aboriginal land?
- What limitations (if any) are there on laws that apply to Aboriginal land?

Accordingly, it is difficult to give a comprehensive, accurate and succinct description of the different laws. The following description must be read with that qualification in mind.

(i) Land available for claim or grant

In broad terms, the categories of land to which some groups of Aborigines and Torres Strait Islanders may receive title under existing legislation are:

- vacant Crown land;
- Crown land which has been reserved for Aborigines or Torres Strait Islanders and which has not subsequently been alienated to private title holders;
- land which has been the subject of a Crown deed of grant in trust to Aborigines or Torres Strait Islanders; or
- in limited circumstances, land in which Aborigines have acquired an estate or interest less than freehold (for example, a pastoral lease).

A cursory glance at a map showing different types of land tenure in Australia will disclose that the amount of land available for claim or grant within those categories is unevenly located in various regions of Australia. Most of the land is remote from major population centres and is of little economic significance, at least in agricultural terms. The descendants of dispossessed Aboriginal groups on the east coast, for example, have relatively small areas of land within those categories which they may claim.

Aborigines may also purchase land, or land may be purchased and held for them, under statutory schemes for the provision of funds for such purposes.³⁹

Grants of land are made by the Crown in right of the Commonwealth or a State, either following a land claim process or under legislation which gives effect to government policy to transfer title to specified areas of Aboriginal land.⁴⁰

Land claim processes are found only in New South Wales, the Northern Territory and Queensland. In New South Wales claims can be made to "claimable Crown lands", including land in towns and cities.⁴¹ In the Northern Territory claims can be made to land that is not in a town and which is "unalienated Crown land" or is "alienated Crown land" in which all estates or interests in the land not held by the Crown are held by, or on behalf of, Aborigines.⁴² In Queensland claims can be made to land outside townships, towns and cities that is "available Crown land" which the Governor in Council has declared, by Gazette notice, is claimable land, and to areas of Aboriginal land or Torres Strait Islander land that is "transferred land".⁴³

39 See, for example, the *Aboriginal Development Commission Act* 1980 (Cth), since repealed and replaced by the *Aboriginal and Torres Strait Islander Commission Act* 1989 (Cth). Money generated for Aborigines from such sources as land tax equivalents in New South Wales and mining royalty equivalents in the Northern Territory is being used to purchase pastoral properties and commercial enterprises. See also *The Queen v Toohey; Ex parte Attorney-General (NT)* (1979) 145 CLR 374 concerning a traditional land claim to land purchased under the *Aboriginal Land Fund Act* 1974 (Cth).

40 For examples of area specific legislation see the various Acts in Victoria and the *Pitjantjatjara Land Rights Act* 1981 (SA) and *Maralinga Tjarutja Land Rights Act* 1984 (SA).

41 *Aboriginal Land Rights Act* 1983 (NSW) s 36(1). "Claimable Crown lands" are lands vested in Her Majesty which, when a claim is made,:

- (a) are able to be lawfully sold or leased, or are reserved or dedicated for any propose, under the *Crown Lands Consolidation Act* 1913 or the *Western Lands Act* 1901;
- (b) are not lawfully used or occupied;
- (b1) do not comprise lands which, in the opinion of the Crown Lands Minister, are needed or are likely to be needed as residential lands; and
- (c) are not needed, nor likely to be needed, for an essential public purpose.

42 *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) ss 50(1)(a), 3(1) and (2). In light of the definitions of "Crown land", "unalienated Crown land" and "alienated Crown land", and other provisions of the *Aboriginal Land Rights (Northern Territory) Act* 1976 claims can be made to land that is not in a town and that is not currently held by a non-Aboriginal person in fee simple or some other estate or interest in land (such as a lease); or that is not set apart or dedicated to a public purpose under federal legislation; or that is not the subject of a deed of grant held in escrow by a Land Council.

Among the types of land which have been claimed are areas of land under grazing licences and other licences; stock routes and stock reserves (although this category has been restricted by the addition of s 50(2D) and (2E) to the Act, which commenced on 1 March 1990; See also *Miscellaneous Acts (Aboriginal Community Living Areas) Act* 1989 (NT)); areas of land under mining interests (including exploration licences and mining leases); pastoral leases held by or on behalf of Aborigines; and Northern Territory national parks (such as Katherine Gorge).

43 *Aboriginal Land Act* 1991 (Qld) ss 2.11-2.19; *Torres Strait Islander Land Act* 1991 (Qld) ss 2.08-2.19. Land available for claim may include vacant Crown land (including land subject to some forms of mining

(ii) Bases of claim or grant

Historical processes in different parts of Australia have resulted in different degrees of disruption or dispossession of Aboriginal and Torres Strait Islanders. In recognition of those processes, the bases on which Aboriginal claims to land are made and land is granted today fall into the following broad categories:

- claims based on ongoing traditional links to the land, involving, for example, spiritual responsibility for significant sites on the land;⁴⁴
- claims based on historical associations with the land on which, for example, successive generations were born and raised;⁴⁵
- claims based on the need for land to assist in restoring, maintaining or enhancing the capacity for self-development, and the self-reliance and cultural integrity, of the group;⁴⁶
- claims for compensation (including grants of land) in lieu of the land of which groups were dispossessed and which they cannot expect to regain (for example, because it is now in private ownership).⁴⁷

(iii) Grant or claim process

Most grants of title to land are made under one of three processes established by legislation: grants of title to land previously reserved for the benefit of Aborigines or Torres Strait Islanders; grants of specifically identified areas of land (following negotiations with Aboriginal groups or to give effect to a government's specific policy commitment); or grants of title to land successfully claimed under a statutory land claim scheme. There are, of course, regional differences in each process.

interests), national park land, Deed of Grant in Trust (DOGIT) land and former Aboriginal reserves and Torres Strait Islander reserves.

44 As in the Northern Territory, Queensland, South Australia.

45 As in the Northern Territory and in Queensland.

46 As in Queensland.

47 As in New South Wales where claims can be made to claimable Crown land by Aboriginal Land Councils without any need to demonstrate whether the claimants or prospective beneficiaries have any spiritual, cultural or historical links to the land. In a legal sense, the nature and extent of those links or the absence of links is irrelevant (except in the case of claims to travelling stock reserves). If the land is claimable then the relevant Aboriginal Land Council can claim it. If the statutory criteria are satisfied, the land should be granted to the applicant. The compensatory aspect of the *Aboriginal Land Rights Act 1983* (NSW) is also evident in provision for the payment of the equivalent of 7.5% of state land tax revenue for 15 years (until 1998) into the New South Wales Aboriginal Land Council Account. The money is used for, among other things, the purchase of land for commercial development. Once purchased, the land becomes Aboriginal land and is subject to provisions of the Act.

Other processes are found in some state legislation under which land may be reserved for the benefit of Aborigines or Torres Strait Islanders, or title may be granted. In New South Wales, for example, the Minister may recommend that the Governor appropriate or resume land for the purposes of satisfying the objectives of the *Aboriginal Land Rights Act 1983* (NSW) if, in the Minister's opinion, there are exceptional circumstances which warrant the appropriation or resumption of the land. Land so appropriated or resumed may be vested in an Aboriginal Land Council (or some other organisation or body established for the benefit of Aborigines).⁴⁸

(iv) *Form of title*

Under most of the major pieces of legislation, title in fee simple (freehold title) is granted. It should be noted that most freehold title granted to Aborigines or Torres Strait Islanders is, in effect, inalienable, because the legislation imposes stringent conditions on dealing with interests in the land and often prevents the sale or mortgage of the land. In the case of the Jervis Bay Territory land (which is the separate coastal portion of the Australian Capital Territory), the grant of freehold title was noteworthy because, until the exception created by that legislation, there was a statutory prohibition on the sale or disposal of freehold land in the Territory. Other people can only obtain leasehold in the Australia Capital Territory.⁴⁹

Leases may be granted in certain circumstances in New South Wales, Western Australia and Queensland. In the case of land in the western division of New South Wales to which the *Western Lands Act 1901* (NSW) applies, a lease in perpetuity is granted under that Act (although a lease is not granted to land determined as being the urban area of a city, town or village).⁵⁰ In Western Australia, Crown land which is reserved for the use or benefit of Aboriginal inhabitants may be reserved under the *Aboriginal Affairs Planning Authority Act 1972* (WA), and then automatically is vested in the Aboriginal Affairs Planning Authority. The land may be placed under the control and management of the Aboriginal Lands Trust which may lease areas to Aboriginal communities. In Queensland, available Crown land which is successfully claimed on the ground of "economic or cultural viability" may be granted by way of a lease in perpetuity, or a lease for a specified term of years, on specified terms and conditions.⁵¹

48 *Aboriginal Land Rights Act 1983* (NSW) s 39.

49 The *Jervis Bay Territory Acceptance Act 1915* (Cth) was amended by the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth) to permit the grant of freehold title.

50 *Aboriginal Land Rights Act 1983* (NSW) s 36(9).

51 *Aboriginal Land Act 1991* (Qld) ss 4.11, 4.16, 5.02; *Torres Strait Islander Land Act 1991* (Qld) ss 4.11, 4.16, 5.02. A claim on the ground of economic or cultural viability is established if the Land Tribunal is satisfied that granting the claim would assist in restoring, maintaining or enhancing the capacity for self-

Elsewhere in Queensland, leases have been granted over certain shires and small blocks of deed of grant in trust land.

(v) *Reservations from title*

Most grants of title to Aboriginal land or Torres Strait Islander land contain some reservations to the Crown. As a general rule, all minerals are reserved to the Crown (either the relevant state or the Commonwealth). The *Aboriginal Land Rights Act 1983* (NSW) contains an exception to that rule. Mineral resources (other than coal, petroleum, gold or silver) are included in any transfer, vesting or purchase of land under this Act.⁵²

(vi) *Title holders*

Almost all the title holders are trusts, councils or corporations all of whose members are Aborigines or Torres Strait Islanders. In many cases, title is held in trust for a range of Aborigines or Islanders with traditional spiritual or historic family and residential links to the land. Aborigines and Islanders may acquire leasehold interests (in some cases, perpetual leases) from the title holder.

(vii) *Access restrictions*

As a general rule, there are stringent statutory limitations on who may enter and remain on Aboriginal land, and on the purposes for which entry may be granted. In some areas it is a criminal offence to enter Aboriginal land unless the person has a written permit or is permitted by the legislation to be on the land.⁵³

(viii) *Restrictions on dealing with title*

As a general rule, title to Aboriginal land is inalienable, that is, in most cases it cannot be sold or mortgaged. Much of the land has been granted on the basis that the groups of relevant Aborigines have spiritual links with the land that stretch back to the time before time (sometimes, though inadequately, called the

development, and the self-reliance and cultural integrity, of the group. In determining the claim, the Tribunal must have regard to the proposal made in the claim for the use of the land.

52 *Aboriginal Land Rights Act 1983* (NSW) s 45(2), (11), (12).

53 The entry restrictions in s 19 of the *Pitjantjatjara Land Rights Act 1981* (SA) were challenged in *Gerhardy v Brown* note 9 *supra*. The High Court decided that the requirements were not in breach of the *Racial Discrimination Act 1975* (Cth) as the *Pitjantjatjara Land Rights Act* (1981) SA is a "special measure" as defined in the *Racial Discrimination Act* (1975) (Cth) and in art 1(4) of the *International Convention on the Elimination of All Forms of Racial Discrimination*, on which the *Racial Discrimination Act* (1975) (Cth) was based. In lengthy judgments, the Justices commented on the need for entry restrictions. See *Gerhardy v Brown* note 9 *supra* at 87-88 per Gibbs CJ, at 104-105 per Mason J, at 113 per Wilson J, at 117, 121-122 per Brennan J, at 145, 150-153 per Deane J.

'Dreamtime') and which include responsibilities to maintain the land in spiritual as well as economic terms. Where land cannot be alienated in those traditional terms, the law provides that it should not be alienated for economic gain. Similar policy considerations may apply where land has been granted because of a group's long historical association with the land. Where land is granted to or for the benefit of a group or community, the land should not be disposed of for the benefit of current members of that group. It should be maintained for the benefit of future members of the group. The restrictions on alienation extend beyond those which prevent disposal of the freehold title. Leases and other interests in respect of Aboriginal land can only be granted in limited circumstances and, in some cases, to restricted classes of persons. Some Acts also contain restrictions or prohibitions on resumption by the Crown.

(ix) *Exploration and mining*

Probably the most contentious issue surrounding the grant of land to Aborigines in Australia has been the extent to which miners and mineral explorers have access to that land. As mentioned earlier, the general legal position is that all minerals vest in the Crown. However, many of the Acts under which land is granted give the title holders power to regulate or prohibit access to land by persons wanting to explore for and mine minerals. Permission to have access to the land may be given subject to terms and conditions, including monetary payments. Some legislation provides for payments to certain categories of Aborigines by way of mining royalty equivalents where mining takes place on Aboriginal land.

(x) *Application of laws*

Aboriginal land provides, for some communities, both legal security to their country and a legal buffer from others who may wish to enter and use that land. For some communities there is a greater ability to retain and maintain the system of traditional law which governs the people and the land. Generally speaking, however, Aboriginal land is not an enclave from those laws which would apply to the land and to people on that land if it were not Aboriginal land. There are specific qualifications to this general principle. Some, such as the modification of exploration and mining laws have been discussed earlier. Others include exemption from land tax in some places.

B. 1991 QUEENSLAND LEGISLATION

The *Aboriginal Land Act 1991* (Qld) and the *Torres Strait Islander Land Act 1991* (Qld) are the most recent pieces of legislation of this type, and for that reason

they merit more detailed description. The Acts provide almost identical schemes for the grant, and the claim and grant, of specified categories of land. The key provisions of the *Aboriginal Land Act 1991 (Qld)* will be summarised and can be read as indicative of the provisions in the other Act.

The Act provides for the grant of inalienable freehold title to certain areas of land described as “transferable land”, without the need for a land claim to be made. In summary, transferable land includes:

- land granted in trust under the *Land Act 1962 (Qld)* for the benefit of Aboriginal inhabitants or for the purpose of an Aboriginal reserve (the “Deed of Grant in Trust” or DOGIT lands);
- land reserved and set apart for an Aboriginal reserve or for the benefit of Aboriginal inhabitants, and certain other land reserved and set apart under the *Land Act 1962 (Qld)*; and
- shire lease land at Aurukun and Mornington Island.

Title to transferred land is granted to trustees who hold the land for the benefit of Aboriginal people. Grants of title to five areas of transferable land were delivered in June 1992. Other grants will be made in due course.

Groups of Aboriginal people may make claims to areas of transferred land, and to available Crown land which the Governor in Council declares to be claimable land. Available Crown land (other than transferred lands) is outside city or town land or township land, and includes national parks declared to be available for claim.

At the end of July 1993 some 49 areas of available Crown land, including 13 national parks, had been declared to be claimable land.⁵⁴

Land claims may be made on one or more of the following grounds:

- the claimants have a traditional affiliation with the land claimed;⁵⁵ or
- the claimants have an historical association with the land claimed;⁵⁶ or

54 See *Queensland Government Gazette*, 21 December 1991 p 2295-8; 29 May 1992 p 877; 5 June 1992 p 1002-3; 27 November 1992 p 1509-1513.

55 A claim by a group of Aboriginal people for an area of claimable land on the ground of traditional affiliation is established if the Land Tribunal is satisfied that the members of the group have 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. In determining the claim, the Tribunal must consult with, and consider the views of, the persons recognised under Aboriginal tradition as the elders of the group of Aboriginal people: *Aboriginal Land Act 1991 (Qld)* s 4.09.

56 A claim by a group of Aboriginal people for an area of claimable land on the ground of historical association is established if the Land Tribunal is satisfied that the group has an association with the land based on them or their ancestors having, for a substantial period, lived on or used the land; or land in the district or region in which the land is located. The claim may be established whether or not all or a majority of the members of the group have themselves lived on or used such land. In determining the claim, the Tribunal must consult with,

- the grant of the land would assist in restoring, maintaining or enhancing the economic or cultural viability of the claimant group.⁵⁷

Land claims are made to the Land Claims Registrar, who is an officer of the Department of Lands. If the Land Claims Registrar is satisfied that a claim appears to be duly made in accordance with the requirements of the Act, the Registrar must refer the claim to the Land Tribunal.⁵⁸ At the end of July 1993, 15 claims had been referred to the Land Tribunal. The blocks of land claimed range in size from small islands (with areas of two to four hectares) to the Simpson Desert National Park (which has an area of 1,012,000 hectares). Together they comprise 1,599,648 hectares, or 0.93 per cent of the area of the State.

Claims are evaluated by the Land Tribunal, a body of one or three persons which will conduct hearings in an informal manner and will take evidence at appropriate places and times around the State.⁵⁹ The Land Tribunal will recommend to the Minister for Lands whether land should be granted. The Act sets out criteria by which the Tribunal can determine whether a claim has been established on one or more of the three grounds. The Act also provides rules for determining any competing claims to areas of land. Claims established on the ground of traditional affiliation with the land are given precedence over claims made on other grounds. Fee simple title to, or a lease of, successfully claimed land is held by grantees for the benefit of specified persons or classes of persons.⁶⁰

There are limitations on dealings with Aboriginal land. The land cannot be sold or mortgaged. As a general rule, the consent of the grantees must be obtained by people wishing to obtain an interest in the land, create a mining interest in the land, or enter into certain agreements for access to or use of the land.⁶¹

The legislation will probably not operate for the direct benefit of all groups of Aborigines in Queensland. For some, their traditional land or the land with which they have historical links has been alienated and will not be made available for

and consider the views of, the persons recognised under Aboriginal tradition as the elders of the group of Aboriginal people: *Aboriginal Land Act 1991 (Qld)* s 4.10.

57 A claim by a group of Aboriginal people for an area of claimable land on the ground of economic or cultural viability is established if the Land Tribunal is satisfied that granting the claim would assist in restoring, maintaining or enhancing the capacity for self-development, and the self-reliance and cultural integrity, of the group. In determining the claim, the Tribunal must have regard to the proposal made in the claim for the use of the land: *Aboriginal Land Act 1991 (Qld)* s 4.11.

58 *Aboriginal Land Act 1991 (Qld)* ss 4.01 - 4.06.

59 *Aboriginal Land Act 1991 (Qld)* ss 8.01-8.40. The full time Chairperson was appointed from 20 January 1992. Appointments for part time Deputy Chairpersons and fifteen part time members were notified in the *Queensland Government Gazette* of 19 February 1993 p 534. For the Practice Directions of the Land Tribunal see its *Report on the Operations of the Land Tribunal* for the year ended 30 June 1992 (1992) Annexure B.

60 *Aboriginal Land Act 1991 (Qld)* ss 4.08 - 4.18, 5.01-5.12.

61 *Ibid* ss 5.13-5.16, 6.03, 7.01, 9.02.

claim. Some will have no extant links with any specific areas of land and there will not be other land available for them to claim on the ground of economic or cultural viability.

Other Aborigines and Torres Strait Islanders may be able to choose to ignore the legislation. They may decide to seek a declaration from the Supreme Court of Queensland⁶² that they already have native title with respect to that land. That option may be available because, in its decision in *Mabo v Queensland (No 2)*,⁶³ the High Court declared (by majority) that the Meriam people of the Torres Strait “are entitled, as against the whole world, to possession, occupation, use and enjoyment of the lands of the Murray Islands”. The Court also concluded 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”.⁶⁴ Justice Brennan (with whose reasons for judgment Mason CJ and McHugh J agreed) stated that “there may be other areas of Australia where native title has not been extinguished and where Aboriginal people, maintaining their identity and their customs, are entitled to enjoy their native title”.⁶⁵ Other Justices appear to have left open that possibility.

On the question of extinguishment, the High Court declared that the native title of the Meriam people “is subject to the powers of the Parliament of Queensland and the power of the Governor in Council of Queensland to extinguish that title by valid exercise of their respective powers, provided any exercise of those powers is not inconsistent with the laws of the Commonwealth”,⁶⁶ including the *Racial Discrimination Act 1975* (Cth).

It should be noted that, although native title is recognised by the common law, it is not an institution of the common law. The nature and incidents of native title must be ascertained as a matter of fact by reference to the traditional laws acknowledged by and the traditional customs observed by the relevant indigenous people. Generally, the rights and interests which constitute native title can be possessed only by those people and their descendants. Native title is not alienable by the common law. Where a clan or group has continued to acknowledge native law and (so far as practicable) to observe the customs based on the traditions of that clan or group, so that the traditional connection with the land has been substantially maintained, the traditional community title of that clan or group can be said to remain in existence. The common law can, by reference to the

62 See *Utemorrah v The Commonwealth* (1992) 66 ALJR 642, 108 ALR 225.

63 Note 2 *supra*.

64 *Ibid* CLR at 217; ALJR at 499; ALR at 170

65 *Ibid* CLR at 69; ALJR at 434; ALR at 50.

66 Note 64 *supra*.

traditional laws and customs of the indigenous people, identify and protect the native rights and interests to which they give rise.

The implications of the High Court's landmark decision in *Mabo (No 2)* are still being assessed. For present purposes I note only that some of those Aborigines and Islanders who could make claims to land in Queensland under an Act on the ground of traditional or customary affiliations with the land, may choose not to make a claim for the grant of title from the Crown but prefer to rely on a declaration of what they already have, should the occasion require it.

One issue which may have a bearing on what approach Aborigines or Torres Strait Islanders take is whether, as a matter of law, the grant of title under say the *Aboriginal Land Act 1991* (Qld) would extinguish or impair the native title (if any) of Aborigines over that land. Some legal opinions have been given to the effect that the grant of title would not extinguish native title but would complement it.⁶⁷ Litigation commenced in the Federal Court to challenge a proposed grant of title under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) has, however, raised the issue whether a grant of title under a similar legislative scheme would impair native title and, if it does, whether a grant of freehold title contrary to the wishes of some people possessing native title would be illegal.⁶⁸ I note that some claims lodged with the Land Tribunal after the High Court's decision have been expressed to be 'without prejudice to any rights that the claimants may have under common law and particularly without prejudice to any rights as described by the High Court of Australia' in the decision in *Mabo (No 2)*.

VI. ABORIGINAL LAND RIGHTS AND ENVIRONMENTAL ISSUES

While much of the debate about Aboriginal land or environmental issues (and indeed most other controversial civil, political, economic, social and cultural issues) turns on the nature and extent of rights, relatively little attention is given to responsibilities. The final matter for discussion in this article is the nature of traditional Aboriginal responsibilities for land and the way those responsibilities

67 Frank Brennan has argued, for example, that statutory native titles would be inconsistent with native title only when the beneficiaries were a class of persons excluding traditional owners and including persons having no interest in the land according to Aboriginal tradition. Given the precedence which the *Aboriginal Land Act 1991* (Qld) gives to claims based on traditional affiliation to land, he suggests that the statutory land claims process properly administered need not be inconsistent with continued recognition of native title. F Brennan "Mabo and its Implications for Aborigines and Torres Strait Islanders" in MA Stephenson and S Ratnapala (eds) *Mabo: A Judicial Revolution* (1993) pp 39-40.

68 See *Pareroutija and Others v Tickner and Ors* (unreported, Federal Court, Beaumont J, 8 March 1993) and case stated to the Full Federal Court.

may be recognised in policies developed within the general debate about caring for the environment.

Early in this century, an American jurist, WN Hohfeld, published papers about fundamental legal conceptions.⁶⁹ Like others before him,⁷⁰ Hohfeld analysed fundamental legal relations in a scheme of 'opposites' and 'correlatives'. His jural correlatives included 'right' and 'duty'. A duty, the sense used by Hohfeld, is a legal obligation. In other words, a duty is what a person is bound to do. For the purpose of looking at traditional Aboriginal links to land, a 'duty' may be described in terms akin to the dictionary definition of the word as a "moral or legal obligation, what one is bound or ought to do".⁷¹ In this article the word 'responsibility' will be used as a synonym, and in substitution, for 'duty'. Responsibility will be used in the sense defined in dictionaries as "a particular burden of obligation upon one who is responsible", that is, one who is "answerable or accountable, as for something within one's power, control, or management";⁷² or a "charge, trust, or duty, for which one is responsible."⁷³

Echoes of such jural correlatives are found in the *Rio Declaration on Environment and Development*, Principle 2 of which acknowledges that States have the 'sovereign right' to exploit their own resources pursuant to their own environmental and developmental policies, and the 'responsibility' to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction. As will be seen below, courts and legislatures have expressly referred to the responsibilities for land which are evident in traditional Aboriginal societies.

A. TRADITIONAL ABORIGINAL RESPONSIBILITIES FOR LAND

Traditional responsibilities for land are often spiritually based and are expressed in a variety of ways. Evidence of Aborigines given in traditional land claim hearings (discussed under subheading C below) shows that responsibilities can be exercised by physically maintaining or protecting a site, visiting the land, performing ritual activity at or near a site, seeking and imparting knowledge about a particular area, foraging or hunting in an area in accordance with local proscriptions on access and activity, cleaning and burning areas, keeping some people away from certain sites (in order to protect the sites and the people from

69 WN Hohfeld *Fundamental Legal Conceptions as Applied in Judicial Reasoning* copyright 1919 by Yale University Press, 1978 Reprinted by Greenwood Press Inc.

70 See for example Gray *Nature and Sources of Law* (1909); Holland *Elements of Jurisprudence* (10th ed) chapter on rights.

71 *The Australian Concise Oxford Dictionary* (7th ed, 1987) p 323.

72 *The Macquarie Dictionary* (1981) p 1472.

73 *The Shorter Oxford Dictionary on Historical Principles* (3rd ed, 1990) p 1810.

danger consequent upon unauthorised entry to them), and by ensuring that knowledge about the sites is confined to a limited group of appropriate people. By continuing to look after or care for the country the people ensure that the country cares for and sustains them.

Descriptions of responsibilities for land can be found in the writings of various anthropologists. For present purposes one example will suffice.

In his study of the Pintupi, Western Desert Aborigines, FR Myers recorded that custodianship of rituals and the sites associated with those rituals is a zealously guarded prerogative. Those people who 'own' a ritual and a place assume responsibility for their care and preservation. They must 'hold on to The Dreaming' and must pass it on to the future, by initiation of younger people and a long process of epiphany in revelatory ceremonies. Through such processes younger men and women gradually are taught how to interpret and act toward the invisible world that underlies their immediate physical and social world.⁷⁴ The concepts of 'looking after' and 'holding' a country, specify rights and duties in the sacred religious domain, over the ritual and secret associations of myths, songs, designs and objects. According to Myers:

When they speak of 'holding' a country or 'carrying the Law', Pintubi represent the relationship in phrases denoting some sort of physical object as a weight or burden - a responsibility - for the holder. Indeed, the relationship is often materially represented by the holder of a country actually possessing sacred boards with the designs of the country. Although such emblems are made by men, they are said to be 'left' by The Dreaming. It is men's responsibility to look after these tokens.⁷⁵

...To 'hold' a country is to have certain rights to it, mainly the right to be consulted about visits to the place, about ceremonies performed there, or about revelatory ceremonies concerning its ritual associations held elsewhere. To carry out this status, one must know (ninti) the story of a place, the associated rituals, songs, and designs. What one 'holds' and what one 'loses' or passes on is essentially knowledge.⁷⁶

Because knowledge is highly valued and vital to social reproduction, men seek to gain such knowledge and to be associated with its display and transmission. It is, in fact, their responsibility to 'follow up The Dreaming' to look after these sacred estates by ensuring that the proper rituals are conducted.⁷⁷ Men think of the transmission of knowledge as a vital responsibility. In old age, they speak of being 'ready to die and wanting to pass on' ceremonies. Responsibility is shared among various people who are integrated into a larger system. The duty to look after

74 FR Myers *Pintubi Country, Pintubi Self: Sentiment, Place and Politics among Western Desert Aborigines* (1986) pp 67-8.

75 *Ibid* p 146.

76 *Ibid* p 149.

77 *Ibid* p 157 citing WEH Stanner "The Dreaming" in TAG Hunderford (ed) *Australian Signpost* (1956).

sacred sites - thus ensuring the continuity of things, making the plants and animals continue to reproduce - is "mediated by a wider sociality".⁷⁸

Those traditional links to land influence where many groups of Aboriginal people live or seek to live. Recognition of the fact was articulated by the House of Representatives Standing Committee in its 1987 report *Return to Country: The Aboriginal Homelands Movement in Australia*. The Committee wrote:

Responsibility to look after country has always been an imperative for Aboriginal people and some have never left the country for which they are responsible except for short periods. However, a number of factors including the policies and actions of governments severely disrupted the ability of many Aboriginal people to live on their country and undertake their responsibilities. A history of the homelands movement must include a history of this disruption but also of changes which have now assisted many Aboriginal people to fulfil a desire to return to their homelands.⁷⁹

Those changes have included the enactment of legislation and the recognition by courts of traditional Aboriginal rights and responsibilities in respect of land. The legislative schemes were summarised in the previous part of this paper. The following discussion focuses particularly on the nature and means of exercise of responsibilities to 'look after country' and legal recognition of those responsibilities.

B. JUDICIAL RECOGNITION OF TRADITIONAL ABORIGINAL RESPONSIBILITIES FOR LAND

The degree to which Australian courts are now willing to take cognisance of notions of traditional Aboriginal land tenure was indicated in a 1985 decision of the High Court where Brennan J confidently asserted:

...the courts of this country are familiar with the existence of traditional Aboriginal affiliations with, and responsibilities in respect of, land. The existence of such affiliations and responsibilities have been recognized judicially on many occasions, and judges who sit in courts in areas where Aboriginal tradition remains strong are familiar, in varying degree, with the nature of the affiliations and responsibilities that exist in respect of the country in those areas.⁸⁰

Ironically, it was those notions of responsibility for land which worked against the plaintiffs in the 1971 *Gove Land Rights* case. Having reviewed the evidence of Aboriginal witnesses, anthropologists and others, Blackburn J noted that there was no dispute that "the fundamental truth about the aboriginals' relationship to the land is that whatever else it is, it is a religious relationship." Nor was it in dispute

78 *Ibid* p 154.

79 Standing Committee on Aboriginal Affairs *Return to Country: The Aboriginal Homelands Movement in Australia* (1987) at [1.20] and generally ch 1.

80 *Gerhardy v Brown* note 9 *supra* at 142-3.

that each clan “regards itself as a spiritual entity having a spiritual relationship to particular places or areas, and having a duty to care for and tend that land by means of ritual observances.”⁸¹

Justice Blackburn held that the plaintiffs' system of social rules and customs was a system of law. The evidence in the case showed “a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence”.⁸² He held, however, that the relationship of the plaintiffs to their defined areas of land could not be described as “proprietary”. His Honour noted that the clan has a duty to care for the land. Such a duty “is not without parallels in our law, which sometimes imposes duties of such a kind on a proprietor. But this resemblance is not, or at any rate is only in a very slight degree, an indication of a proprietary interest”.⁸³

In his view, the clan was not shown to have a significant economic relationship with the land, but the spiritual relationship was well proved. The idea of clans being responsible for looking after their country is implicit in the following analysis of the evidence for that spiritual relationship to land. Justice Blackburn wrote:

One of the manifestations of this [spiritual relationship] is the fact that sacred sites associated with a particular clan are to be found there... Another manifestation is that the rites performed by the clans have as part of their object the fructification and renewal of the fertility of the land. The evidence seems to me to show that the aboriginals have a more cogent feeling of obligation to the land than of ownership of it. It is dangerous to attempt to express a matter so subtle and difficult by a mere aphorism, but it seems easier, on the evidence, to say that the clan belongs to the land than that the land belongs to the clan.⁸⁴

Notions of looking after sites are not confined to groups of Aborigines living in small, remote communities. In New South Wales analogous evidence was given in a case involving a golf course development on land in which Aboriginal human remains had been found. Justice Lockhart of the Federal Court considered the claim of the Aboriginal people that burial places must remain peaceful, tranquil and undisturbed by human beings. Their claim was based on Aboriginal tradition. His Honour found that the burial places are places which Aborigines believe are the place of the spirits waiting to be called back. If the spirits are disturbed, the people believe that they will suffer because of the failure to care for them.⁸⁵ In other words, failure to carry out the obligation or responsibility to protect the sites

81 *Milirrpum v Nabalco Pty Ltd* note 24 *supra* at 167, see also at 171.

82 *Ibid* at 267-268.

83 *Ibid* at 272, see also 273-4.

84 *Ibid* at 270-1.

85 *Wamba Wamba Local Aboriginal Land Council and Anor v Minister Administering the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 and Anor* (1989) 86 ALR 161 at 172.

in accordance with Aboriginal tradition would lead to detrimental consequences for the custodians of that site.⁸⁶

C. STATUTORY RECOGNITION OF TRADITIONAL ABORIGINAL RESPONSIBILITIES FOR LAND IN THE NORTHERN TERRITORY

The traditional spiritual responsibilities which Aborigines have for land have been recognised in the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). That 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
- (b) are entitled by Aboriginal tradition to forage as a right over that land.⁸⁷

The differences between legal notions of property rights and traditional Aboriginal notions of land tenure were discussed by Brennan J of the High Court when considering the definitions of "Aboriginal tradition" and "traditional Aboriginal owners" in *R v Toohey; Ex parte Meneling Station Pty Ltd*.⁸⁸ His Honour wrote:

Owners of land under Anglo-Australian law are understood to be vested with a bundle of rights exercisable with respect to land: (cf. per Rich J in *Minister for the Army v Dalziel* (1944) 68 CLR 261, at 285). The term 'traditional Aboriginal owners' has a very different connotation. A traditional right to forage is the only 'right' included as an element in the definition, but even that right is not necessarily exclusive of the foraging rights of others. Foraging rights apart, the connexion of the group with the land does not consist in the communal holding of rights with respect to the land, but in the group's spiritual affiliations to a site on the land and the group's spiritual responsibility for the site and for the land. Aboriginal ownership is primarily a spiritual affair rather than a bundle of rights.

Traditional Aboriginal land is not used or enjoyed only by those who have primary spiritual responsibility for it. Other Aborigines or Aboriginal groups may have a spiritual responsibility for the same land or may be entitled to exercise some usufructuary right with respect to it.⁸⁹

His Honour noted that the Act:

⁸⁶ See also *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27.

⁸⁷ *Aboriginal Land Rights (Northern Territory) Act 1976*, s 3(1): "Aboriginal tradition" is defined as "the body of traditions, observances, customs and beliefs of Aborigines or of a community or group of Aborigines, and includes those traditions, observances, customs and beliefs as applied in relation to particular persons, sites, areas of land, things or relationships".

⁸⁸ (1982) 158 CLR 327.

⁸⁹ *Ibid* at 357-8.

...protects the exercise of those usufructuary rights which Aboriginal tradition either required certain groups of Aboriginals to exercise or allowed certain groups to enjoy with respect to land.⁹⁰

Looking at the broader social context within which rights and responsibilities may be exercised, his Honour observed that:

As Aboriginal tradition within a local descent group is eroded or renewed with the passing of time, so the strength of the group's spiritual affiliations to sites on their land and their spiritual responsibility for those sites and for that land may wane or wax.⁹¹

A traditional land claim may be made to specified categories of land by or on behalf of the traditional Aboriginal owners of the land. When land becomes Aboriginal land the traditional Aboriginal owners have considerable legal power to determine what does or does not happen on that land.

Professor Ken Maddock has argued that there may have been undue emphasis in land rights cases and legislation on spiritual links to land, but that such an emphasis is explicable because, although economic links to land may have been weakened or broken, spiritual links have survived and may be maintained (and observed), away from the traditional land of a particular group.⁹² Thus Justice Blackburn's understanding that the "fundamental truth" of the Gove people's relation to land to be "that whatever else it is, it is a religious relationship" should be seen in the local social context. These people had been living since 1935 at Yirrkala, where a benign mission administration allowed their ritual life to continue (and so helped to sustain their religious view of the land), while introducing a new economy and pattern of residence in place of the old.

In his final report proposing what became the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), Woodward J quoted RM Berndt's opinion that Aboriginals have "two levels of ownership, the primary or religious level and the secondary or economic level". Maddock notes that, like other anthropologists, Berndt had been able to study religious life first hand by attending ceremonies at missions and government settlements and by discussing their significance with the performers. No more than the others had he been able to follow the yearly round of activity by which Aboriginals supported themselves on the land before changing to sedentary life. He suggests that this fact may explain the emphasis which the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) laid on spiritual affiliations and spiritual responsibility.

90 *Ibid* at 358-9.

91 *Ibid* at 359.

92 Note 1 *supra* pp 31-2.

Be that as it may,⁹³ there has been much evidence in land claim hearings to demonstrate the continuance of spiritual affiliations with and spiritual responsibilities for land. There has been less emphasis on traditional rights to forage on land, undoubtedly, in some cases, for the reasons suggested by Maddock.

Aboriginal people often describe the exercise of their traditional responsibilities for land as 'looking after' their country. The expression 'looking after' can be used in a number of senses, given the range of responsibilities which may arise with respect to a particular area.⁹⁴ In order to exercise those responsibilities, people may have to exercise rights such as the right to enter and remain on land. As Toohey J noted, although the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)* speaks of responsibility not right, "in a broad sense they are correlatives and one may throw light upon the other".⁹⁵

A person may, in company with others, have responsibilities with respect to one or more areas of land. Individuals may have responsibilities for the traditional country of their father's father, their father's mother, their mother's father and their mother's mother. Only those with the proper relationship to country may speak for it. Speaking in public confirms the right of that person to take on the responsibility.⁹⁶ Rights and responsibilities will also be influenced by such things as age, gender, status, personal history and personal abilities.⁹⁷

The range of responsibilities held and exercised by groups of Aboriginal people in the Northern Territory are described in the reports by successive Aboriginal

93 See also H Middleton *But Now We Want the Land Back* (1977) Middleton (p 156) has criticised 'liberal anthropologists' (such as WEH Stanner and RM Berndt, who gave evidence in the *Gove Land Rights* case) for failing to understand that, in Aboriginal traditional society "the economic relations were primary, were the decisive factor in the society, and that religion was secondary, that it was part of the superstructure of beliefs and institutions which are based on and reflect the material base of the society. Aborigines traditionally had clearly defined rights over certain areas of the land but their economic organisation was destroyed by white colonisation. Their religion survived in places but the anthropologists could not see beyond it to the land and the system of hunting and gathering which had once created and sustained that religion."

94 In one land claim report, Toohey J, noted that sometimes 'looking after' was used "to indicate ownership and sometimes, I think, with a sense of trusteeship because traditional owners were dead or absent. Again there were times when people said they looked after country, meaning that they visited it and protected it against desecration, perhaps in their capacity as rangers. At other times the implication was clear that they did not visit the country, except occasionally, but accepted responsibility for it". (*Alligator Rivers Stage II Land Claim* (1981) at [103]. See also Aboriginal Land Commissioner (Kearney J) *Upper Daly Land Claim* (1991) vol 1 at [33], [37], [44], vol 3 at [68], [88].

95 Aboriginal Land Commissioner (Toohey J) *Anmatjirra and Alyawarra Land Claim to Utopia Pastoral Lease* (1980) at [133].

96 For example see Aboriginal Land Commissioner (Olney J) *Stokes Range Land Claim* (1991) at [4.7.4]; Aboriginal Land Commissioner (Kearney J) *Nicholson River (Waanyi/Garawa) Land Claim* (1985) at [79]-[83]; Aboriginal Land Commissioner (Maurice J) *Ti-Tree Station Land Claim* (1987) at [140]-[146].

97 Aboriginal Land Commissioner (Kearney J) *Mount Allan Land Claim* (1985) at [38]-[39]; Aboriginal Land Commissioner (Kearney J) *Warlpiri Kukatja and Ngarti Land Claim* (1985) at [62]-[63].

Land Commissioners about traditional land claims.⁹⁸ In this article it is only possible to sketch the various types of responsibilities and the ways they are exercised and to give some illustrations gleaned from those reports. Broadly speaking, the responsibilities can include educational, custodial and protective

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- 98 The following reports of Aboriginal Land Commissioners have been published by AGPS, Canberra:
- Borroloola Land Claim* (1979) Toohey J;
 - Land Claim by Warlpiri and Kartangururu-Kurintji* (1979) Toohey J;
 - Land Claim by Alyawarra and Kaititja* (1979) Toohey J;
 - Uluru (Ayers Rock) National Park and Lake Amadeus/Luritja Land Claim* (1980) Toohey J;
 - Yingawunarra (Old Top Springs) Mudbura Land Claim* (1980) Toohey J;
 - Anmatjirra and Alyawarra Land Claim to Utopia Pastoral Lease* (1980) Toohey J;
 - Lander Warlpiri Anmatjirra Land Claim to Willowra Pastoral Lease Report* (1980) Toohey J;
 - Limmen Bight Land Claim* (1981) Toohey J;
 - Finniss River Land Claim* (1981) Toohey J;
 - Alligator Rivers Stage II Land Claim* (1982) Toohey J;
 - Warlmanpa, Warlpiri, Mudbura and Warumungu Land Claim* (1982) Toohey J;
 - Land Claim by Gurindji to Daguragu Station* (1982) Toohey J;
 - Daly River (Malak Malak) Land Claim* (1982) Toohey J;
 - Kaytej, Warlpiri and Warlmanpa Land Claim* (1982) Toohey J;
 - Yutpundji-Djindiwirritj (Roper Bar) Land Claim* (1982) Toohey J;
 - Nicholson River (Waanyi/Garawa) Land Claim* (1985) Kearney J;
 - Cox River (Alawa/Ngandji) Land Claim* (1985) Kearney J;
 - Mount Allan Land Claim* (1985) Kearney J;
 - Gurindji Land Claim to Daguragu Station* (1985) Maurice J;
 - Timber Creek Land Claim* (1985) Maurice J;
 - Mount Barkly Land Claim* (1985) Kearney J;
 - Warlpiri Kukatja and Ngarti Land Claim* (1985) Kearney J;
 - Ti-Tree Station Land Claim* (1987) Maurice J;
 - Murrniji Land Claim* (1987) Kearney J;
 - Jila (Chilla Well) Warlpiri Land Claim* (1987) Maurice J;
 - Jawoyn (Katherine Area) Land Claim* (1987) Kearney J;
 - Lake Amadeus Land Claim* (1988) Maurice J;
 - Mataranka Area Land Claim* (1988) Maurice J;
 - Kidman Springs/Jasper Gorge Land Claim* (1989) Olney J;
 - Warumungu Land Claim* (1988) Maurice J;
 - McLaren Creek Land Claim* (1990) Olney J;
 - Garawa/Mugularrangu (Robinson River) Land Claim* (1990) Olney J;
 - Wakaya/Alyawarre Land Claim* (1990) Olney J;
 - Bilinara (Coolibah-Wave Hill Stock Routes) Land Claim* (1990) Olney J;
 - Stokes Range Land Claim* (1990) Olney J;
 - Upper Daly Land Claim Volumes 1, 2 and 3* (1989-1990) Kearney J;
 - Western Desert Land Claim* (1990) Olney J;
 - Finke Land Claim* (1990) Olney J;
 - Kenbi (Cox Peninsula) Land Claim* (1991) Olney J;
 - North-west Simpson Desert Land Claim* (1992) Olney J;
 - Tanami Downs Land Claim* (1992) Olney J;
 - Yurrkuru (Brookes Soak) Land Claim* (1992) Olney J;
 - Harts Range Land Claim* (1992) Olney J.

responsibilities. Although there is some overlap in the content of these categories they provide a means of grouping those responsibilities.

(i) *Educational responsibilities*

It is the responsibility of people to seek and to impart knowledge about country. This educational responsibility involves the maintenance of a group's knowledge of the land and sites on it. As one Aboriginal Land Commissioner observed, "much of the knowledge of ceremony and ritual relating to land which concerns the spiritual relationship between the traditional owner and the land is esoteric, closely guarded by the older, initiated persons, and gradually acquired by members over a lifetime".⁹⁹ Senior members impart and younger members acquire that knowledge over many years and in a variety of ways. For example, children are taught in the course of taking them hunting, camping and foraging and in the performance of spiritual responsibilities for land. Visits to country as a part of everyday life entail learning about dreaming associations, proper behaviour, and flora and fauna to be found in the country. This has a practical bush use in terms of acquiring spatial orientation. It also involves the retention within the group of a "body of knowledge of the spiritual landscape, the inner meaning of the visible signs of the activities of the Dreamings".¹⁰⁰ Knowledge transmitted in the formal context of ritual involves the novice being introduced to dreamings associated with particular areas of land and may involved such things as the wearing of site-associated mythological designs.¹⁰¹

(ii) *Custodial responsibilities*

Custodial responsibilities can involve such things as ceremonial activities.

Some groups think that their custodial responsibilities are discharged by their visiting sites, by simply being there or camping there.¹⁰² Some have attempted to purchase land and, if unsuccessful, are reluctant to move away from the land for which they have responsibilities.¹⁰³

99 *Upper Daly Land Claim* note 98 *supra* vol 3 at [86]. See also *Yutpundji-Djindiwirritj (Roper Bar) Land Claim* note 98 *supra* at [61] where it was noted that djunggaiyi and miniringgi each have an important role in the passing on of knowledge to young people about the country of their fathers and mothers.

100 Note 98 *supra*: *Jawoyn (Katherine area) Land Claim* at [58]; see also at [91]-[93], [167]; see also *Stokes Range Land Claim* at [4.7.3]; *Upper Daly Land Claim* vol 1 at [35], [37], vol 3 at [84], [88]; *Warlpiri Kukatja and Ngarti Land Claim* at [62]-[63]; *Murrnaji Land Claim* at [94].

101 *Stokes Range Land Claim* note 98 *supra* at [4.7.2]; *Upper Daly Land Claim* note 98 *supra* vol 2 at [51].

102 *Jawoyn (Katherine Area) Land Claim* note 98 *supra* at [96], [106]; *Upper Daly Land Claim* note 98 *supra* vol 1 at [33], vol 2 at [45], vol 3 at 91].

103 *Mataranka Area Land Claim* note 98 *supra* at [6.12.5].

Land claim reports are replete with descriptions of the nature of ceremonies associated with particular tracts of land, and the various roles to be performed by members of identifiable groups of people.

For example, in many land claims, evidence has been given of the respective ritual roles of people whose responsibilities for an area of land have been passed to them from their father's father (known in different parts of the Northern Territory as *kirda* or *miniringgi*) and those people whose responsibilities for the same area have been passed to them from their mother's father (*kurdungurlu* or *djunggaiyi*) or their mother's mother (*dalnyin*). In the *Cox River (AlawalNgandji) Land Claim* report, for example, Kearney J summarised the respective roles of *miniringgi* and *djunggaiyi* for the land claimed in the following terms:

Miniringgi...They may ask the *djunggaiyi* for the ceremony to be held. In the ceremony, they take part in singing the song cycles, perform the dances, and wear the estate's body designs, a crucial index of their status as *miniringgi* for the estate. They are under a duty to learn and transmit to the next generation the knowledge of the country, the song cycles, and the narrative of the myths, though about some matters they need the permission of the *djunggaiyi* to speak. They are required under penalty to avoid certain parts of sites, and to pay the *djunggaiyi* if sites are damaged. All *miniringgi* are forbidden to eat particular parts of their totemic animals. Women *miniringgi* dance and sing in their own area, look after the novices and do the cooking.

Djunggaiyi...For the major ceremonies controlled by men, the male *djunggaiyi* fix the time for the ceremony, in consultation with the *dalnyin*; prepare the ceremony grounds; construct the ceremonial objects; and decorate the *miniringgi*. Where the ceremonies involve song cycles, they take part in the singing. They fine *miniringgi* if they make a mistake during the ceremony. They learn and transmit the narratives of the myths to the next generation; the head *djunggaiyi* has a particular responsibility to do so. They take care of the sites, and fine the *miniringgi* if a site is damaged. They may catch totemic animals for the *miniringgi*. The women *djunggaiyi* control the public area in the male controlled ceremonies.¹⁰⁴

Similar statements can be found in other reports,¹⁰⁵ as can statements about the responsibilities of *dalnyin* for their mother's mother's land.¹⁰⁶

104 *Cox River (AlawalNgandji) Land Claim* note 98 *supra* at [46], [47].

105 For example note 98 *supra*: see *Anmatjira and Alyawarra Land Claim to Utopia Pastoral Lease* at [90]-[98]; *Lander Warlpiri Anmatjira Land Claim to Willowra Pastoral Lease Report* at [99]-[109]; *Limmen Bight Land Claim* at [62], [67]-[85]; *Warlmanpa, Warlpiri, Mudbura and Warumungu Land Claim* at [93], [112]-[28]; *Land Claim by Gurindji to Daguragu Station* at [58]-[64]; *Kaytej, Warlpiri and Warlmanpa Land Claim* at [58], [62], [65], [67], [81], [84], [90]; *Yutpundji-Djindiwirriij (Roper Bar) Land Claim* at [53]-[72]; *Nicholson River (Waanyi/Gurawa) Land Claim* at [78], [85], [215]-[18]; *Mount Allan Land Claim* at [30]-[9], [60], [61]; *Mount Burkly Land Claim* at [44], [54], [57], [73], [76], [79], [83]; *Warlpiri Kukatja and Ngarti Land Claim* at [21], [39], [40], [47], [61]-[63].

106 For example of the role of *dalnyin* in ceremonies see *Cox River (AlawalNgandji) Land Claim* note 98 *supra* at [48].

Visiting sites which are said to be sacred or dangerous may involve the performance of rituals. When approaching or leaving a site, people may call out in their language to the spirits believed to reside there in order to inform the spirits that the people are approaching and are carrying out the proper procedures. When people are foraging or hunting, the purpose of calling out may be so that the spirits will provide foods to the people. The ritual involved in approaching sites may include the use of sweat from their bodies, or water (or mud) from a site, to introduce the local Aborigines or strangers to the Dreamings or spirits of that site. These acts are to ensure that no harm will come to those persons visiting the site.¹⁰⁷

Custodial responsibilities may also include the duties to clean sites and to burn the country (even though there are limitations on this practice these days).¹⁰⁸ Seasonal burning allows for the revitalisation of and regrowth on the country. When the land is opened up, it exposes animals to be hunted and the new grass attracts more animals. Selective hunting and gathering, and verbal communication with country and with deceased owners, also form part of the exercise of responsibilities for land. Together, those practices may also be seen as part of discharging the obligation to nurture country or keep the country 'good', although at times they may be in conflict with European notions of land use.¹⁰⁹

(iii) *Protective responsibilities*

Protective responsibility is exercised for the benefit of the local group of Aborigines as well as for outsiders. It is particularly important where sites on the land are associated with Dreamings that are held to be capable of releasing destructive powers if disturbed. Violation of sites is expected to result in retribution in the form of fire, flood, disease or some other calamity. Hunting and other activities may be prohibited within the sphere of influence of such sites.¹¹⁰

The protective responsibility may mean that the relevant Aboriginal people must try to protect sites from violation by other people who are ignorant of the resulting

107 *Jawoyn (Katherine Area) Land Claim* note 98 *supra* at [97]-[100], [169]; *Upper Daly Land Claim* note 98 *supra* vol 1 at [38], vol 3 at [69], [72], [85].

108 *Jawoyn (Katherine Area) Land Claim* note 98 *supra* at [101]; *Upper Daly Land Claim* note 98 *supra* vol 1 at [39], vol 2 at [47].

109 *Kidman Springs/Jasper Gorge Land Claim* note 98 *supra* at [9.1]; *Stokes Range Land Claim* note 98 *supra* [4.7.5].

110 *Jawoyn (Katherine Area) Land Claim* note 98 *supra* at [60], [61], [170-1]. Mr Justice Kearney noted that the "highly apocalyptic" nature of Jawoyn cosmology was unusual. The Jawoyn may differ from most Aboriginal societies in the higher degree to which they expect major cataclysmic events such as floods, plagues of snakes, or lightning bolts to follow infringements of spiritual rules. But see also descriptions of the dire consequences of disturbance in *Stokes Range Land Claim*, note 98 *supra* at [4.7.6]; *Upper Daly Land Claim* note 98 *supra* vol 1 at [28], [40]-[42], vol 2 at [46], [48], [58], vol 3 at [83]; *Yutpundji-Djindiwirritj (Roper Bar) Land Claim* note 98 *supra* at [59]-[60].

dangers, and by doing so they also protect those people and everyone else from the consequences of such violations. Those responsible for sites may also be obliged to avoid damaging or disturbing them. Damage to sites may be seen as having potential to cause sickness and death. In some places the uttering of a particular place name or other word is prohibited, or certain trees must not be interfered with. At certain places, the dangers may be gender specific. For example, there are some areas which women will not enter. They believe harm will come to them should they do so, and they will not speak about the significance of the site except in the most general manner. Residence at a site may be the most effective way of protecting it. So, too, is the involvement of the relevant Aboriginal people in consultation about proposed development of land (such as road construction) in the area. Steps taken to prevent interference with or damage to sites may also include having sites registered under the relevant sites protection legislation,¹¹¹ or simply keeping people a good distance away from places such as ceremony grounds.¹¹²

In order to protect some sites, the relevant Aboriginal people may seek to keep them as secret as possible. For others, such secrecy may pose some practical problems.¹¹³

As with ceremonial responsibilities, protective responsibilities may be divided among members of a group. Justice Maurice noted that (at least in respect of one claim area) when damage occurs to a site the tendency is for those held most directly responsible for payment to be *miniringgi* and for the recipients of the payment to be *djunggaiyi* and *darlnyin*.¹¹⁴ The passage from the report on the *Cox River (AlawalNgandji) Land Claim* quoted earlier is another example of such responsibilities and liabilities.

Aboriginal people see themselves as caretakers of a relationship of trust deriving from the Dreaming and passed on to them by their immediate forebears. The discharge of responsibilities in the numerous ways just summarised maintains the people and the country. The relationship is reciprocal. The country cares for its people. Some Aboriginal claimants have said that in their own country they will never go hungry and the dangerous places will not harm them, provided they

111 *Jawoyn (Katherine Area) Land Claim* note 98 *supra* at [101]-[104]; *Stokes Range Land Claim* note 98 *supra* at [4.7.1], [4.7.3]; *Upper Daly Land Claim* note 98 *supra* vol 1 at [43], vol 3 at [90].

112 *Mataranka Area Land Claim* note 98 *supra* at [7.3.1].

113 *Jawoyn (Katherine Area) Land Claim* note 98 *supra* at [105].

114 *Mataranka Area Land Claim* note 98 *supra* at [7.3.2]. He noted that, if any of those in these role-relations are considered too young, others may stand in for them. If the site is one of ceremonial significance, settlement of the situation may be largely or entirely handled by senior men, some of whom may be acting in role-relationships broadly defined in relation to ceremonial participation and not defined in as narrow terms as local descent group membership.

exercise the proper care. Just as they know and care for their country, they believe that country knows and cares for its people.¹¹⁵

In some cases it may not be clear whether Aboriginal people draw a distinction between things which Europeans might consider spiritual and those which are economic or secular. The important concept is that the land is maintained by Dreaming activity, through the ceremonial life of the people receiving responsibility for that Dreaming from their ancestors. The abundance of certain economically prized goods at a place is seen as the result of Dreaming activity.¹¹⁶ Such notions infuse the following excerpt from evidence given in a central Australian land claim concerning responsibilities arising from the *Jukurrpa* (or the 'Dreaming' or the 'Dreamtime').

'Jukurrpa means like God - been given everything'...'It is set down in jukurrpa - it comes from jukurrpa - that the kurdungurlu must go first and the kirda come after, with leaves'. The purpose of ritual is to maintain the land, 'for making the country green and bush tucker all the time', 'to increase the animals, to make the animals fat'. The dancing 'holds up' the country. 'We are holding up the Ngurlu - the seed, sustaining the seed...We follow the Jukurrpa in the correct way...We go by virtue of the law and we sustain the law'.¹¹⁷

D. STATUTORY RECOGNITION OF ABORIGINES' AND TORRES STRAIT ISLANDERS' RESPONSIBILITIES FOR LAND IN QUEENSLAND

The traditional (and other) responsibilities which Aborigines and Torres Strait Islanders have for their lands are expressly recognised in the 1991 Queensland legislation. References to such responsibilities are found in the preamble to each Act, and in the provisions relating to the transfer of title to areas of land already reserved for the benefit of Aborigines or Torres Strait Islanders, and in the provisions relating to the land claim process.

The preamble to the *Aboriginal Land Act* 1991 (Qld) refers to the prior occupation, use and enjoyment of land in Queensland by Aboriginal people in accordance with Aboriginal tradition. It recognises the spiritual, social, historical, cultural and economic importance of land to Aboriginal people and recites that many Aboriginal people were dispossessed and dispersed after European settlement. The preamble (and indeed the Act) does not refer to the 'rights' of Aboriginal people to land. Instead it states that the Parliament is satisfied that:

- (a) 'Aboriginal interests and responsibilities in relation to land' have not been adequately and appropriately recognised by the law; and

¹¹⁵ *Kidman Springs/Jasper Gorge Land Claim* note 98 *supra* at [9.1].

¹¹⁶ See *Warlmanpa, Warlpiri, Mudbura and Warumungu Land Claim* note 98 *supra* at [92], [93].

¹¹⁷ *Lander Warlpiri Anmatjirra Land Claim to Willowra Pastoral Lease Report* note 98 *supra* at [101].

- (b) special measures need to be enacted for the purpose of securing adequate advancement of 'the interests and responsibilities' of Aboriginal people in Queensland.¹¹⁸

It is the express intention of the Parliament to make provision in this Act 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".

The *Torres Strait Islander Land Act 1991* (Qld) commences with a similar preamble which refers to the "interests and responsibilities in relation to land" of Torres Strait Islanders.

Where land is transferred to Aborigines or Torres Strait Islanders without the need for land claims, the deeds of grant may specify the responsibilities which the people particularly concerned with the relevant land have agreed to assume in relation to the land.¹¹⁹

The legislation provides for claims to be made by groups of Aboriginal people or by Torres Strait Islanders to areas of 'claimable land' described earlier in this article. A land claim application must include, among other things, a statement of the responsibilities in relation to the land that the claimants agree to assume if the land is granted because of the claim. If the claim is made on the ground of economic or cultural viability, the claim must also include a statement of the specific proposal for the use of the land claimed.¹²⁰ In other words, an essential component of any claim is a statement that the claimants will assume specified responsibilities in relation to the land if that land is granted.

The legislation defines these 'responsibilities' in relation to land to include:

- responsibilities under Aboriginal tradition (or Island custom) for the land, including, for example, responsibilities for areas that are of particular significance under Aboriginal tradition (or Island custom); and
- responsibilities for the land that may affect neighbouring land, including, for example, responsibilities in relation to fire and vermin control.¹²¹

A land claim is assessed by the relevant Land Tribunal which must determine whether the claim is established on one or more of the grounds of traditional affiliation, historical association and economic or cultural viability. The notion of responsibility is also inherent in at least the first of those grounds. A claim on the

118 Section 1.03 of the *Aboriginal Land Act 1991* (Qld) defines "interest" in relation to land to include "a right, power or privilege over, or in relation to the land".

119 *Aboriginal Land Act 1991* (Qld) s 3.01(4); *Torres Strait Islander Land Act 1991* (Qld) s 3.01(4).

120 *Aboriginal Land Act 1991* (Qld) s 4.04; *Torres Strait Islander Land Act 1991* (Qld) s 4.04.

121 *Aboriginal Land Act 1991* (Qld) s 1.03; *Torres Strait Islander Land Act 1991* (Qld) s 1.04.

ground of “traditional affiliation” is established if the Land Tribunal is satisfied that the members of the group have 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.¹²² Aboriginal tradition is “the body of traditions, observances, customs and beliefs of Aboriginal people generally or of a particular group of Aboriginal people, and includes any such traditions, observances, customs and beliefs relating to particular persons, areas, objects or relationships”. The expression “Island custom” (known in the Torres Strait as “Ailan Kastom”) is similarly defined.¹²³

When the Land Tribunal makes a recommendation to the Minister for Lands that an area of land be granted, the Tribunal must advise the Minister, in writing, in relation to each of a number of matters including the responsibilities in relation to the land that the group of Aboriginal people concerned agree to assume if the land is granted because of the claim, and how those responsibilities should be expressed in any deed of grant or lease granted in relation to the land.¹²⁴

If the Land Tribunal recommends to the Minister that an area of land be granted to a group of Aboriginal people or Torres Strait Islanders and if the Minister is satisfied that the land (or part of it) should be so granted, the Minister must direct the Registrar of Titles to prepare a deed of grant in respect of the land. The deed of grant must specify both the ground on which the Land Tribunal recommended that the land be granted, and the responsibilities that the group of Aboriginal people have agreed to assume in relation to the land.

That requirement (among others) is expressed to have effect “despite any other Act or any rule of law or practice”. Similarly, if a lease is prepared in respect of land successfully claimed on the basis of economic or cultural viability, that lease must (among other things) specify the responsibilities that the group of Aboriginal people of Torres Strait Islanders have agreed to assume in relation to the land. Again, that provision takes effect “despite any other Act or any rule of law or practice”.¹²⁵

These notions of responsibility give express legal recognition to traditional principles that caring for and looking after country is an essential part of having rights to that land. As is clear from the legislation, responsibilities for land can be responsibilities of a spiritual or cultural nature, reflecting the responsibilities which people with traditional links to the land already have.

122 *Aboriginal Land Act 1991* (Qld) s 4.09; cf *Torres Strait Islander Land Act 1991* (Qld) s 4.09 on “customary affiliation”.

123 *Aboriginal Land Act 1991* (Qld) s 2.03; *Torres Strait Islander Land Act 1991* (Qld) s 2.02.

124 *Aboriginal Land Act 1991* (Qld) s 4.16(5); *Torres Strait Islander Land Act 1991* (Qld) s 4.16(5).

125 *Aboriginal Land Act 1991* (Qld) s 5.01; *Torres Strait Islander Land Act 1991* (Qld) s 5.01.

The 15 land claim applications received by the Land Tribunal to the end of July 1993 have listed a range of responsibilities. Claims to vacant Crown land or former Aboriginal reserve land included the following statements of responsibilities:

- look after the areas where our ancestors used to camp and hunt;
- hunt and fish and camp on our land so that our children learn about it and about our culture;
- burn the grass at the right time of the year to preserve the land so the species can grow on;
- we would visit the country regularly;
- we would make sure the country is kept clean;
- we would help make sure that what happens on the land does not damage or affect neighbouring land by controlling fire, pests and fencing the land;
- some of us may live on the land;
- we would make sure that sites are looked after;
- maintaining traditional Aboriginal cultural ties applicable to this group for this particular area.

Claims to national park land have included the following statements of responsibilities:

- to look after and use the land in accordance with Aboriginal tradition;
- to manage the cultural values of the national park and in particular to oversee and take part in rock art conservation, cultural interpretation of the landscape and managing and controlling visitor access to the area;
- subject to arrangements satisfactory to the appropriate family groups, to engage in management and conservation of natural values of the national park.

At the end of July 1993, no land claim had been prepared to a stage where it could be heard by a Land Tribunal. Accordingly, it is not possible to describe what the exercise of those responsibilities would involve and what effect the exercise of those responsibilities would have on the land. The debate about the exercise of those responsibilities on national park land and other areas valued for their natural features is considered in the next part of this article.

E. CONSERVATION VALUES AND TRADITIONAL RESPONSIBILITIES FOR LAND

In the course of the general debate about environmental issues, Aborigines are sometimes described as conservationists whose traditional values about resource use require the preservation of the natural environment or at least minimal human

impact on it. Such a view is at best simplistic and may be derived from observations of the degree of impact which some Aboriginal groups have had on the natural environment but which do not fully account for Aboriginal attitudes to their environment. Professor Robert Tonkinson touched on this matter in his study of the Mardudjara people who live in a desert region of Western Australia.¹²⁶ At a general level Tonkinson states that, in common with many other hunter-gatherer societies whose adaptation demands highly symbiotic relationships with their natural environment, Aborigines see "an essential unity among the components of their cosmic order: human society, the plant and animal world, the physical environment, and the spiritual realm." To maintain this unity and guarantee continued harmony with the spiritual powers, Aborigines must exercise their responsibilities to perform rituals and obey the Law which has come to them as a legacy of what, in English, is inadequately described as the Dreamtime. If ritual appeals are properly made, the ancestral powers (as co-residents of the same cosmic order) are obliged to respond positively by supplying the rain, babies, flora and fauna that guarantee the continuation of life.¹²⁷

In analysing the environment in which the Mardudjara live, Tonkinson has shown that ecological necessities keep people dispersed in small groups most of the time.¹²⁸ The evolution of their culture has entailed a maximising of the exploitative possibilities of the natural environment. This has taken place within the limits set by ecology and technology. The Mardudjara attribute neither superiority nor autonomy to the forces of nature since to do so would suggest an opposition between nature and humanity. Rather, they see both as elements of a wider cosmic order, a totality that must include the all-powerful spiritual beings of their Dreamtime. Although they postulate a harmony among its component parts, they regard their actions as essential for its maintenance.

The most visible impact made by the Mardudjara on the land is their continuous practice of burning grassland. They also dig holes, cut down trees, uproot shrubs, clear campsites, place sticks and stones in forks of trees (which warn of something sacred and/or dangerous nearby), dig out wells, and so on. Yet because they are few in number and highly mobile, their total impact on the physical environment is slight. Tonkinson argues that the resulting impression of "environmental awareness" to the observer may well be an illusion, merely a product of ecological imperatives. Even if significant alteration of landforms was possible with their existing technology, such activity is precluded by religious convictions. Creativity is the sole prerogative of human transformations of the landscape. It is for the

126 R Tonkinson *The Mardudjara Aborigines: Living the Dream in Australia's Desert* (1978).

127 *Ibid* pp 16-17.

128 The temporary meeting of various groups at times of relative abundance of some food staple at a site facilitates, among many other important things, the maintenance of a shared religious life and of cultural transition.

people to fulfil their ritual responsibilities in accordance with the Dreamtime blueprint.¹²⁹

RM and CH Berndt, in their more general text *The World of the First Australians*,¹³⁰ also point out that Aborigines were not in a position to nurture their environment (except in mytho-ritual terms) or to change the environment radically. The religious cycles underlined a theme of unchanging nature within the context of seasonal fluctuation, and were designed to perpetuate natural resources and so sustain the status quo at all levels. Environmental exploitation was strictly correlated with and limited by the group's needs for survival, rather than being a direct or conscious attempt at conservation for conservation's sake. That is not to say that there were not instances of localised detriment to the natural environment. According to the Berndts, there are plenty of examples of profligacy in the sense that collection of plant or animal food was in excess of needs of consumption. One example is the firing of large tracts of country for purposes of hunting. Another is the destruction of trees in order to extract honey or edible grubs or to remove sheets of bark. They conclude that the need for restraint was not particularly apparent, because the kind of social life which traditionally existed inevitably imposed its own internal controls. But they note that views differ as to whether the activities of Aborigines in the past had significant and deleterious effects on the environment.¹³¹ The Berndts conclude that most firing of country for hunting

129 Note 126 *supra* pp 30-1.

130 RM and CH Berndt *The World of the First Australians* (5th ed, 1988) pp 146-7.

131 *Ibid* p 147. The Berndts record that Calaby, for instance, sees no reason "to doubt that they (the Aborigines) had little or no deleterious effect on the survival of most faunal species as a direct result of their predatory activities": he continues, "there is no archaeological or ethnographical evidence that predation by Aborigines has caused the extinction of any species" (JH Calaby "Man, Fauna and Climate in Aboriginal Australia" in DJ Mulvaney and J Golson (eds) *Aboriginal Man and Environment in Australia* (1971) p 90). Mulvaney takes a contrasting view. Aborigines, he says, "almost certainly played a role in altering the ecological character of the continent (and, less directly, the soil) through selective hunting activities and frequent burning of vegetation". He continues, "Man and the dingo together represented a scourge to the Prehistoric fauna; the two were virtually the sole predatory carnivores on the continent" (DJ Mulvaney "The Prehistory of the Australian Aborigine", (1966) 214(3) *Scientific American* 93). Tindale (1959) had suggested earlier that "Aborigines probably had a profound effect on the vegetation, chiefly by their destructive and uncontrolled use of fire for hunting" (cited in Calaby p 91). In Cleland's view, however, Aborigines had been "in equilibrium with their environment" and there was no evidence to support the claim that their special food-collecting habits "rendered any species of animal liable to extinction". He also believed that the effects of fire were, with some exceptions, mainly localised (JB Cleland "The Ecology of the Aboriginal in South and Central Australia" in BC Cotton (ed) *Aboriginal Man in South and Central Australia, Part I* (1966) pp 123-6). Merrilees takes an opposite stand, considering that continued burning caused modification of the natural habitat on a vast scale (D Merrilees "Man the Destroyer: Late Quaternary Changes in the Australian Marsupial Fauna", (1968) 51 *Journal of the Royal Society of Western Australia*). More recently, Sutton and Anderson stated: "The stereotype of Aborigines passively succumbing to the dictates of their environment has also been recently questioned. We now know that they altered the landscape in significant ways, using what has been called 'fire-stick farming' to control underbrush growth and to facilitate hunting. Aborigines also altered species

purposes was relatively controlled (although it did not always seem to be) and spread over local areas only.¹³²

Those writers, however, were considering either the activities of Aboriginal communities in the past, or relatively isolated communities whose impact on the environment was conditioned by such things as their relatively small numbers, the range of tools which they used, and their total dependence on their traditional country for survival. It is possible that the same conclusions need not be drawn where groups have the use of technology such as guns, motor vehicles and motor boats and where other sources of sustenance are available to them.

A number of environmental issues arising from traditional Aboriginal uses of land have been of concern to conservationists. Indeed Penny Figgis has described the history of the relationship between the conservation movement and Aboriginal interests as "somewhat chequered".¹³³ For much of the movement's existence, Aboriginal rights have been a non-issue. The national park model which was adopted as the ideal was one where the preservation of nature was paramount and any substantial human activity, and certainly human settlement, was rejected as incompatible. According to Figgis, the major emphasis is now placed on conserving wilderness from which man and his works are excluded except for recreational activities which leave no trace.

Aboriginal interests, however, have not been ignored by all conservationists. In 1978, for example, the Australian Conservation Foundation (the ACF), under the presidency of Dr HC Coombs, concluded an "historic exchange of Statements of Intent" between the Northern and Central Land Councils and the ACF. The two groups pledged themselves to work "in a spirit of cooperation and mutual trust in conserving the land". At the time Dr Coombs said "[t]he ACF is convinced that the best guarantee for the future of the wildlife in Aboriginal lands is for the land to be restored to real Aboriginal ownership and control".¹³⁴ Figgis recalls that the support of conservationists was "particularly fulsome" as they perceived that Aboriginal opposition could add weight to their own efforts against various mining operations, particularly uranium mining in the Alligator Rivers region of the Northern Territory.

Although this new found enthusiasm was partly based on a genuine recognition of the depth of the relationship between Aboriginal people and their land and the great antiquity of Aboriginal interaction with the environment there was a good

occurrence of flora and fauna by resource management and possibly assisted in the extinction of prehistoric animals." (P Sutton (ed) *Dreamings: The Art of Aboriginal Australia* (1988) p 5).

132 Note 130 *supra* p 148.

133 P Figgis "Conservation and Aboriginal Land - Conflict or Symbiosis?" (1986, unpublished paper). At that time Figgis was Vice-President and Northern Territory Councillor, Australian Conservation Foundation.

134 "Aborigines and ACF Unite on Land Claims" *Australian Conservation Foundation Newsletter* vol 10 no 3, May 1978.

deal of romanticism in which all Aborigines were embraced as natural conservationists totally in harmony with nature whose possession of land would ensure its conservation management. 'Land rights not uranium' stickers bedecked conservationists' cars exemplifying the perception that land rights meant no development.¹³⁵

Some people have reviewed their support as Aboriginal opposition to mining has declined and Aboriginal ownership and control of substantial tracts of land has increased.

Figgis has usefully analysed the "anxieties of conservationists over Aboriginal lands and land use" into the following four main categories:

- *competition*: the perception that much of the remaining areas of natural unalienated land are subject to land claims and so will be 'lost' as potential national parks;
- *private ownership*: that unalienated Crown land which becomes Aboriginal title will cease to be public land and be closed to public access;
- *modern practices*: that the outstation movement or successful claims over existing nature reserves or national park lands will mean the penetration of previously natural areas with roads, settlements, motor vehicles and firearms;
- *development*: that Aborigines will allow environmentally unsound developments (especially mining, pastoralism and tourist developments) on their lands.

Examples of how some of those concerns have been raised and dealt with in the course of land claim hearings in the Northern Territory are examined below. There are indications that the same concerns will have to be considered by the Land Tribunal dealing with Aboriginal land claims in Queensland, particularly where claims are to national parks lands. In 1992 a person applied to be a party to a national park claim because he believed that the claim would cut across fundamental principles affecting the management and control of the relevant national park and that the values of national parks would be adversely affected by the granting of the claim. His concern arose in part because the land claim application indicated that the Aboriginal claimants intended to use the land in accordance with Aboriginal tradition. The protection of the lives of native animals and their ecosystem from human interference would, he submitted, be adversely affected by that form of land use, particularly if it involved hunting and long term or large scale camping.¹³⁶

¹³⁵ Note 133 *supra* p 3.

¹³⁶ See the decision of the Land Tribunal concerning the application by Rupert Russell to be made a party to the proceeding for the land claim to Melville National Park (24 August 1992) and, on appeal from that decision,

In his second report on proposals for Aboriginal land rights legislation in the Northern Territory, Woodward J discussed in some detail “[r]econciling Aboriginal interests with conservation”.¹³⁷ He commenced with the observation, made in his first report, that “conservationists properly argue that the interests of man, even of Aboriginal man, should in certain circumstances be subordinated to those of other forms of life. Aboriginal man lived in harmony with his environment in the past, but that was before the use of modern hunting equipment or the introduction of tourist and pastoral activities”.¹³⁸ He suggested that there be a thorough survey of land use to ensure areas are neither arbitrarily proclaimed for conservation nor overlooked. Once areas which are worthy of special protection have been identified, an attempt should be made to reconcile Aboriginal interests with those of conservation, particularly by way of joint management of such areas as national parks and wildlife sanctuaries.

Although Woodward J accepted the view that Aboriginal interests have much in common with those of conserving the environment, he thought “it would be foolish to ignore the fact that there are some areas in which they will come into conflict”. Where such conflict arises, the Aborigines’ interests should be considered by an independent arbitrator. He suggested that attempts should be made, as far as possible, to reconcile Aboriginal needs and the best interests of conservation by compromise within a given area, even though the result may not be in accordance with best conservation planning. Finally, he said that Aboriginal interests should only be overruled where the case for conservation is a strong one. This could occur, for example, if a species of animal was threatened by Aboriginal activity.¹³⁹

His Honour also referred to a practical conservation issue which would arise where Aborigines desire that buffalo or wild cattle should not be eliminated from particular sanctuaries but should be culled by Aborigines for food or for sale. He believed that it should be possible to arrive at a compromise based on numbers or on particular localities. This would depend upon the real extent of the risk to indigenous species if buffalo or cattle were allowed to remain, which risk would have to be weighed against the importance of the food source to local Aborigines.¹⁴⁰

In Queensland an attempt at balancing these interests in respect of national parks which are successfully claimed by Aborigines is found in recently enacted

the decision of the Land Appeal Court in *R Russell v G Neate, Chairperson of Land Tribunal* (8 February 1991).

137 AE Woodward, *Aboriginal Land Rights Commission Second Report* (1974) at [492]-[509], [516]. Separate consideration was given to Ayers Rock at [510]-[515].

138 *Ibid* at [492].

139 *Ibid* at [504]-[508].

140 *Ibid* at [509].

legislation. The *Aboriginal Land Act 1991* (Qld) provides¹⁴¹ that, if granted land is or includes national park land then the grant of the national park land:

- is subject to the condition that the grantees lease the national park land, in perpetuity, to the State for the purposes of the management of the national park land under the *Nature Conservation Act 1992* (Qld); and
- is subject to such other conditions as the Governor in Council determines, by order in council, in relation to the national park land or national parks generally.

There is to be a board of management for each area of granted national park land. The Aboriginal people particularly concerned with that land are to be represented on the board of management.

The Minister for Environment and Heritage must, in cooperation with the board of management and before the grant of the land, prepare a management plan for the national park land. In the preparation of a management plan, the Minister must:

- consult with, and consider the views of, the Aboriginal people particularly concerned with the national park land; and
- as far as practicable, but subject to s 5.20 of the *Aboriginal Land Act 1991* (Qld) and the *Nature Conservation Act 1992* (Qld), act in a way that is consistent with any Aboriginal tradition applicable to the national park land (including any tradition relating to activities on the national park land).

The lease of the national park land must be subject to the following conditions:

- that the national park is to be managed in accordance with the management plan as in force from time to time; and
- that the management plan is to be implemented by the board of management.

The *Aboriginal Land Act 1991* (Qld) expressly provides that nothing in the Act or a management plan or lease under this section is to result in a decrease, in the aggregate, in the public rights of access that existed in relation to the national park land immediately before the land became claimable land.¹⁴²

Comparable provisions are found in the *Torres Strait Islander Land Act 1991* (Qld).

The *Nature Conservation Act 1992* (Qld) provides that a national park (Aboriginal land) or a national park (Torres Strait Islander land) is to be managed as a national park but, as far as practicable, that management is to be in a way that is consistent with any Aboriginal tradition or Island custom applicable to the area

141 *Aboriginal Land Act 1991* (Qld) s 5.20, as amended by the *Nature Conservation Act 1992* (Qld). NB: As at July 1993 most of the *Nature Conservation Act* had not commenced to operate.

142 *Aboriginal Land Act 1991* (Qld) s 5.20(10).

(including any tradition or Island custom relating to activities in the area).¹⁴³ The Act also provides that a national park is to be managed to:

- (a) provide for the permanent preservation of the area's natural condition to the greatest possible extent; and
- (b) protect and present the area's cultural and natural resources and their values; and
- (c) ensure that the only use of the area is nature-based and ecologically sustainable.

The management principles mentioned in (a) and (b) are the cardinal principles for the management of national parks.¹⁴⁴

Although there has been criticism of some of those provisions by some supporters of Aborigines,¹⁴⁵ it will be apparent that there is considerable scope for Aborigines and Torres Strait Islanders to influence the way in which some national parks are managed and for traditional practices and values to form part of park management in some areas of Queensland. It would certainly appear to be consistent with a recommendation from the IVth IUCN World Congress in Venezuela in February, 1992 that:

- 6(c) IUCN, Governments and park managers should incorporate customary and indigenous tenure and resource use and control systems as a means of enhancing bio-diversity conservation.¹⁴⁶

The national park provisions in the Queensland legislation have their counterparts in respect of some national parks in the Northern Territory. Issues discussed in the course of determining traditional claims in the Northern Territory to land which included a wildlife sanctuary, nature park, or an existing or proposed national park, may provide an indication of matters which might be raised in the course of some land claims in Queensland.

(i) Wildlife sanctuaries and conservation areas

The first Warlpiri land claim, heard in 1978, included land in the Tanami Desert Wildlife Sanctuary which was proclaimed in 1964 and which the Northern Territory Parks and Wildlife Commission (the Wildlife Commission) was anxious to maintain as a wildlife sanctuary. The claimants argued that the existence and

143 *Nature Conservation Act 1992* (Qld) ss 18, 19.

144 *Ibid* s 17.

145 B Miller "Green Fingers Across Black Land" (1992) 58 *ALB* 3-6. See also R Blowes "From Terra Nullius to Every Person's Land: Legal Bases for Aboriginal Involvement in National Parks - Precedents from the Northern Territory" (1991) 52 *ALB* 4-6.

146 Quoted by B Miller *ibid* at 4. The IUCN is the International Union for Conservation of Nature and Natural Resources.

future of the sanctuary would not suffer if the land became Aboriginal land unconditionally. There was evidence that the area had a wide range of flora of particular importance because of the desert like nature of much of it. It was described as "Australia's major semi-arid sanctuary". A report about the sanctuary emphasised the importance of the area for long term study and management control, particularly as reserves of pristine country are rare on a world and national level. The Aboriginal Land Commissioner, Toohey J, was satisfied that "the area is of great importance as a sanctuary and has a unique quality because of its size and the extent to which it has remained in an unspoiled state".¹⁴⁷ The Wildlife Commission's report emphasised that the remoteness and size of the sanctuary had been its protection. The report contended that, as a conservation and reference area, any activity that would disturb the environment would be an immediate threat. If degradation occurred, much of the value of the area as a pristine reference area would be lost. There was evidence, however, that the sanctuary could sustain a number of Aboriginal outstations without necessarily conflicting with conservation principles, as long as such things as roads and permanent settlements were planned so that any danger to the environment was minimised.

Put in a 'stark form' the question was whether, if some damage to the environment is inevitable from occupation, that damage should be accepted to accommodate the wishes of the people concerned or those wishes should bow to the advantages to be gained from preserving the sanctuary as untouched as possible.¹⁴⁸ Justice Toohey stated that, in terms only of conservation, the sanctuary would be best suited if there were no occupation of a permanent nature and if visits were restricted. At the same time it appeared sufficiently from the evidence that, with control and cooperation, danger to the environment could be kept to a level where it is unlikely to do any serious harm. It was emphasised by some of the witnesses who gave evidence on behalf of the Wildlife Commission that preservation of the sanctuary did not mean leaving it untouched. There are real benefits to be gained by some forms of activity, in particular controlled burning. Unrestricted bushfires are damaging, but so too is a complete absence of any burning, particularly to small animals.¹⁴⁹ There was general recognition during the hearing of the need to continue forms of control over the sanctuary in order to preserve its very special features. There was also recognition that if the land should become Aboriginal land there should be schemes and agreements for the protection and conservation of wildlife in, and the protection of the natural features of this land. The real issue lay

147 *Land Claim by Warlpiri and Kartangarurru-Kurintji* note 98 *supra* at [386].

148 *Ibid* at [388]-[390].

149 *Ibid* at [391].

in the extent to which use and occupation by Aboriginal people was likely to endanger the sanctuary and the point at which its ultimate control should reside.¹⁵⁰

In the course of the land claim hearing, there was some discussion of the role of Aborigines as "natural conservationists" or "natural destroyers of the country and its wildlife". Justice Toohey noted that at times the discussion became "unduly polarised".¹⁵¹ Against some anecdotal and anthropological evidence to establish the "natural destroyers" role¹⁵² his Honour concluded that:

...the habits of small nomadic communities of some years ago do not necessarily provide a guide to the conduct of larger groups with access to rifles and motor vehicles and the bottles, cans and packages that are part of our current existence. There is no need to attach a label to the Warlpiri and Kartangaruru-Kurintji either as natural conservationists or as natural destroyers. The evidence of particular Aborigines and of meetings held evidenced a willingness on the part of the traditional owners to speak to and cooperate with the Wildlife Commission and other bodies concerned with the conservation and the protection of wildlife and the natural features of the country. It is a pity that in the past there has not been more involvement of the traditional owners in the sanctuary and more discussion between them and what was once the Reserves Board and is now the Commission. Greater consultation and cooperation between all concerned may well have resulted in an agreement on this aspect of the land claim hearing.¹⁵³

He accepted, in light of evidence from Dr HC Coombs, that there was an "element of risk whichever course is followed but the probabilities are that if there is an unconditional grant of the land within the sanctuary there will be a satisfactory agreement for its management and that no serious harm will result". He made it clear that this comment was based on the circumstances of this claim, having regard to the size of the sanctuary, the nature and extent of likely occupation and the evidence generally. The circumstances of other claims may well differ.¹⁵⁴

150 *Ibid* at [392].

151 *Ibid* at [393].

152 *Ibid* at [394]-[395]. One witness quoted the following passage from Professor T Strehlow's book *Arandu Traditions* (1947) pp 49-50: "For a few months after a rain a large wandering horde of men, women and children revelled in an abundance of food. Animals were slaughtered ruthlessly and only the best and fattest parts of the killed game were eaten; every tree was stripped bare of its fruits, and all that were unripe and tasteless were tossed away with that air of wasteful carelessness that characterises the improvident native whenever a brief spell of material abundance smiles upon his hard lot".

153 *Ibid* at [396].

154 *Ibid* at [401]. Writing in 1986, Penny Figgis used the experience of the Warlpiri people's cooperation with the Conservation Commission of the Northern Territory to save the endangered Rufus Hare Wallaby in the Tanami Desert as contradicting the presumption by some conservationists that Aboriginal people view animals purely as a food source and do not perceive and care about their declining numbers. "Respectfully approached as people with knowledge to share, the traditional owners co-operated in using fire to enlarge suitable habitat, helped capture wild animals for breeding and have protected the reintroduced animals from disturbance. This co-operation stemmed from their awareness of declining numbers and their wish to have the animals back, as much for their place in Law as for their food value": P Figgis note 133 *supra* p 14.

The conservation of flora and fauna populations in the Tanami Desert was also in issue in the Western Desert land claim heard by Olney J in 1989, some 11 years after the hearing of the first Warlpiri land claim. The land claimed comprised an area of land 46 kilometres wide by 185 kilometres long, with the long western boundary being the border between the Northern Territory and Western Australia. Evidence was given concerning conservation planning in the region of the claim area. Parts of the claim area came within parts of proposed conservation areas. The management requirements of the Conservation Commission of the Northern Territory would include the conduct of intensive biological survey work, management of five regimes, the removal of feral animals and the possible reintroduction of animal species from captive breeding populations.¹⁵⁵ Evidence was given about such things as conservation values and exploration (and possible mining) activity in the area. On behalf of the claimants it was submitted that, because the management requirements of the proposed conservation areas do not require land tenure, those areas should not be excluded from any grant of Aboriginal land. The parties should, however, negotiate a plan of management in consultation with the traditional Aboriginal owners.¹⁵⁶ Justice Olney concluded:

The difficulties involved in balancing the reasonable expectations of miners, conservationists and traditional Aboriginal owners are legion, and are well known to all concerned. Ultimately the relevant decisions are political and fall outside the scope of any function conferred upon the Aboriginal Land Commissioner.¹⁵⁷

In his view, because there was no reason to believe that the traditional owners would act in respect to the land in a manner inimical to the interests of the Conservation Commission, there was no discernible reason why the granting of title should be delayed until a management agreement had been entered into between the relevant Aboriginal Land Council and the Conservation Commission.¹⁵⁸ Later in the report he noted that the claim area was barely 'used', apart from some hunting and foraging by Aborigines and some mineral exploration. The possible increase in visitation by Aboriginal people for hunting and ceremonial purposes was unlikely to have any real effect on the land as a whole. If a management agreement was reached there may be a systematic attempt to eradicate wild donkeys and cattle and patchwork burning off of areas in collaboration with the traditional Aboriginal owners.¹⁵⁹

155 *Western Desert Land Claim* note 98 *supra* at [10.4.2].

156 *Ibid* at [10.4.7].

157 *Ibid* at [10.4.9].

158 *Id.*

159 *Ibid* at [11.1]-[11.3].

(ii) *National parks and nature parks*

Land claims have been successfully made to areas of Commonwealth national park land (Kakadu) and Northern Territory national park land (Katherine Gorge). In his report on the Alligator Rivers Stage II land claim Toohey J noted that a grant to a Land Trust of the land recommended for grant would be "inextricably linked with the operation" of the *National Parks and Wildlife Conservation Act 1975* (Cth) in relation to Kakadu National Park. The grant would be subject to a condition that there be a lease of the land to the Director of National Parks and Wildlife "so as to enable the Director to hold the land for the purposes of" that Act.¹⁶⁰ The Act preserved the rights of Aborigines to the traditional use of any area of land or water for hunting or food gathering and for ceremonial or religious purposes, subject to regulations made to conserve wildlife in the area and expressly affecting the traditional use of the area by Aborigines.¹⁶¹ Aborigines would be involved in the planning and management of the National Park land.¹⁶² His Honour concluded that there would be advantages to Aborigines if the land were to be granted and, in this regard, no detriment to the Commonwealth or its agencies and no effect on proposed usage of the land.¹⁶³

In his report on the Jawoyn (Katherine Area) land claim, Kearney J noted that the claim to Katherine Gorge National Park "aroused the strongest opposition by many people, based on genuine and deeply-held values and beliefs".¹⁶⁴ His Honour made the following preliminary observations.

First, the Park is one of the great natural wonders of Australia and a priceless heritage for future generations of mankind. It is unthinkable that it should cease to be a National Park, open to all Australians and to all visitors from around the world. If there were the slightest chance that the grant of this claim would put at risk the status of the Park, or access to the Park by every citizen, I would comment in the strongest terms on the detriment which would flow if a grant were made.

Second, at every stage during this long enquiry the claimants have steadfastly maintained that if their claim is granted the Park will remain as a National Park. They have given a complete, full and unequivocal assurance. It should be treated as such, it should be acted upon as such and it should be enforced as such. I proceed on the basis that all necessary steps to ensure this result will be taken.¹⁶⁵

In his view, there was "no essential disagreement" between the claimants and others. However, during the course of the inquiry, the claimants and the Northern

160 *Alligator Rivers Stage II Land Claim* note 98 *supra* at [240], citing *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 12(2B).

161 *National Parks and Wildlife Conservation Act 1975* (Cth) s 70 cited in *Alligator Rivers Stage II Land Claim* note 98 *supra* at [219], [250].

162 See *Alligator Rivers Stage II Land Claim* note 98 *supra* at [254]-[258].

163 *Ibid* at [220]-[235], [259].

164 *Jawoyn (Katherine Area) Land Claim* note 98 *supra* at [193].

165 *Ibid* at [194], [195], see also [203].

Territory were unable to agree on measures to achieve that objective.¹⁶⁶ His Honour pointed out that there was "ample precedent", particularly in the Northern Territory, for the creation of national parks over land owned by traditional Aboriginal owners. In his view, the active involvement of the Jawoyn people in the Park would enhance its value to visitors.¹⁶⁷ Such agreement was to come subsequently and be embodied in legislation.¹⁶⁸

During the Upper Daly land claim proceedings, questions were raised about whether public rights of access to a particular nature park would continue if the land became Aboriginal land. The main features of the park were hot springs and a river, and it catered for the recreational needs of both tourists and residents of the Darwin region as a place for camping, picnicking and swimming. The major concerns of the Conservation Commission and the Tourist Commission were that access by visitors to the Park might be restricted and further development of the Park as a tourist attraction precluded. Their special concern was that access would be restricted when the claimants wished to use the Park for their traditional purposes, and that such restrictions would result in the area being seen as an unreliable tourist destination, with the result that the level of tourism would decline.¹⁶⁹ Justice Kearney said that the concern was not fanciful. Women claimants indicated during the inquiry that they may wish to conduct secret women's ceremonies from time to time at a particular hot spring. In practice this would necessitate the exclusion of outsiders from the general tourist area of the park for up to two weeks. The Park would have to be closed to visitors during such a ceremony.¹⁷⁰ But he stated that the Commission's concerns must be assessed in the light of other matters which emerged during the inquiry. The claimants considered that the Park should continue as a tourist attraction, but they sought to have a Wagiman input into its management and development. It appeared that the Conservation Commission saw no difficulty in principle with such an input.¹⁷¹ Justice Kearney referred to "ample precedent" in the Northern Territory for the legitimate concerns of the commissions to be resolved. He cited, in support of that conclusion, the arrangements in place for the management of the Gurig¹⁷² and Nitmiluk (Katherine Gorge) National Parks and possibly also for the Daly River Nature Park, where Aboriginal traditional owners participate in park management. His Honour suggested that suitable management arrangements could be made with the claimants which would balance the need for reliable access by

166 *Ibid* at [204].

167 *Ibid* at [204], [226].

168 *Nitmiluk (Katherine Gorge) National Park Act 1989 (NT)*.

169 *Upper Daly Land Claim* note 98 *supra* vol 3 at [127]-[131].

170 *Ibid* at [131].

171 *Ibid* at [132].

172 See *Cobourg Peninsula Aboriginal Land and Sanctuary Act 1981 (NT)*.

visitors with the claimants' need to use the park occasionally for traditional purposes. In his view, the two needs "are by no means incompatible; balancing them is itself a management exercise".¹⁷³

Evidence was given in the *Wakaya/Alyawarra* land claim proceedings about a proposal to establish a national park encompassing parts of the rugged range country in the general vicinity of, and including parts of, the claim area.¹⁷⁴ Justice Olney concluded that there was "no question as to the conservation, historical, scenic and heritage value of the proposed park".¹⁷⁵ Having considered evidence about the various options that might be open to the Northern Territory government depending on whether land claimed became Aboriginal land, and having noted that the park proposal would be viable even if that land were excluded from the park, he expressed the view that if that part of the claim area became Aboriginal land the mutual interests of the Conservation Commission of the Northern Territory and the traditional owners "could be satisfactorily catered for by way of a negotiated agreement". Indeed he did not think that "any detriment would result" to the Northern Territory Government, the Conservation Commission or the community at large in the event that the whole or part of the land claimed were to be granted to an Aboriginal land trust.¹⁷⁶

Proposals for the establishment of Gregory National Park on or in the vicinity of neighbouring claim areas were considered first in the *Kidman Springs/Jasper Gorge* land claim and later in the *Stokes Range* land claim. The general thrust of evidence given by the representative of the Conservation Commission of the Northern Territory in the former land claim hearing suggested that, political considerations aside, an accommodation between the Conservation Commission and those representing the interests of the traditional Aboriginal owners could be reached.¹⁷⁷ Although some planning would have been necessary to accommodate proposals for a living area and a road, Olney J thought that there was no reason to believe that a grant of title to Aborigines would cause any detriment to the Commission insofar as it is concerned with the establishment and management of the proposed park.

Experience elsewhere has demonstrated that adequate safeguards can be established so that the apparently competing interests of the traditional Aboriginal owners to preserve sacred sites from desecration and to secure privacy in their living areas, on the one hand and the anticipated desire of potential users of the park to have full

173 *Upper Daly Land Claim* note 98 *supra* vol 3 at [133], [135].

174 See *Wakaya/Alyawarra Land Claim* note 98 *supra* at [10.3.1]-[10.3.2].

175 *Ibid* at [10.3.3].

176 *Ibid* at [10.3.4]-[10.3.6].

177 *Kidman Springs/Jasper Gorge Land Claim* note 98 *supra* at [14.2.4].

access to places of interest and recreation within the park on the other, can be accommodated.¹⁷⁸

At one stage the Northern Territory Government intended that the nearby Stokes Range land claim area should form part of the proposed Gregory National Park.¹⁷⁹ Evidence was given during the land claim hearing that there had been consultation with local Aboriginal groups throughout the planning stages of the park but that the lodgment and hearing of the Stokes Range land claim put an end to the agreed plans for park management. The Conservation Commission stated that if the land claimed were to be granted, the Commission would exclude the area from the Gregory National Park. The "policy decision was reached after considering a multitude of factors". The policy (as at September 1989) superseded previous planning, management and development proposals. The Commission described the Stokes Range area as a "significant ecological resource" which was expected to remain in a "relatively pristine condition" irrespective of its future management. The Commission was happy to look at any request by an Aboriginal Land Trust that it assist in the management of the area, but any management system would be separate from the management of the Gregory National Park.¹⁸⁰

Justice Olney did not comment in detail on the Commission's "self explanatory" statement. He noted that the Commission did not assert that any detriment would be suffered by the land becoming Aboriginal land and, in his opinion, there could be no basis for any such assertion.¹⁸¹ He commented that if the claim area were to become Aboriginal land, the proposed land usage (as a national park) would be affected not so much by the change in status of the land but by the Northern Territory Government's decision to not seek any lease-back arrangement with the traditional owners. Such arrangements have been entered into successfully in other areas and "it is surprising that no attempt has been made to explain why it is thought that a similar scheme, involving as it inevitably would, Aboriginal participation in the management of the park is not thought to be appropriate". His Honour noted that the Northern Territory Government intended to include the claim area in the park if it did not become Aboriginal land.¹⁸²

178 *Ibid* at [14.2.6].

179 *Stokes Range Land Claim* note 98 *supra* at [9.4.1].

180 *Ibid* at pp 42-44.

181 *Ibid* at [9.4.4].

182 *Ibid* at [10.2].

F. TRADITIONAL RESPONSIBILITIES FOR LAND IN THE
MANAGEMENT OF ULURU (AYERS ROCK - MOUNT OLGA)
NATIONAL PARK

The Plan of Management (the Plan) for Uluru (Ayers Rock - Mount Olga) National Park (the Park) illustrates the extent to which traditional Aboriginal interests in and perceptions of land can be taken into account in joint land management programmes. The Park is of national and international significance.¹⁸³ It became Aboriginal land when title was granted to the Uluru-Kata Tjuta Land Trust on 26 October 1985.¹⁸⁴ The land was granted on condition that there be a lease of the land from the Land Trust to the Director of National Parks and Wildlife. The lease contains terms to ensure that the interests of Aborigines are incorporated in the management of the land.¹⁸⁵ The Plan was prepared under the *National Parks and Wildlife Conservation Act 1975* (Cth), s 11(8) of which provides that the following must be taken into account: the encouragement and regulation of the appropriate use, appreciation and enjoyment of the Park by the public; the interests of the traditional Aboriginal owners and of other Aborigines;

183 Ayers Rock - Mt Olga National Park was accepted in January 1977 as a Biosphere Reserve under the UNESCO Man and the Biosphere Program. In 1987, Uluru (Ayers Rock - Mt Olga) National Park was inscribed on the World Heritage List established under the *Convention Concerning the Protection of the World Cultural and Natural Heritage*. The Park is listed on the Register of the National Estate established under the *Australian Heritage Commission Act 1975* (Cth).

184 The *Aboriginal Land Rights (Northern Territory) Amendment Act 1985* (Cth) and the *National Parks and Wildlife Conservation Amendment Act 1985* (Cth) provided for the area of Uluru National Park to be granted as inalienable freehold land to the Uluru-Kata Tjuta Land Trust, and set in place the new procedures necessary to establish the Board to manage the Park in conjunction with the Director of National Parks and Wildlife.

185 The lease agreement between the Uluru-Kata Tjuta Land Trust and the Director of National Parks and Wildlife provided for an annual rental of \$75,000 to be paid to the traditional owners along with 20 per cent of the entrance fees. The provisions of the lease, excluding the term, are to be reviewed at least every five years. The lease also provided that:

- the maintenance of Aboriginal tradition be encouraged through the protection of areas, sites and matters of significance to the traditional owners;
- all practicable steps be taken to promote Aboriginal administration, management and control of the Park and to urgently implement a program for training Aboriginal people in the requisite skills;
- as many Aboriginal people as possible be involved in the operations of the Park and, to facilitate this, adjustments in working hours and conditions be made to accommodate the needs and culture of Aboriginal people employed in the Park;
- in managing the Park, the use of traditional Aboriginal skills be maximised;
- a knowledge and understanding of the traditions, language, culture and skills of Aborigines be promoted among non-Aboriginal employees in the Park (and, where possible, among visitors to the Park and residents of Yulara) and arrangements be made for proper instruction by Aborigines engaged for that purpose;
- traditional owners and their organisations be consulted regularly about the administration, management and control of the Park; and
- Aboriginal business and commercial initiatives and enterprises within the Park be encouraged.

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; the protection, conservation and management of wildlife within the Park; and the protection of the Park against damage.

The Park's board of management has 10 members, including the Director of National Parks and Wildlife and six members nominated by the traditional Aboriginal owners.

The Plan contains numerous references to the Tjukurpa as a guide to management of the land. The Tjukurpa is the period of the creation during which all features, both animate and inanimate, were first formed.¹⁸⁶ As noted earlier in this article, the term is nearly always (but inaccurately) translated as 'the Dreaming' or 'the Dreamtime'. The Plan states:

The Tjukurpa is, above all, a religious philosophy. Like any religious philosophy elsewhere in the world, it provides answers to the fundamental questions of existence, the meaning of life and the continuation of all things. The Tjukurpa defines what is real, what is natural and what is true. These definitions stand as the Law which governs all aspects of Anangu life.¹⁸⁷

Tjukurpa is spoken of in terms of both the past and the present. All the land, including its features and the life upon it, were created during the Tjukurpa and by the Tjukurpa. None of the mountains, creeks, claypans, water sources or other natural features existed before then; nothing did. During this time, ancestral beings in the form of humans, animals and plants travelled widely across the land and performed remarkable feats of creation and destruction. The journeys of these beings are remembered and celebrated wherever they went. The record of these activities exists today in aspects and features of the land. For Anangu, this record provides an historical accounting of how the land came to look as it does, as well as religious proof of what the land means.

When Anangu speak of the many natural features within Uluru National Park, their interpretations and explanations of these features are expressed in terms of the activities of particular Tjukurpa beings rather than by reference to geological or other types of explanation. Primarily, Anangu have a religious interpretation of the landscape of the Park. In traditional terms therefore, Anangu speak of the meaning of the Park, not just what shapes its surface features take.¹⁸⁸

The Plan refers in some detail to the Tjukurpa as a guide to management in terms of it being a religious interpretation of landscape, an ecological record, a means of mapping the landscape (to record ancestral sites and paths), a basis for the interpretation of the Park to visitors, and as a source of the rules of appropriate behaviour.

186 Plan of Management, Glossary p 105.

187 Anangu is the term which Pitjantjatjara and Yankunytjatjara people use to describe themselves.

188 Note 186 *supra* p 11.

The practical consequences of taking that approach include involving the relevant Aborigines in decisions about capital works projects (such as roads, walking tracks and car parks) to ensure that the nature and location of proposed developments do not conflict with Tjukurpa; incorporating Anangu fire management knowledge and practices into the mosaic burning strategy for the Park and surrounding areas; using Anangu interpretative materials (such as brochures and signposts) to present Anangu ecological understanding for the benefits of visitors; using mapping to decide on the location of nearby Aboriginal homelands and homelands roads; developing appropriate employment and work practices; and imposing restrictions on certain activities within the Park.¹⁸⁹

The Plan describes the Tjukurpa as the “law of ecological responsibility” because Tjukurpa relates to what Anangu usually refer to as “caring properly for the land”.

Caring for the land is an essential part of ‘keeping the Law straight’. From this area of Tjukurpa, Anangu learn their rights and responsibilities in relation to: sites on the land; other people who are related to the land in the same way; and the ancestral beings with whom sites and tracks are associated. This is also where Anangu learn about religious responsibilities - the formal religious responsibilities of caring for the land. It is within this sphere that Anangu have generally had the most difficulty in communicating with Piranypa (non-Aborigines).¹⁹⁰

One objective of the Plan is to give “a high priority to Anangu responsibility to care for their country by involving Anangu in all areas of decision making and Park work.”¹⁹¹ Decision - and policy - making in the Park have been based on the principle that the responsibility of Anangu to care for their country may sometimes take precedence over other management considerations. Anangu involvement has been sought in most decision-making processes, including planning for developments, staff selection, work programming, planning for interpretation and designing training programs. This involvement has been facilitated through such things as employing *tjilpi* (old men) and *minyma pampa* (old women) as full time rangers, and as part time Park employees, and allowing senior Anangu to set work direction in areas of traditional land management expertise (as with the mosaic burning program).

The Plan also notes that an essential part of keeping Anangu Law is ensuring that knowledge is not imparted to the wrong people and making sure that access to significant or sacred sites is not gained by the ‘wrong people’ (whether ‘wrong’

189 Examples of activities that will not be permitted in the Park are: car rallies, weddings, fund-raising events, concerts, athletic events, formal dinners, hang-gliding, parachuting, ballooning, rock climbing and competitive racing. There are restrictions on commercial filming and art work.

190 Note 186 *supra* pp 21-2.

191 *Ibid* p 22.

means men or women, Piranypa visitors or certain other Anangu). According to the Plan:

It is as much a part of Anangu religious responsibility to care for this information properly as it is for other religions to care for their sacred precincts and relics. The same is the case for sites and locations on ancestral tracks where events took place that are not for public knowledge. Neither the knowledge of, nor access to, such sites is permissible under Anangu Law. Even inadvertent access to some sites constitutes sacrilege. Ignorance of the offence by either Anangu or Piranypa is no excuse, for it is Anangu who are charged with the religious responsibility to ensure that such sacrilege does not occur. Another element in keeping the Law straight involves participating in the *inma* (ceremonies) which explain, teach and celebrate the Tjukurpa.¹⁹²

Information (including pictures) concerning the details and significance of sites and ancestral tracks and their associated songs and rituals is not always freely available to everyone. There are public versions and restricted (sacred) versions of most of the Tjukurpa. Some knowledge is properly known only by adult men and women; some is restricted only to women, some only to initiated men. For instance, no details or performances of the *inma* associated with Kata Tjuta (Mount Olga) would be made available for tourists yet *inma* involving secular aspects of some Tjukurpa associated with Uluru (Ayers Rock) may be performed for visitor information and enjoyment.

The existence of such restricted categories of knowledge concerning certain sites and ancestral tracks, together with the religious imperative of protecting these places, has already made it necessary to fence a number of sites at the base of Uluru itself. All are restricted because of their associations with non-public portions of ancestral tracks which also have more publicly accessible aspects in areas outside the Park. Similarly, at Kata Tjuta measures are required to limit access in some small specific areas to enable Anangu to discharge their religious responsibilities of properly caring for the land by restricting certain kinds of knowledge to the appropriate people.

In normal circumstances, Anangu would not isolate sites in such a way nor identify them for the information of visitors. Compromises have had to be agreed to within the Park and special non-Anangu measures have been taken to assist Anangu to continue protecting the Tjukurpa whilst assisting visitors to continue enjoying the Park within the context of culturally appropriate behaviour.¹⁹³

One objective of the Plan is to "conserve the Park fauna by maintaining the diversity of habitats and by actively managing native animal populations in the Park where and when necessary".¹⁹⁴ The Plan notes that hunting is an integral

192 *Ibid* p 23.

193 *Ibid* pp 23-4.

194 *Ibid* p 37.

component of a traditional way of life which, although somewhat modified in recent times, is still of considerable importance. While, in the past, most animals were regarded as a food resource, hunting is nowadays largely confined to certain species.

Anangu hunt in remote areas of the Park and on Aboriginal land outside the Park. There is no evidence that Anangu subsistence hunting has a significant effect on the populations of wild animals.¹⁹⁵

Animal species are also profoundly part of the Tjukurpa and apparently there is a great deal of interest in the possible reintroduction to the area of animals of religious significance, such as the *mala* (hare-wallaby), *wayuta* (brush-tailed possum) and *waru* (black flanked rock wallaby).¹⁹⁶

The Plan also deals with the fire management action plan. It is noted that fire was used extensively by the Aborigines in Central Australia before the introduction of livestock by Europeans. Aboriginal people deliberately intervened with fire and developed it as a technology for ecosystem manipulation for a number of reasons, including hunting and encouragement of bush tucker vegetation and green feed for animals.¹⁹⁷ According to the Plan, Anangu will continue to play a major role in fire management. They will continue to provide advice on the management of flora and fauna and cultural sites, this advice then being incorporated into the fire management strategy to be used within and adjacent to the Park.¹⁹⁸

G. RESPONSIBILITIES FOR LAND AND GENERAL LAND MANAGEMENT ISSUES

This article has concentrated on examples of traditional responsibilities for land and their exercise in particular places. Mention should be made also of more general issues of land management as they concern Aboriginal land owners. Grants of freehold title and leases have been made under the legislation summarised earlier in this article so that Aborigines own or control some 12 per cent of the land mass of Australia. Other properties have been purchased or leased by or on behalf of Aboriginal people. Many, if not all of the problems of land degradation in Australia apply to areas of Aboriginal land. The authors of a major report, *Caring for Country: Aborigines and Land Management*, published in May

195 *Ibid* p 36 citing the South Australian Government Report of the Inter-departmental Working Group on Aboriginal Hunting (1985, unpublished) T Piper "Conservation and Hunting by Aborigines in the Top End of the Northern Territory" (1985) 3 *Australian Ranger Bulletin* 19; R Layton *Uluru: An Aboriginal History of Ayers Rock* (1986).

196 *Ibid* p 36.

197 *Ibid* p 37, citing R Jones "Fire Stick Farming" (1969) 16 *Australian Natural History* pp 224-8, SJ Hallam *Fire and Hearth: A Study of Aboriginal Usage and European Usurpation in South Western Australia* (1975).

198 *Ibid* p 38.

1991 have argued that Aboriginal land management approaches have “undoubtedly been the most effective yet employed in ensuring the sustainability of Australia’s land in the past, and by implication must be relevant to future development”. They argue that, consequently, land management policies should not only recognise their value but also provide programs appropriate to their support.¹⁹⁹ They note, however, that there have been few public comments at government level that the recognition of Aboriginal land management needs and the potential contribution of Aboriginal perceptions of resource use should be seen as an essential part of economically sustainable development.²⁰⁰ A rising awareness of Aboriginal land management requirements has coincided, they observe, with major changes in the national policy agenda. These include the increased profile of environmental issues, the year and decade of Landcare commencing in 1990, the Federal Government’s environmentally sustainable development process focused on working groups and new sustainable development policies for each government, department and the Federal Government’s ‘reconciliation’ process with Aborigines.²⁰¹ Aboriginal land management is relevant to all of these policies and so is relevant to the activities of a variety of Commonwealth and state government departments.

The authors argue that it is important that Aboriginal people participate in the government’s initiatives in land management and conservation. If they do not, the authors contend that those programs cannot achieve their objectives. At least 12 per cent of Australia could be excluded from efforts to redress land degradation and avoid further damage, and Aboriginal people would be excluded from efforts to increase awareness and improve land practices. The opportunity of incorporating Aboriginal knowledge, skills and insights would also be missed.²⁰² The authors do not suggest that Aboriginal access to particular programs be measured by any exact equity benchmark such as 12 per cent to match the percentage of Australian land owned. The problems to be addressed are not spread evenly across Australian land. Neither are Aboriginal interests in land management and capacity for involvement restricted to the land they currently own. There has been a very uneven distribution between regions of Aboriginal rates of participation in the various land management programs with Northern Territory

199 E Young et al *Caring for Country: Aborigines and Land Management* (1991) p 4.

200 *Ibid* p 5.

201 *Ibid* p 7. See *Council for Aboriginal Reconciliation Act* 1991 (Cth).

202 *Ibid* pp 55-56. The programmes through which funds for land management are available directly to the public are the National Soil Conservation Programme, One Billion Trees Programme, Save The Bush Programme, Murray-Darling Basin Natural Resources Management Strategy Programme, National Estate Grants Programme, National Rainforest Conservation Programme, Local Government Development Programme - Environmental Management Sub-Programme, taxation provisions and Federal Water Resources Assistance Programme.

Aboriginal organisations being outstandingly successful. Their success may be due, in part at least, to the gaining of land tenure by those groups and their developing an infrastructure to address land management issues.²⁰³

The traditional Aboriginal notions of responsibility for land described earlier in this article are maintained in many parts of the country, particularly in rural areas where access to ancestral country has remained possible. Aboriginal land owners in such areas (which account for a high proportion of total Aboriginal held land) do not necessarily assess their land as a commercial asset and may not see the generation of cash from the exploitation of its resources as a major priority. The authors point to three 'important elements', namely, foraging and hunting for game; complex systems of inheritance of land responsibility which are interwoven with decisions about its use; and strong convictions that people should live on or close to important places in their ancestral country so that they can care for them properly. As the authors observe, the feelings which Aborigines have for their land are vital to the ways in which they use the land now under their control, although frequently the processes and beliefs have been misunderstood by non-Aboriginal land users.²⁰⁴

The different perceptions of land usage and land management can lead to misunderstandings or conflict when proposals are made for Aboriginal land. Even in areas where traditional lifestyles are less marked, the elements may continue to play important parts in Aboriginal land ownership and management. Europeans and other newcomers acquired land as a commodity, to provide sustenance to their families through production for consumption and sale, and as an asset which could be disposed of for cash. They believed that the land must be tamed through arable and pastoral activity to be productive. Many people do not regard Aboriginal land use practices sympathetically and therefore criticise Aboriginal land owners for their interest in alternative uses such as controlled subsistence harvesting. Non-Aboriginal advisers generally see cultivation and grazing as the sole means of land resource development.²⁰⁵

Traditional practices such as hunting and gathering may continue but the technology has changed. Implements such as crowbars have replaced wooden digging sticks, rifles have almost entirely replaced spears and boomerangs, and motor vehicles and boats with outboard motors are now seen, in some communities, as necessities. The incorporation of new technology and the use of cash in contemporary subsistence has not, however, destroyed the cultural significance of hunting and foraging. Those activities still provide people with satisfaction which is only partly related to the nutritional content of the foods

203 *Ibid* p 72.

204 *Ibid* pp 108-109.

205 *Ibid* pp 110-111.

obtained. The authors of the report observe that those activities allow Aboriginal people "to express profound environmental knowledge stretching back over many generations, and continually reinforces their beliefs in the spiritual value of such knowledge; it is also an important medium of education, whereby both spiritual and ecological knowledge is handed on to succeeding generations."²⁰⁶

Another factor occurring through alternative management practices on Aboriginal land is the use of fire in vegetation control. As noted earlier, Aboriginal burning practices enhanced the natural vegetation regeneration and ensured the survival of wildlife habitats. The authors argue that the reintroduction of these practices on Aboriginal land formerly under non-Aboriginal control may also have contributed to a reduction in the risk of degradation - a 'positive' contribution. The authors conclude that the fact that much of this contribution is occurring in extremely marginal and environmentally fragile areas makes it all the more important. Similarly, Figgis has pointed to various papers that argue that Aboriginal fire management prevents disastrous large scale wildfire and provides a rich diversity of habitat for animals. Indeed, some research suggests that it is the absence of Aboriginal burning practices which has been a principal cause of the serious decline of mammal populations in the arid zone.²⁰⁷

Also of general interest is the extent to which traditional hunting practices should be legally protected, particularly where they involve the hunting of endangered or protected species. In its report *The Recognition of Aboriginal Customary Laws*, the Australian Law Reform Commission devoted four chapters to traditional hunting, fishing and gathering practices and rights. The Australian Law Reform Commission made a number of recommendations about legal recognition of those practices and rights.²⁰⁸ It stated that an equitable resolution of legitimate claims to natural resources requires that there be a carefully articulated ordering of priorities. It suggested that, in certain circumstances, conservation measures must override traditional hunting and fishing interests, and that the following priorities appeared to be justified:

- conservation and other identifiable overriding interests;
- traditional hunting and fishing;
- commercial and recreational hunting and fishing.²⁰⁹

Expanding on those priorities, the Australian Law Reform Commission stated that conservation principles represent a legitimate limitation on the rights of

206 *Ibid* pp 111-112.

207 P Figgis note 133 *supra* pp 16-17 citing work by Graham Griffin and Grant Allan of the CSIRO, Alice Springs, and by Latz and Friedal.

208 Australian Law Reform Commission *The Recognition of Aboriginal Customary Laws* (1986) summary of recommendations at [1001].

209 *Ibid* at [978]-[979] and following discussion at 1001].

indigenous people to hunt and fish as do interests of safety, rights of innocent passage, shelter and safety at sea. Necessary conservation measures may require restrictions on traditional hunting and fishing interests. While Aborigines should be given control over resources on Aboriginal land, this control should nonetheless be subject to the principle of conservation. It may be necessary to prohibit or restrict traditional hunting or fishing by limiting the numbers taken and the methods by which or the areas in which they are taken, in the case of rare and threatened species (in particular those threatened with extinction).

The *Nature Conservation Act 1992* (Qld) provides an example of the legislative working out of these matters. As a general rule it is an offence for a person to take, use or keep a protected animal other than under a conservation plan applicable to the animal or a licence, permit or other authority.²¹⁰ Similarly it is usually an offence to take a protected plant other than under a conservation plan applicable to the plant or a licence, permit or other authority.²¹¹ Special recognition is given, however, to the interests of Aborigines and Torres Strait Islanders. Section 85 of the Act provides that an Aborigine or Torres Strait Islander may take, use or keep protected wildlife under Aboriginal tradition or Island custom, subject to any conservation plan that expressly applies to the use of particular protected wildlife or protected area in the particular circumstances. An offence is created in relation to an Aboriginal person or Torres Strait Islander who takes, uses or keeps protected wildlife in contravention of a conservation plan or other authority. According to the explanatory notes prepared with the legislation, the conservation plans will take account of the principles established by the Australian Law Reform Commission.

Finally it is worth noting that the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth) expresses Aboriginal responsibilities for land in broad environmental terms. Under that Act, freehold title to some 403 hectares was granted to the Wreck Bay Aboriginal Community Council. The Council's functions include exercising, for the benefit of the members of the Wreck Bay Aboriginal community, its powers as owner of the land. It may grant a lease of Aboriginal land and may enter into agreements for the recovery of minerals on the land. The Act obliges the Council to "have regard to the preservation of the environment" in the performance of its functions.²¹² Where the Council proposes to carry out any works or projects that "could have a significant effect on the environment", the Council shall give the Minister written particulars of the works

210 *Nature Conservation Act 1992* (Qld) s 81. Note: At July 1992 most of the provisions of the Act had not commenced operation.

211 *Ibid* s 82.

212 *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth) s 47(1).

or project.²¹³ For those purposes 'environment' is broadly defined to include "all aspects of the surroundings of a natural person, whether affecting the person as an individual or in the person's social groupings".²¹⁴

V. CONCLUSION

The land rights of indigenous people are being granted increasing recognition internationally and within Australia. Part of that recognition is an identification of the rights and responsibilities of indigenous peoples in the management of the environment. The *Rio Declaration on Environment and Development* is an example of this trend. As noted earlier, Principle 22 of that Declaration states:

Indigenous people and their communities, and other local 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.

Australian Aborigines have had, and continue to have, a role in national park management in places such as Uluru, Kakadu and Nitmiluk national parks, and Cobourge Peninsula Sanctuary, in the Northern Territory. In Queensland, there will be opportunities for the knowledge and traditional practices of Aborigines and Torres Strait Islanders to be employed in environmental management and development. The emphasis in Queensland legislation on responsibilities for land highlights the recognition that traditional rights to land are coupled with correlative duties or responsibilities. It remains to be seen what that will mean in practical terms.

No culture is frozen in the past. Local cultures of groups of Aborigines and Torres Strait Islanders are changing.²¹⁵ But those of the principles and practices of traditional cultures which remain may inform and guide the way in which parts of the environment are managed. It may be that by using principles and practices from the past it will be possible to protect and preserve our environment in the future.

213 *Ibid* s 47(2).

214 *Ibid* s 47(3).

215 This fact was recognised by the High Court in *Mabo v Queensland (No 2)* note 2 *supra*.