

CLIMATE CHANGE AND HUMAN RIGHTS: ISSUES AND OPPORTUNITIES FOR INDIGENOUS PEOPLES

EMILY GERRARD*

I INTRODUCTION

This article examines issues and opportunities in relation to Indigenous peoples' participation in responses to climate change both nationally and internationally. This includes ways in which Indigenous Australians may choose to participate in local development opportunities through environment-based commercial activities (such as carbon offset projects). This paper illustrates the need to protect and grow space for Indigenous peoples' participation in climate change responses, emphasising as a minimum the need to preserve the existing rights and interests of Indigenous peoples in Australia. Finally and briefly, examples of the ways in which Indigenous peoples have sought redress for damage and loss as a result of climate change are discussed.

II INDIGENOUS PARTICIPATION IN CLIMATE CHANGE DIALOGUE AND RESPONSES

In Australia to date, there has been little space afforded for dialogue and collaboration with Indigenous peoples about responses to climate change. This is reflective of a similar issue internationally, where Indigenous peoples have found it necessary to strongly assert their right to participate in global discussions and strategies to address climate change.

Ever since the conclusion of the *United Nations Framework Convention on Climate Change* ('UNFCCC')¹ in 1992 and the subsequent *Kyoto Protocol*² to

* (BSc, LLB (Hons), University of New England). The author is a lawyer based in Victoria and has worked in corporate practice and at Native Title Services Victoria Ltd. The views expressed in this paper do not necessarily represent the views of current or former employers. This article is based on a presentation by the same author at the recent Human Rights and Equal Opportunity Legal Seminar: 'Human Rights and Climate Change: A Tragedy in the Making'.

1 Opened for signature 4 June 1992, 31 ILM 849 (entered into force 21 March 1994).

2 Opened for signature 16 March 1998, 37 ILM 22 (entered into force 16 February 2005) ('*Kyoto Protocol*').

that Convention, Indigenous peoples have raised their concerns about Kyoto mechanisms in many international forums.³

These concerns include:

- that market incentives for carbon sinks will lead to large-scale forest plantations and a consequent loss of traditional country and ecosystems;⁴
- that measures to mitigate climate change are based on a worldview of territory that reduces forests, lands, seas and sacred sites to only their carbon absorbing capacity; and
- that Indigenous communities have not been provided with sufficient information or resources to adequately respond to climate change.⁵

The 2000 *Declaration of Indigenous Peoples on Climate Change*⁶ at the Hague sets out the position of Indigenous peoples on the *UNFCCC* and the *Kyoto Protocol*. This position has been reiterated and built upon since 2000 by Indigenous peoples at subsequent *UNFCCC* conferences and through the work of the United Nations Permanent Forum on Indigenous Issues ('UNPFII'). In 2008, the UNPFII identified that a key barrier to the realisation of Indigenous peoples' coping and adaptation capacities is the lack of recognition and promotion of their human rights.⁷ Many of these rights are reflected in the *United Nations Declaration on the Rights of Indigenous Peoples*.⁸

The *United Nations Declaration on the Rights of Indigenous Peoples* supports the participation of Indigenous peoples in climate change strategies and responses. The *Declaration* also recognises that respect for Indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment.⁹

3 See, eg, Second International Indigenous Forum on Climate Change, *Declaration of Indigenous Peoples on Climate Change* (2000) <<http://www.c3.hu/~bocs/eco-a-1.htm>> at 12 September 2008; TEBTEBBA, *The Quito Declaration on Climate Change* (2000) <http://www.tebtebba.org/index.php?option=com_docman&task=cat_view&gid=18&Itemid=27&limitstart=10> at 12 September 2008; World Rainforest Movement, *Third International Forum of Indigenous Peoples and Local Communities on Climate Change* (2001) <<http://www.wrm.org.uy/actors/CCC/IPBonn.html>> at 12 September 2008; TEBTEBBA, *Milan Declaration of the Sixth International Indigenous Peoples Forum on Climate Change* (2003) <http://www.tebtebba.org/index.php?option=com_docman&task=cat_view&gid=18&Itemid=27> at 12 September 2008; Indigenous Peoples Indigenous Voices, 'UN's Indigenous Forum Issues Recommendations on Climate Change and Other Challenges as Two-Week Meeting Concludes' (Press Release, 2 May 2008).

4 This is because Kyoto-compliant plantations may involve mono-species incapable of supporting the complex ecosystems they often replace.

5 See *Declaration of Indigenous Peoples on Climate Change*, above n 3, arts 7–8. See also Victoria Tauli-Corpuz and Aqqaluk Lynge, *Impact of Climate Change Mitigation Measures on Indigenous Peoples and on their Territories and Lands*, UN Doc E/C.19/2008/10 (2008).

6 *Declaration of Indigenous Peoples on Climate Change*, above n 3.

7 *Conference on Indigenous Peoples and Climate Change Copenhagen, 21 – 22 February 2008 – Meeting Report*, UN Doc E/C.19/2008/CRP.3 (2008).

8 UN GAOR, 61st sess, UN Doc A/Res/61/295 (2007).

9 *Ibid.* The Declaration includes an affirmation that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind.

Further, the *Declaration* provides that Indigenous peoples:

- have the right to practice and revitalise their cultural traditions and customs;¹⁰
- have the right to participate in decision-making in matters which would affect their rights;¹¹ and
- have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters, coastal seas and other resources.¹²

Indigenous peoples have a 'special interest' in climate change issues, not only because through their physical and spiritual relationships with land, water and associated ecosystems, they are particularly vulnerable to climate change; but also because they have a specialised ecological and traditional knowledge relevant to finding the 'best fit' solutions.

The importance of traditional knowledge and the right of Indigenous peoples to protect and enjoy their traditional knowledge are promoted in a number of international instruments.¹³ In particular the *Convention on Biological Diversity*¹⁴ recognises the importance of Indigenous peoples' traditional knowledge in the conservation and sustainable use of biodiverse ecosystems. One of the purposes of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) – which embodies some of Australia's international obligations under the *Convention on Biological Diversity* – is to promote a partnership approach to environmental protection and biodiversity conservation through recognising and promoting Indigenous peoples' role in, and knowledge of, the conservation and ecologically sustainable use of biodiversity.¹⁵

The *Charter of the United Nations*,¹⁶ the *International Covenant on Economic, Social and Cultural Rights*¹⁷ and the *International Covenant on Civil and*

10 Ibid art 11(1). This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature.

11 Ibid art 18.

12 Ibid art 25.

13 For example, the right to protect and enjoy traditional knowledge is reflected in: *Universal Declaration on Human Rights*, GA Res 217A(III), art 27, UN Doc A/810 (1948); *Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3, art 15 (entered into force 3 January 1976); *International Labour Organisation Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries*, opened for signature 27 June 1989, 28 ILM 1382, arts 15, 23 (entered into force 5 September 1991); and Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, *Rio Declaration on Environment and Development*, principle 22, UN Doc A/CONF.151/26 (Vol 1) (1992). For further discussion about the rights and interests of Indigenous people in relation to the protection and enjoyment of their traditional knowledge, see Michael Dodson, *Report of the Secretariat on Indigenous Traditional Knowledge*, UN ESCOR, 6th sess., UN Doc E/C.19/2007/10 (2007).

14 Opened for signature 5 June 1992, 31 ILM 818, (entered into force 29 December 1993).

15 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3.

16 Art 1(2).

17 Opened for signature 16 December 1966, 993 UNTS 3, art 1 (entered into force 3 January 1976).

*Political Rights*¹⁸ affirm the fundamental importance of the right to self-determination of all peoples, which includes the freedom and right to pursue economic, social and cultural development. Climate policy and mitigation strategies present a key opportunity to bring traditional knowledge and practices and economic markets together. This opportunity should not be passed over by ‘mainstreaming’ responses in a way that fails to accommodate the particular concerns and specialised interests of Indigenous peoples.

III SOCIAL, CULTURAL, ENVIRONMENTAL AND ECONOMIC DEVELOPMENT OPPORTUNITIES

In the context of development opportunities, the following examples outline some of the many ways in which Indigenous people may contribute, formally and informally, to environmental services (in this case through carbon abatement projects). These examples illustrate some of the tangible and intangible assets of Indigenous communities that may be realised through meaningful and respectful partnerships and investment.

The first example is the West Arnhem Land Fire Abatement Project (‘WALFAP’), a carbon offset project in western Arnhem Land in the Northern Territory. The West Arnhem Fire Management Agreement (‘Agreement’) provides the basis for a strategic fire management project to offset greenhouse gas emissions from a Liquefied Natural Gas plant in Darwin Harbour.¹⁹ Under the Agreement, private industry will contribute a minimum of A\$1 million per year to the project over 17 years.²⁰

The WALFAP reduces greenhouse gas emissions by adapting traditional fire management practices in country that is prone to unchecked wildfires. Unmitigated wildfires contribute to approximately 40 per cent of the Northern Territory’s greenhouse gas emissions.²¹ The WALFAP has direct and collateral ecological benefits, by reducing the net greenhouse gas emissions from wildfire and by conserving environmental and cultural values in the adjacent World Heritage listed Kakadu National Park.²² WALFAP employs local Aboriginal land management rangers and facilitates and supports the transfer of Indigenous knowledge between generations as Elders work with young people as part of the project.

The Darwin Liquefied Natural Gas plant agreed to offset greenhouse gas emissions from the plant as part of its licensing arrangements with the Northern

18 Opened for signature 16 December 1966, 999 UNTS 171, art 1 (entered into force 23 March 1976).

19 Agreements, Treaties and Negotiated Settlements Project, *West Arnhem Land Fire Management Agreement* (2006) <<http://www.atns.net.au/agreement.asp?EntityID=3638>> at 17 September 2008. See also Australian Human Rights Commission, *Native Title Report 2007* (2007) <http://www.hreoc.gov.au/social_justice/nt_report/ntreport07/chapter12.html> at 17 September 2008.

20 Ibid.

21 Marion Scrymgour, ‘Multi-Million Dollar Arnhem Land Greenhouse Gas Fire Sale’ (Press Release, 24 August 2006). See also J Russell-Smith, ‘Emissions Abatement Opportunities from Savanna Burning’ (Paper presented at Workshop for Greenhouse Emissions Offsets Programs, Melbourne, July 2007).

22 *Native Title Report 2007*, above n 19.

Territory Government.²³ As such, the Agreement enables industry to address permit requirements in a manner designed to achieve economic, social and environmental outcomes. Carbon and biodiversity offset projects clearly have application in the northern savanna region and elsewhere in Australia.

Indigenous peoples in Australia have long performed activities which generate commodity and non-commodity services (for all Australians) from the natural environment.²⁴ Many environmental services performed by Indigenous peoples are not 'new' to federal, State and Territory governments. Government departments and agencies have been involved in joint and cooperative management arrangements with Indigenous peoples for some time. However, the current threat of climate change and associated 'low carbon' context creates the need to value these services more appropriately and to provide adequate financial and regulatory infrastructure to enable access to, and growth of, new opportunities.

'Patch burning' of the Martu people in the northwestern section of the Western Desert is another example of a broader public benefit arising from traditional practices. The Martu people are native title holders over a large determination area in Western Australia. As discussed in recent work of the Desert Knowledge CRC and others,²⁵ Martu women undertake burning activities which assist hunting by revealing tracks and dens of small burrowing animals.²⁶ The mosaic of burnt areas resulting from the women's use of fire has the collateral benefit of mitigating wild fires in the summer months and sustaining the biodiversity of this area of the Western Desert.²⁷ The preservation of certain trees and shrubs increases the capacity of the ecosystem to maintain carbon sequestration.²⁸

A common issue identified in relation to both the WALFAP and Martu examples is the vulnerability of these projects to changes in policy and support structures.²⁹ This reiterates the need for binding and meaningful rights

23 The project is a carbon-offset project, providing a service for a fee under the Agreement. It is important to note that the Agreement is not a 'carbon trading' agreement. Darwin Liquefied Natural Gas cannot 'trade' the credits as Kyoto-linked reduction units. Also, the offsets serve to fulfill a requirement for a development application (as such, 'additionality' would be difficult, if not impossible to demonstrate). For further information see Tropical Savannas CRC, *The West Arnhem Land Fire Abatement Project (WALFAP)* (2008) <http://savanna.ntu.edu.au/information/arnhem_fire_project.html> at 17 September 2008; *Native Title Report 2007* above n 19.

24 David Campbell, Jocelyn Davies and John Wakerman, 'Realising Economies in the Joint Supply of Health and Environmental Services in Aboriginal Central Australia' (Working Paper No 11, Desert Knowledge CRC, 2007).

25 Ibid 9. Also cited by these authors is Douglas W Bird, Rebecca Bliege and Christopher H Parker, 'Aboriginal Burning Regimes and Hunting Strategies in Australia's Western Desert' (2005) 33(4) *Human Ecology: An Interdisciplinary Journal* 443.

26 See Campbell, Davies and Wakerman, above n 24.

27 Ibid.

28 Ibid.

29 In particular, the centralisation of essential infrastructure away from small remote outstations in favour of larger settlements. See Campbell, Davies and Wakerman, above n 24, 17. See also Rolf Gerritsen, 'Constraining Indigenous Livelihoods and Adaptation to Climate Change in SE Arnhem Land, Australia' (Paper presented at the International Expert Group Meeting On Indigenous Peoples and Climate Change, Darwin, 2 April 2008).

surrounding engagement processes. Land rights (and water rights) are reoccurring key issues which underpin meaningful engagement and participation in development opportunities for Indigenous peoples. In Australia, these foundations remain unstable, despite suggestions by Woodward J in 1974, some 34 years ago, that the provision of adequate land rights was one way to facilitate economic development in Indigenous communities.³⁰

More certain legal tenure generally provides greater scope to use land for economic development. In Australia, at present, it may be possible to use communal freehold rights under various forms of land rights legislation, freehold land grants as part of native title settlement packages³¹ and/or Indigenous Land Corporation properties for environmental market opportunities. However, the restrictive treatment of these and other forms of Aboriginal or Torres Strait Islander rights and interests in land (and water) can limit the involvement of Indigenous communities.³²

Scope also exists for other opportunities through collaborative projects relating to climate change and environmental management, which support shared understandings about country (for example the existing Caring for Country programs and the Indigenous weather knowledge project).³³ Inadequate legal protection for the unique nature of Indigenous traditional knowledge means agreements in relation to all collaborative projects need to provide appropriate and adequate protection of Indigenous peoples' intellectual property.

30 AE Woodward, *Aboriginal Land Rights Commission: Second Report* (1974).

31 See the settlement agreement package for the Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagalk Peoples' Application for determination of native title in Victoria, in which freehold title to certain parcels of land was transferred back to the traditional owners: National Native Title Tribunal, *Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagalk Native Title Determinations: What They Mean for the Wimmera Region* (2005) <<http://www.nntt.gov.au/Publications-And-Research/Publications/Documents/Multimedia%20and%20determination%20brochures/Determination%20brochure%20Wimmera%20December%202005.pdf>> at 17 September 2008. See also, Agreements, Treaties and Negotiated Settlements Project, *Wotjobaluk, Jaadwa, Jadawadjali Wergaia and Jupagalk Indigenous Land Use Agreement (ILUA)* (2005) <<http://www.atns.net.au/agreement.asp?EntityID=3126>> at 17 September 2008. For examples of specific legislative land grants see *Aboriginal Land (Manatunga Land) Act 1992* (Vic); *Aboriginal Lands Act 1991* (Vic).

32 Other forms of tenure include for example Aboriginal reserves under various State and Territory statutes.

33 See Department of Environment, Water, Heritage and the Arts, *Ways to Improve Community Engagement: Working with Indigenous Knowledge in Natural Resource Management* (2004) <<http://www.environment.gov.au/indigenous/publications/pubs/community.pdf>> at 18 September 2008. See also, Donna Green, *Sharing Knowledge* <<http://www.sharingknowledge.net.au/>> at 18 September 2008 and Bureau of Meteorology, *Indigenous Weather Knowledge Program* <<http://www.bom.gov.au/iwk/>> at 18 September 2008. For examples of 'Caring for Country' land and sea management activities and initiatives see the work of the *North Australia Indigenous Land and Sea Management Alliance* (NAILSMA) <<http://www.nailsma.org.au/>> at 18 September 2008. See also the activities supported by the Northern Land Council <http://www.nlc.org.au/html/care_menu.html>; Balkanu Cape York Development Corporation <<http://www.balkanu.com.au/business/caring.html>>; Kimberley Land Council <<http://www.klc.org.au/landsea.htm>>; and presentation by Wayne Bergman: <http://www.klc.org.au/pdfs/3_Keynote_WBergmann_KLC.pdf> at 18 September 2008.

IV EMISSIONS TRADING AND ASSOCIATED REGULATION

Australia has ‘stepped up’ its response to climate change since ratifying the *Kyoto Protocol* and taking a lead role in negotiations at the *UNFCCC* Conference of the Parties in Bali last year. Two key developments are the Garnaut Climate Change Review³⁴ and Federal Government’s Carbon Pollution Reduction Scheme (‘CPRS’) Green Paper.³⁵

There are three key issues concerning the interaction between the CPRS and Indigenous peoples in Australia:

- 1) Indigenous peoples have unique cultural interests, economic development aspirations and legal rights and interests that should be respected, preserved and promoted where they intersect with the CPRS;
- 2) Indigenous peoples possess many tangible and intangible assets that may be realised through meaningful and respectful partnerships and investment; and
- 3) As significant landholders, especially in northern Australia, the contribution of Indigenous peoples to mitigation efforts need to be recognised as a major component of the national mitigation response.

The opportunity for projects similar to the WALFAP has been created by a growing consideration of greenhouse gas emissions in the context of development and environmental approvals. The need for offsetting environmental impacts as part of environmental approvals processes is likely to remain, along with opportunities to participate in voluntary carbon markets.

However, the future of voluntary offset markets and the growth and application of projects like WALFAP outside the northern savanna region may be limited under proposed compulsory emissions trading regulation.

The recent Green Paper proposes that offsets will only be considered in sectors not covered by the CPRS. The broad coverage of the proposed CPRS therefore limits the scope for activities to create offset credits. The Green Paper suggests that particular sources of emissions are unlikely to ever be included in the scheme, such as emissions from uncontrolled burning of savanna grasslands in

34 See Garnaut Climate Change Review, *Draft Report: June 2008* (2008) <[http://www.garnautreview.org.au/CA25734E0016A131/WebObj/GarnautClimateChangeReview-FULLDraftReport,4July2008/\\$File/Garnaut%20Climate%20Change%20Review%20-%20FULL%20Draft%20Report,%204%20July%202008.pdf](http://www.garnautreview.org.au/CA25734E0016A131/WebObj/GarnautClimateChangeReview-FULLDraftReport,4July2008/$File/Garnaut%20Climate%20Change%20Review%20-%20FULL%20Draft%20Report,%204%20July%202008.pdf)> at 18 September 2008; Garnaut Climate Change Review, *Targets and Trajectories – Supplementary Draft Report: September 2008* (2008) <[http://www.garnautreport.org.au/reports/Garnaut%20Review%20-%20Targets%20and%20trajectories%20-%20Supplementary%20Draft%20Report%20-%205%20Sept%202008%20\(Accessibility%20enabled\).pdf](http://www.garnautreport.org.au/reports/Garnaut%20Review%20-%20Targets%20and%20trajectories%20-%20Supplementary%20Draft%20Report%20-%205%20Sept%202008%20(Accessibility%20enabled).pdf)> at 18 September 2008; Ross Garnaut, *Garnaut Climate Change Review Final Report* (2008) <[http://www.garnautreport.org.au/reports/Garnaut%20Climate%20Change%20Review%20-%20Final%20Report%20-%2030%20September%202008%20\(Full%20version\).pdf](http://www.garnautreport.org.au/reports/Garnaut%20Climate%20Change%20Review%20-%20Final%20Report%20-%2030%20September%202008%20(Full%20version).pdf)> at 2 October 2008.

35 Australian Government Department of Climate Change, *Carbon Pollution Reduction Scheme Green Paper* (2008) (‘Green Paper’) <<http://www.climatechange.gov.au/greenpaper/report/pubs/greenpaper.pdf>> at 18 September 2008.

Northern Australia. The specific exclusion of savanna emissions may be a positive measure, enabling the continuation of certain Indigenous offset projects in northern Australia.

Both the Garnaut Review³⁶ and the Federal Government's Green Paper recognise the potential contribution Indigenous peoples can make to the mitigation of climate change impacts. It is promising that the Government has identified the need to consult with Indigenous land managers about savanna emissions reduction and activities in the forestry context.³⁷ However, it is important that this consultation does not focus only on these examples and consequently limit engagement with the full spectrum of valuable ways in which traditional land management and traditional knowledge can contribute to viable offset/mitigation projects (nationally). It will be interesting to see how these consultations and any linkage proposals develop in the coming months. It may be possible for 'complementary measures' to the CPRS to provide scope for specific arrangements for Indigenous participation in market opportunities.³⁸

Other key access issues (in the context of market opportunities) for Indigenous peoples include:

- financial assistance or incentives for investment in Indigenous owned, managed or partnered projects. Carbon projects take time, and require financial and human resources.³⁹ Assistance beyond the Commonwealth's current proposal of A\$10 million is likely to be needed;⁴⁰ and
- water security and availability for traditional land management activities and cultural use. This issue is relevant to debate around use rights and cultural flow allocations from river systems.⁴¹

36 Garnaut Climate Change Review, *Draft Report*, above n 34, 368.

37 *Green Paper*, above n 35.

38 *Ibid* section 1.4. Complementary measures may supplement the CPRS and assist further reduction of carbon pollution. The Green Paper sets out that the Government is reviewing existing programs to ensure they remain relevant. While the CPRS will be the primary measure to achieve emissions reduction targets, other measures will be required to address market failures, or to deal with the distributional consequences of the new scheme.

39 For example, the WALFAP took a number of years to develop. The exercise was initiated in 2005 and designed over a two-year period (2006/07), following five years of preliminary data-gathering and fieldwork in 2000–04. See Gerritsen, above n 29.

40 The Commonwealth Caring for Our Country initiative set out funding priorities including \$10 million to assist Indigenous peoples to access carbon markets.

41 See Jessica Weir, 'Making the Connection Between Water and Sustaining Indigenous Cultural Life' (2006) Australian Government, Land and Water Australia <http://www.lwa.gov.au/sirp/Publications_and_Tools/People_Practice_and_Policy/Institutions_and_Governance/Making_the_connection/indexdl_3862.aspx> at 18 September 2008; Monica Morgan, Lisa Strelein and Jessica Weir, *Indigenous Rights to Water in the Murray Darling Basin: In Support of the Indigenous Final Report to the Living Murray Initiative* (2004) Australian Institute of Aboriginal and Torres Strait Islander Studies <http://www.aiatsis.gov.au/_data/assets/pdf_file/4728/DP14.pdf> at 17 September 2008. See also the general work of the Murray Lower Darling Region Indigenous Nations (MLDRIN) <<http://www.mldr.in.org.au/>> at 17 September 2008.

In contrast to Australia's approach to date, the New Zealand Government has carried out a study of the likely impacts (positive and negative) of an emissions trading scheme on the rights and interests of Maori.⁴² The purpose of the study was to inform the consultation processes with Maori and the finalisation of climate change policy by the New Zealand Government. A similar analysis in the Australian context would inform considerations of 'fairness' and provide insight into how to remedy any distributional impacts from the ultimate scheme design.⁴³ It is imperative (and consistent with a human rights based approach) to ensure Indigenous interests are not marginalised in the face of emerging policy, law and technology.

Innovations and changes create demands for more efficient processing, new 'low carbon' technology, renewable energy and investment in carbon sequestration. New laws, regulation and policy create certain opportunities yet also bring complexity to dealings and engagement with Indigenous peoples, particularly in relation to land and natural resource use and development.

For example, in preparing for sequestration developments, most Australian States have legislated to provide a basis for the legal recognition of carbon rights in trees and natural resources products. The nature of these carbon rights varies across jurisdictions. There is inconsistency in relation to the land on which these carbon rights may be created (private or public/Crown land) and whether these carbon rights create an interest in land.⁴⁴ The interaction between carbon rights in trees and other legal interests, including native title, is complex.

In Australia, native title and other systems for Indigenous land return, cultural heritage, environmental and property laws, along with human rights instruments,⁴⁵ provide mechanisms for possible protection and advancement of Indigenous interests in these new environmental markets. However, many of these laws and interests are vulnerable and do not create a well-protected space

42 New Zealand Ministry for the Environment, *Maori Impacts from the Emissions Trading Scheme: Detailed Analysis and Conclusions* (2008) <<http://www.mfe.govt.nz/publications/climate/maori-impacts-analysis-conclusions-jan08/index.html>> at 17 September 2008.

43 The Australian Government has identified criteria against which it will assess the design options for the CPRS. These include 'fairness'. Distributional impacts are also discussed in the *Green Paper*, above n 35. Distributional impacts effectively describe the distribution of the costs or benefits of interventions across different groups in society.

44 See, eg, *Conveyancing Act 1919* (NSW) as amended by the *Carbon Rights Legislation Amendment Act 1998* (NSW); *Forestry Act 1959* (Qld) as amended by the *Forestry and Land Title Amendment Act 2001* (Qld); *Forest Property Act 2000* (SA); *Forestry Rights Act 1996* (Vic) as amended by the *Forestry Rights (Amendment) Act 2001* (Vic); *Carbon Rights Act 2003* (WA); *Forestry Rights Registration Act 1990* (Tas) as amended by the *Forestry Rights Registration Amendment Act 2002* (Tas). See also discussion by Samantha Hepburn, 'Carbon Rights as New Property: Towards a Uniform Framework' (Paper presented at the ANU College of Law Seminars, Canberra, 21 August 2008); Jacqueline Peel, 'The Role of Climate Change Litigation in Australia's Response to Global Warming' (2007) 24 *Environmental and Planning Law Journal* 90.

45 See, eg, *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2004* (ACT).

for Indigenous participation in climate change adaptation and mitigation strategies.⁴⁶

New climate change related laws, regulations and markets may further limit Indigenous peoples' rights and interests through the regulation, extinguishment or suspension of native title and by restricting rights in relation to access and use of land, natural and biological resources. Negotiations in relation to access and use of Indigenous lands must be comprehensive and well-resourced. Free, prior and informed consent is an important requirement in these circumstances, particularly where the grant of other interests in land, trees or water may restrict use and enjoyment of the area (or resource) for the duration of a third party interest.

It is essential that new regulations preserve the existing rights and interests of Indigenous peoples in Australia and use the space created by these rights and interests to grow future opportunities.

V CLIMATE EFFECTS AND CLIMATE LITIGATION

As outlined above, it is possible for Indigenous peoples to formally and substantially engage in climate change related market opportunities. It is also possible for Indigenous groups to participate in climate litigation.

Inextricably linked to environmental damage is damage to Indigenous peoples' cultural heritage and identity. The devastation of sacred sites, burial places and hunting and gathering spaces, not to mention a changing and eroding landscape, cause great distress to Indigenous peoples.

There are strong indications that communities in the Torres Strait are already affected by rising sea level and other impacts of climate change.⁴⁷ These impacts not only threaten human health and the habitability of areas but also the viability of local enterprise and activities such as fishing, hunting and harvesting other foods and medicines, which are influenced by seasonal or environmental variation. Examples of legal action taken by Indigenous peoples and local communities include:

- the Arctic Inuit people petitioning the American Government at the Inter-American Human Rights Commission in December 2005 to establish mandatory limits on greenhouse gas emissions and help Arctic Inuit people adapt to the unavoidable impacts of climate change. The key

46 There are limitations concerning the use of native title as a means of underwriting economic activities. Further, native title rights and interests can be regulated or extinguished by the operation of legislation or the granting of inconsistent or competing interests in land and waters. Native title holders and Indigenous land managers face significant problems in trying to create and register any third party interests in trees, natural resources or land for carbon sequestration/offset projects. More robust legal property interests are needed for Indigenous peoples to fully participate in emerging natural resource management and carbon/biodiversity offset economic development opportunities.

47 Donna Green. 'How Might Climate Change Affect Island Culture in the Torres Strait?' (Research Paper 001, CSIRO Marine and Atmospheric, 2006) <http://www.cmar.csiro.au/e-print/open/greendl_2006a.pdf> at 18 September 2008.

argument advanced in the petition was that the impacts in the Arctic of human-induced climate change infringe upon the environmental, subsistence, and other human rights of the Inuit people;

- the current lawsuit by the Alaskan native village of Kivalina against a number of oil, coal and power companies for their contribution to global warming and the impact on homes and country disappearing into the Chukchi Sea.⁴⁸ The village is facing relocation due to sea erosion and deteriorating coast. The Kivalina seek monetary damages for the defendants' past and ongoing contributions to global warming, public nuisance and damages caused by certain defendants' acts in conspiring to suppress the awareness of the link between their emissions and global warming,⁴⁹ and
- legal action taken by communities in Nigeria against Shell and other oil companies in relation to gas flaring, which was also successful on environmental and human rights grounds.⁵⁰

In Australia to date, climate-related legal action has focused on administrative action in planning and environment decisions, with varying degrees of success.⁵¹ These proceedings are part of a growing body of climate change jurisprudence. While legal precedents from other jurisdictions are not necessarily applicable in Australia, it is worth noting discussion and debate in academic and non-government organisation circles about the scope for negligence/nuisance actions in Australia.⁵²

VI SUMMARY AND CONCLUSIONS

The emergence of climate change law and policy and increased environmental awareness present an important opportunity to support Indigenous people to exercise a right to development in accordance with their needs, interests and aspirations. It is in the public interest for Indigenous people, as important

48 *Native Village of Kivalina and City of Kivalina v ExxonMobil Corporation and others* Complaint for Damages and Demand for Jury Trial, (US District Court, Northern District of California, 28 U.S.C. §§ 1331, 2201). The Complaint was lodged in February 2008. A motion to dismiss was recently filed by defendants and a hearing date has been scheduled for December 2008.

49 *Ibid.*

50 The plaintiffs in this case argued that gas flaring produced air pollution and constant heat, light and noise. In November 2005, the Federal Court of Nigeria determined that the actions of the oil companies constituted a gross violation of community members' fundamental human right to life (including healthy environment) and was a violation of human rights protected by the Constitution of the Federal Republic of Nigeria: *Gbemre v Shell Petroleum Development Company Nigeria Ltd and Others* (Suit No. FHC/B/C/53/05, Federal Court of Nigeria, 14 November 2005).

51 See eg, Robert Ghanem, Kirsty Ruddock and Josie Walker, 'Are our Laws Responding to the Challenges Posed to our Coasts by Climate Change?' (2008) 31(3) *University of New South Wales Law Journal* 895.

52 See, eg, Peel, above n 44; Joseph Smith and David Shearman, *Climate Change Litigation: Analysing the Law, Scientific Evidence and Impacts on the Environment, Health and Property* (2006); Australian Conservation Foundation, *Tort Based Climate Change Litigation in Australia* (2002) <http://www.acfonline.org.au/uploads/res/res_climate_change_litigation.pdf> at 17 September 2008.

knowledge holders and land managers, not to be excluded from collaborative engagement and partnerships with the public and private sector in responses to climate change.

Although parts of Australia have benefited from innovative and supportive Caring for Country programs and Indigenous environmental and land management services, greater acknowledgement and support is needed for Indigenous peoples to grow development opportunities associated with climate mitigation activities. At present, traditional knowledge and the ecological services performed by Indigenous peoples are generally informal, undervalued and/or under-supported.

National and international emissions trading will directly and indirectly affect Indigenous peoples' rights and interests, particularly where new and competing interests in land and resources arise. In order to ensure Indigenous peoples are appropriately engaged in responses to climate change, standards of best practice should be established to guide governments and proponents in dialogue and partnerships with Indigenous communities. Such principles would provide greater clarity for all stakeholders as well as encourage engagement beyond the existing 'bare minimum' requirements for land use and development projects in Australia.

It is a departure from the *Declaration on the Rights of Indigenous Peoples* for governments not to consult and cooperate in good faith with Indigenous peoples before adopting and implementing legislative or administrative measures that may affect them.⁵³ Australia's responses to climate change should not ignore the objects of existing domestic legislation or international instruments to which it is a party (or to which it has signaled it is likely to become a party).⁵⁴

Indigenous peoples are vulnerable to not only the impacts of climate change, but also to the impacts of government responses to this significant issue. As such, policy and lawmakers should engage with Indigenous communities to ensure relevant decisions are informed by the specialised traditional knowledge and practices of Indigenous peoples. Limiting the involvement of Indigenous peoples in devising climate responses risks limiting the long-term effectiveness of climate change mitigation and adaptation strategies.

53 See, eg, art 19.

54 See, eg, Australian Labor Party, *2007 National Platform, Chapter 13: Respecting Human Rights and Fair Go for All* (2007) <http://www.alp.org.au/download/now/2007_platform_chapter13.pdf> at 17 September 2008, which sets out that 'Labor will endorse the UN Declaration on the Rights of Indigenous Peoples and be guided by its benchmarks and standards'.