7. Towards a Carbon Constrained Future: Climate Change, Emissions Trading and Indigenous Peoples' Rights in Australia[1]

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> *Our traditional knowledge on sustainable use, conservation, protection of our territories has allowed us to maintain our ecosystems in equilibrium … Our cultures, and the territories under our stewardship, are now the last ecological mechanisms remaining in the struggle against climate devastation. All Peoples of the Earth truly owe a debt to Indigenous Peoples for the beneficial role our traditional subsistence economies play in the maintenance of planet's ecology.* (*Declaration of Indigenous Peoples on Climate Change*, 2000: Articles 2 and 3)

Despite the turbulent evolution of climate change law and policy over recent years, the opportunities, issues and risks for Indigenous peoples arising from the use of market based mechanisms to address environmental issues remain relatively unchanged. The central theme of this paper (first drafted in 2008) also remains unchanged: the importance of early and meaningful engagement with, and respect for, Indigenous peoples and their rights, interests and knowledge in this rapidly evolving area of law and policy.

Since the initial version of this paper in 2008, the Carbon Pollution Reduction Scheme has been proposed and defeated and the political landscape has shifted to a minority Labor Government. There have been a number of climate change conferences and developments in greenhouse gas regulation, both nationally and internationally. This includes the recent *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth), which passed through the Australian Parliament on 23 August 2011.

Key updates have been made to this paper to reflect the contemporary policy announcements and proposed regulatory instruments within Australia.

1 This paper was originally written subsequent to a presentation on climate change at the AIATSIS Native Title Conference in June 2007 (in part published as Gerrard, 2008). The reference list includes a number of works that are not cited in the text but form part of the background research for the original paper and the current work and are considered a useful resource for the reader.

However, at the time of writing this prologue, Australia sits on the cusp of further significant reform: the Clean Energy Future Plan (and carbon pricing mechanism – or carbon tax) of the Gillard Labor Government.

Developments at the international level include a number of non-binding commitments by parties to the United Nations Framework Convention on Climate Change (UNFCCC) and Kyoto Protocol at Copenhagen and Cancun. In the absence of a binding international agreement, the obligations of various international countries remains uncertain beyond the Kyoto Protocol's first commitment period (2008–2012) – the 'post 2012' environment.

Climate change has focused global attention on the multiple important values of our natural environment and fragile ecosystems. Within this shifting focus lie opportunities for Indigenous people, whose knowledge, understandings and practices, not to mention landholdings, hold great potential for solutions to the problems facing our natural world.

Debate about climate change has been intensifying at an international level for decades. In Australia, momentum has grown rapidly since 2007 with ratification of the Kyoto Protocol, the Garnaut Reviews in 2008 and 2011 (Garnaut, 2008, 2011),[2] and the proposed introduction of regulation and trading mechanisms to address greenhouse gases emissions (DCC, 2008a, 2008b, 2009b; DCCEE 2011a, 2011b).[3] However, while governments have improved their approach since 2007, these responses have not adequately engaged with Indigenous Australians.

Maximising space for Indigenous participation and economic development in emerging law and policy relies on the recognition of fundamental rights and interests of Indigenous peoples. This includes the right to participate in development opportunities in accordance with Indigenous peoples' needs, interests and aspirations. It also includes the right to determine and realise meaningful opportunities based on their specialised knowledge and traditional practices. Indigenous peoples' rights and interests must be embedded in emerging climate change law and policy in Australia to avoid another frontier for assimilation and appropriation of country, knowledge and culture.

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2 Action since 2007 was preceded by coordinated State and Territory government responses, for example the National Emissions Trading Taskforce, established by Australian State and Territory Governments in 2004 in response to the Australian Government's refusal to ratify the Kyoto Protocol. The Taskforce was formed to examine proposed design options for a multi-jurisdictional Australian emissions trading scheme. The final report of the Taskforce in December 2007 was released for consideration by the Garnaut Climate Change Review process, see: <http://www.garnautreview.org.au/CA25734E0016A131/WebObj/NETTReportfromStateandTerritoryOfficials_Finalreceived14March2008/$File/NETT%20Report%20from%20State%20and%20Territory%20Officials_Final%20received%2014%20March%202008.pdf>

3 Australian Government Carbon Pollution Reduction Scheme Green Paper/White Paper consultation process (July – December 2008) and exposure draft legislation (March 2009), CFI consultation and subsequent legislation, December 2010 and the recent Clean Energy Future 2011 package of reform. See: <http://www.climatechange.gov.au/cfi> (accessed 12 August 2011), and <http://www.cleanenergyfuture.gov.au/> (accessed 12 August 2011).

This paper explores the potential opportunities for Indigenous peoples in the emerging carbon economy and issues at the interface between western concepts of property and law and the understandings, values and cultural responsibilities of Indigenous people. In exploring these issues, it is acknowledged that participating in the carbon economy may not be considered appropriate by all Indigenous peoples.

Climate change – evolving global awareness

In 1979, an international conference convened by the World Meteorological Organisation expressed concern that human activities were causing regional and perhaps global changes in climate. The conference called for global cooperation to examine the future direction of climate change and appealed to nations to foresee and prevent changes in climate that may be adverse to the well-being of humanity (IPCC, 2004).

In 1985 a joint World Meteorological Organisation, United Nations Environment Programme and International Council for Science concluded that global average temperatures were likely to rise by the first half of the 21st century as a result of increased greenhouse gases from human activities (IPCC, 2004).

In 1988 the World Meteorological Organisation and United Nations Environment Programme established the Intergovernmental Panel on Climate Change (IPCC) to examine, monitor and report on matters relating to climate change. Early work of the IPCC underpinned the drafting and signing of the UNFCCC in 1992.

The UNFCCC commenced in 1994 and provides a mechanism for intergovernmental action to address climate change. As parties to the UNFCCC, governments agree to gather and share information on greenhouse gas emissions, policy responses and best practices. Parties also agree to introduce strategies for addressing greenhouse gas emissions and adapting to the expected impacts of climate change (UNFCCC, 1994).

Scientific certainty in relation to global warming and the role of human activities in accelerating climate change has increased since early reports of the IPCC (2007).[4] In February 2007 the IPCC Working Group 1 reported that global temperatures may rise from 1.1 to 6.0° Celsius by 2100, and sea levels from 18 to 59 centimetres, depending on future greenhouse gas emissions (IPCC, 2007). Scientists and governments have since warned that sea level rise is likely to surpass these estimates and reach possible levels of 140 centimetres

4 The IPCC concluded in 2007 that there was a 'very high confidence' (greater than 90 per cent chance) that global warming is occurring as a result of human activities.

(DCC, 2008b: 2–3).[5] More recently, Professor Garnaut has noted that advances in science about the warming of the earth and the contribution of human activity to this phenomenon as beyond reasonable doubt (Garnaut, 2011).

In Australia warming is likely to occur at a rate similar to average global temperature increases. As a result of reduced rainfall and increased evaporation, water security problems are projected to intensify by 2030 in southern and eastern areas of Australia (IPCC, 2007: 9). The frequency of drought may increase by up to 20 per cent over most of Australia and climate change is expected to cause a higher incidence of water-borne diseases (DCC, Fact Sheet). Rainfall reductions in some areas of Australia are leading to lower water flows into rivers, wetlands and dams. In the Murray Darling, a 10 per cent change in rainfall has seen a 35 per cent reduction in stream flows (DCC, 2008a: 5). The Wet Tropics and Kakadu wetlands, alpine areas and deep coral reefs have been identified as particular areas at risk to the impacts of climate change (DCC, 2008b: 2–14). The Department of Climate Change and Energy Efficiency (DCCEE) has noted that by 2030, it is estimated that Australia will be exposed to a one degree Celsius increase in temperature, 20 per cent more months of drought, a 25 per cent increase in days of very high or extreme fire danger and increased storm surges and severe weather events.[6]

International responses to climate change

The Kyoto Protocol

The UNFCCC is a significant instrument in its own right as it contains the framework for an international regime to address climate change. It is also an important instrument because the Kyoto Protocol is a protocol to this convention. The Kyoto Protocol came into force on 16 February 2005 and sets emissions targets for 'developed' countries during the first commitment period (from 2008 to 2012) (*The Kyoto Protocol*, 1998). Parties who meet their targets are able to trade 'carbon credits' (reduction units) generated through any greater reduction of greenhouse gas emissions. Emissions trading is supplementary to domestic abatement action and is one of the 'flexible mechanisms' under the Protocol that parties can use to achieve their emission reduction targets.[7]

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5 Recent research discussed in the Australian Government CPRS White Paper indicates sea levels may rise in some areas by up to 1.4 metres by 2100.

6 DCCEE, see: <http://www.climatechange.gov.au/climate-change/impacts.aspx> (accessed 12 August 2011).

7 Other flexible mechanisms include Joint Implementation (JI) projects and the Clean Development Mechanism (CDM). These flexible mechanisms enable developed country parties to the Protocol to implement projects in other developing country (CDM) or developed country (JI) parties. In order to obtain reduction units (or 'credits') from CDM or JI projects, methods of measuring emissions reduction must be verified

Under the Kyoto Protocol, greenhouse gas emissions reductions from forest 'sinks', which are essentially forests established on cleared land (reforestation), can be used to show compliance with binding emissions targets.[8] As discussed in more detail below, Indigenous peoples have argued that the inclusion of forest sinks and incentives for other large-scale 'clean' development in the Protocol may have detrimental effects on ecosystems and Indigenous livelihoods (*Declaration of Indigenous Peoples on Climate Change*, 2000; see also, *Declaration of the First International Indigenous Forum on Climate Change*, 2000).

Following the 2007 Conference of the Parties to the UNFCCC and members of the Kyoto Protocol in Bali, attention has focused on the ways in which benefits for avoided deforestation can be included in current and future mechanisms.[9] Avoided deforestation (including reduced emissions from deforestation and land degradation in developing countries (REDD)) may provide opportunities and a means of protecting forest-dependent communities from large-scale land clearing. However, there remain concerns with the design and implementation of avoided deforestation projects. In particular these concerns relate to how law and policy will be developed to enable appropriate tenure and natural resource (including carbon) rights and how benefits from avoided deforestation projects will be distributed to Indigenous peoples and forest dependent communities (IFIPCC, 2007; Graham-Harrison, 2007). While REDD projects are designed for implementation in developing countries, avoided deforestation projects have been accredited under voluntary carbon market standards in Australia.[10] Avoided deforestation projects are capable of attracting benefits (or credits) under the Australian Government's new Carbon Farming Initiative (CFI). As discussed below, tenure and access issues particular to Indigenous peoples are relevant to the participation in these regulatory proposals.

Indigenous land and water interests are threatened by not only the direct impacts of climate change but also the indirect impacts of national and international mitigation and adaptation responses. For example an agreement between the Ugandan Government and a multinational corporation to plant trees on 25,000 hectares of expropriated parkland led to the removal of residents from the area

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and projects must demonstrate that the reduction in emissions is in addition to what would otherwise have occurred without the project (also called '*additionality*'). Various reduction units can be traded by parties to the Protocol and used to meet compliance targets. Australia, as a party to the Protocol, will be able to use the flexibility mechanisms to achieve its emissions targets. Seventh Conference of the Parties to the UNFCCC (COP 7) held at Marrakech 29 October – 19 November 2001, (hereafter Marrakech Accords).

8 Afforestation is the conversion of land that has not contained a forest for at least 50 years to forested land. Whereas reforestation by contrast is the conversion of land that was not forested on 31 December 1989 to forested land. In both cases forests must be human induced (planted by humans).

9 UNFCCC COP 13 Decision -/CP.13 (FCCC/CP/2007/6/Add.1. 14 March 2008): Reducing emissions from deforestation in developing countries: approaches to stimulate action. Agreed at COP 13/CMP 3, Bali, Indonesia, December 2007.

10 Avoided deforestation projects have been accredited under Australia's Greenhouse Friendly scheme. See: <http://www.climatechange.gov.au/greenhousefriendly/abatement/projects.html>

and restricted the income of locals from land use and grazing. Villagers were prevented from accessing the area to obtain food and traditional materials from the forest (Tauli-Corpuz and Lynge, 2008). Similarly, the identification by the IPCC that greenhouse gas emissions may be mitigated by the replacement of fossil fuels with biofuels has led to expansion of oil palm and other bioenergy crop plantations in Malaysia and Indonesia (Tauli-Corpuz and Lynge, 2008). Competing land uses not only create tensions and conflict with (and between) local communities, but also generate a struggle between food production and bioenergy cropping which in turn influences the supply of food markets. These activities can undermine the practical needs of Indigenous communities and infringe the fundamental human rights of peoples in these areas. Local communities are losing rights over land and facing increases in living expenses through, for example, an increase in the price of staple foods.

Indigenous peoples' participation in mitigation and adaptation strategies

As awareness about the potential impacts of climate change grew in the 1980s and 1990s, Indigenous peoples from around the world started to lobby for a role in the formulation or responses to predicted impacts of climate change. The 2000 Declaration of Indigenous Peoples on Climate Change expresses the integral nature of Indigenous peoples' rights in the management of natural carbon sinks on country in accordance with their culture, law, beliefs and use of these forests. The position articulated in the Declaration has been reiterated and built upon by Indigenous peoples at subsequent UNFCCC conferences and through the work of the United Nations Permanent Forum on Indigenous Issues.

Concerns articulated by Indigenous peoples in relation to international responses to climate change and the Kyoto Protocol include that:

- market incentives in relation to carbon sinks will lead to large-scale forest plantations and projects and a consequent loss of traditional country and abuse of ecosystems;
- discussions within the UNFCCC, along with practical implementation of the Kyoto Protocol, do not recognise the right of Indigenous peoples to adequate participation;
- 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 fail to take account of the fact that trees, vegetation and associated ecosystems are enmeshed with tangible and intangible cultural property rights;

- the importance of Indigenous peoples' traditional knowledge has not been adequately recognised in relation to climate change; and
- Indigenous communities have not been provided with sufficient information or resources to adequately respond to climate change. (*Declaration of Indigenous Peoples on Climate Change*, 2000: Articles 7–8; see also, Tauli-Corpuz and Lynge, 2008; *Declaration of the First International Indigenous Forum on Climate Change*, 2000)

Indigenous people have a 'special interest' in climate change and government responses to the impacts and effects of global warming. This interest is attributable not only to their unique physical and spiritual relationships with land, water and associated ecosystems (which gives rise to a particular vulnerability to climate change) but also to the specialised ecological and traditional knowledge they hold, which is relevant to finding 'best fit' solutions to climate change.

In 2008, the United Nations Permanent Forum on Indigenous Issues identified that a key barrier to the realisation of Indigenous peoples' adaptation capacities is the lack of recognition and promotion of their human rights. Many of these rights are reflected in the United Nations Declaration on the Rights of Indigenous Peoples (2007), which supports the participation of Indigenous peoples in climate change strategies and responses.[11] The United Nations Declaration on the Rights of Indigenous Peoples also recognises that respect for Indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment. The rights set out in the United Nations Declaration on the Rights of Indigenous Peoples are supported by other international instruments, including the Universal Declaration of Human Rights and other core human rights treaties (see, for example, *International Covenant on Civil and Political Rights,* 1966; *International Covenant on Economic, Social and Cultural Rights,* 1966). It is noted the Australian Government recently announced support for the United Nations Declaration on the Rights of Indigenous Peoples (Australian Labor Party, 3 April 2009). However, as identified by the United Nations Permanent Forum on Indigenous Issues statement welcoming Australia's endorsement of the Declaration, the

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11 *UN Declaration on the Rights of Indigenous Peoples*, 2007. Further, the Declaration provides that Indigenous peoples:

- have the right not to be subjected to forced assimilation or destruction of their culture (Article 8(1));
- have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature (Article 11 (1));
- have the right to participate in decision-making in matters which would affect their rights (Article 18);
- have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources (Article 25), *UN Declaration on the Rights of Indigenous Peoples*.

challenge ahead for Australia is how the contents of the Declaration will be implemented at a national level through the adoption of appropriate legislation and policies (Anaya *et al*., 2009; Australian Human Rights Commission, 2010).

Several international and national legal instruments recognise the importance of Indigenous peoples' traditional knowledge in environmental management and biodiversity conservation (see, for example, *Universal Declaration on Human Rights*, 1948: Art 27; *International Covenant on Economic, Social and Cultural Rights,* 1966: Art 15*; International Labour Organisation Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries,* 1992: Arts 15, 23*; Rio Declaration on Environment and Development*, 1992: Principle 22; see also, Dodson, 2007). The United Nations Convention on Biological Diversity (1992) promotes the importance of Indigenous peoples' traditional knowledge in the conservation and sustainable use of biodiversity.[12] Having ratified the United Nations Convention on Biological Diversity, Australia is under an obligation to (as far as possible and appropriate) respect, preserve and maintain the knowledge, innovations and practices of Indigenous peoples relevant to the conservation and sustainable use of biological diversity.[13] The United Nations Convention on Biological Diversity also promotes the wider application of traditional knowledge and practices, with the approval and involvement of the holders of such knowledge, and encourages the equitable sharing of benefits arising from the utilisation of such knowledge, innovations and practices. These concepts are important in the design of responses to climate change and Indigenous peoples' access to and participation in associated economic opportunities.

Other key principles of international environmental law further support Indigenous peoples' participation in strategies to address climate change (see, the Brundtland Report, 1987; see also, for discussion, Sands, 2003: 285–289).[14]

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12 In particular Article 8(j): 'Each contracting Party shall, as far as possible and as appropriate: subject to national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge innovations and practices'.

13 Articles 8(j) and 10, *United Nations Convention on Biological Diversity*. The objects of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (which embodies some of Australia's international obligations under the United Nations Convention on Biological Diversity) include the promotion of 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. See section 3 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

14 Principles such as: Ecologically sustainable development (ESD) or 'sustainable development (generally understood to be as articulated in the *Brundtland Report*: 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs.'); Intergenerational equity (promoting conservation and sustainable use of biodiversity for the benefit of present and future generations); the precautionary principle (where there is a threat of significant reduction or loss of biodiversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimise such a threat); and *the polluter pays principle* (the requirement that the costs of pollution should be borne by the person responsible for causing the pollution).

These principles are also relevant to the apportionment of responsibility in responding to the impacts of global warming. In particular, the principle of 'common but differentiated responsibility', derived from the concept of the common heritage of humankind and embodied in the UNFCCC, recognises historical differences in the contributions of different populations to global environmental problems, and the differences in their respective economic and technical capacities to address these problems (see, for discussion, CISDL, 2002). This principle encourages a shared response to climate change while protecting certain populations from a disproportionate burden in meeting mitigation and adaptation obligations (UNFCCC, 1992: Art 3; Sands, 2003: 286–289). The Clean Development Mechanism (CDM) is a mechanism through which countries can create tradable carbon credits by investing in projects in 'developing' countries. At the international level, this measure is an example of the principle's operation under the UNFCCC's Kyoto Protocol.

The principle of common but differentiated responsibility is usually interpreted at an international level, however it has application in a domestic setting, particularly in relation to the operation of the CFI and the design and implementation of the Australia Government's Clean Energy Future Plan (specifically, the proposed carbon pricing mechanism). Relatively speaking, it can be argued that non-Indigenous Australians have derived a greater economic benefit and played a greater role in creating environmental problems and should provide financial, technological, and other assistance to those who have contributed least to the creation of current environmental problems. Valuing the contributions of Indigenous peoples (past, present and future) is an essential component of equitable responses to climate change in Australia. For thousands of years Indigenous peoples have sustainably used and harvested country and their stewardship over biodiversity has sequestered significant volumes of carbon in soil, vegetation and trees. Employing a common but differentiated responsibilities approach to emissions trading and other responses to climate change in Australia promotes substantive equality between Indigenous and non-Indigenous peoples. Ignoring the inequalities between Indigenous and non-Indigenous peoples' capacities to adapt to climate change risks drifting into what Archbishop Desmond Tutu has described as a world of 'adaptation apartheid' (UNDP, 2007: 13).

The fundamental human right to self-determination, which includes the freedom and right to pursue economic, social and cultural development is embodied in many international legal instruments and is also relevant to responses to climate change (*International Covenant on Civil and Political Rights,* 1966; *International Covenant on Economic, Social and Cultural Rights,* 1996). Climate change policy design and mitigation strategies present an important opportunity to bring traditional knowledge and practices together with economic and social development. This opportunity will be diminished if governments 'mainstream' responses in a way that fails to accommodate the particular concerns and specialised interests of Indigenous peoples.

Historic policy documents (DCC, 2008b: 3–6) and Australia's status as a party to the UNFCCC, confirm Australia's commitment to the principle of common but differentiated responsibility and respective capabilities at an international level. However, despite the distinct socio-economic 'gap' between Indigenous and non-Indigenous Australians acknowledged by the Australian Government,[15] this principle has not filtered through to design of the voluntary carbon market and the compliance market at a domestic level. The basis on which Indigenous Australians are included in responses to climate change and the mechanisms by which disproportionate costs (Garnaut, 2008: 389; 2011)[16] and market access burdens will be minimised have not been articulated in the proposed scheme. Achieving 'real improvements and outcomes for Indigenous communities' under the Government's 'Close the Gap' policy agenda (FaHCSIA, 2009), including 'taking stock of the true extent of inequality' and 'forging corporate partnerships' necessarily involves ensuring legal foundations and policy incentives are present to grow opportunities and partnerships.

A domestic variation of the Kyoto Protocol CDM could be introduced as a design feature of the CFI or carbon pricing mechanism to implement the principle of 'common but differentiated responsibility' at a national level. Such a mechanism could draw from key aspects of the CDM; promote technology and capacity transfer and foster projects that deliver environmental, economic and social outcomes, as well as the maintenance or revitalisation of culture (Cardinoza, 2005: 197–210).

Measures to promote sustainable investment in Indigenous communities were absent in the previously proposed CPRS, (which barely addressed Indigenous involvement in land use, land use change and forestry activities). While the Australian Government has made an effort to include specific pathways for Indigenous peoples to participate in the CFI,[17] further legislative and systemic changes are needed to ensure access to meaningful economic development opportunities and provide incentives for investment.[18]

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15 The Australian Government acknowledges that 'Closing the Gap' on the relative disadvantage facing Indigenous Australians is fundamentally important to building a fairer Australia. <http://www.fahcsia.gov.au/sa/indigenous/pubs/general/documents/closing_the_gap/closing_the_gap.pdf>

16 Costs of preparing projects for accreditation under compliance schemes or voluntary carbon offset standards and general costs of living – for example, as noted by Professor Garnaut in the Garnaut Climate Change Review Final Report in relation to the rising cost of fuel resulting from emissions trading: 'Remote Indigenous Communities in northern and central Australia are likely to be particularly affected, given their reliance on diesel fuel for power supply as well as transport.' (at p 389).

17 The Carbon Credits (Carbon Farming Initiative) Bill 2011 (Cth) proposes specific pathways for native title holders, which include: deeming provisions for a native title registered body corporate to be the project proponent in certain circumstances; confirmation that consents and other certificates from otherwise eligible interest holders (such as Crown land Ministers) are not required where a group holds exclusive possession native title; and expressly enables consents in relation to carbon offset projects to be provided in registered ILUAs.

18 The recently announced Clean Energy Future reforms include $22 million for an Indigenous Carbon Fund, which will assist Indigenous peoples involvement in the CFI. However, there remain a number of issues associated with State, Territory and Commonwealth legislative regimes to create, transfer and recognise carbon rights in country. These inconsistencies, as well as differing views of governments on the status of native title and other Indigenous tenure interests create uncertainty for Indigenous peoples involvement in the CFI and related markets.

Australia's response to climate change

A number of policy and legislative measures have been proposed in recent years to try and facilitate greenhouse gas emissions reduction and climate change mitigation and adaptation. The Rudd Labor Government attempted to introduce an emissions trading scheme in the form of the Carbon Pollution Reduction Scheme. More recently, the Gillard Labor Government has passed legislation to enable the CFI and proposed further reforms through the Clean Energy Future Plan. The Clean Energy Future Plan includes a fixed and floating phase emissions trading scheme known as the 'carbon pricing mechanism'.

In addition, the Australian Government has created and replaced a number of voluntary emissions reduction initiatives. Examples include the Greenhouse Friendly program and its replacement the National Carbon Offset Standard. The CFI creates a voluntary carbon market for emissions avoidance (reducing emissions to the atmosphere) and carbon sequestration (the storage of carbon in land, vegetation and trees) projects in the land use sector. CFI carbon credits will be capable of use to meet requirements under the new 'compliance' or compulsory emissions trading scheme (the carbon tax or 'carbon pricing mechanism').

The voluntary carbon market is relevant to companies and individuals that are not required by law to limit carbon emissions yet still wish to offset their greenhouse gas emissions. This behaviour may be driven by one or more of various imperatives including concern for environmental, marketing or branding considerations or to satisfy corporate social responsibility commitments. There are various standards and accreditation processes used to calculate emissions reduction for the voluntary market. A number of these standards and processes have been operating for many years, where as some, like the National Carbon Offset Standard or CFI are recent developments.

In order to have emissions reductions accredited under most voluntary markets, it is necessary to demonstrate that the project meets the following criteria:

- *Additionality* – abatement must be additional (beyond what would be undertaken as part of business-as-usual (common industry practice) or beyond what is required by law/regulation).
- *Permanence* – emissions reductions must be permanent. In the case of forest sinks, this requires that carbon remains stored and will not be released into the atmosphere in the future.
- *Measurability* – methodologies used to quantify the amount of carbon sequestered must be accepted and robust.
- *Transparency* – consumers and other interested stakeholders must be able to examine information on projects through the internet.

- *Independently verified* – eligibility of the project and the amount of carbon sequestered must be validated by an independent third party.
- *Registered* – units generated must be registered and tracked in a transparent and accessible registry. (DCC, 2008d: 15–16; *Carbon Credits (Carbon Farming Initiative) Act 2011* and associated Explanatory Memorandum)

These criteria are modelled on rules under the Kyoto Protocol for Clean Development Mechanism (CDM) projects. The CFI takes a slightly different approach to the assessment of 'additionality'. Under the CFI proponents must demonstrate a project passes the 'additionality test', which involves an assessment of legal additionality (whether the project or activities are required by law) and an assessment of whether the project is of a type included on a 'positive list'.[19]

There are cost implications in meeting these criteria, including consultant costs in designing and establishing projects and ongoing costs involved in monitoring and reporting on emissions reductions.

Tenure and 'additionality' requirements under these proposals complicate access to emerging markets for Indigenous peoples. Traditional lands are sometimes held in trust or not 'owned' by Indigenous peoples under a Torrens system of land tenure. Further, Indigenous peoples' lands often consist of conservation land; areas subject to reservations, declarations or covenants which require conservation and environmental management activities – such as joint management agreements and Indigenous Protected Areas. Demonstrating that revegetation, reforestation or land management activities in these areas satisfy additionality requirements (are in addition to what would otherwise occur) for the purposes of voluntary or compulsory markets is therefore difficult for Indigenous landowners and managers in these areas. To ensure access for these communities, definitions, 'lists' and requirements under new and proposed legislation need to accommodate this issue and the impacts of conditional land return on Indigenous land interests.

Further, the compulsory and voluntary drivers for sourcing carbon credits is likely to have a significant impact on the value of voluntary markets and on investment in voluntary offset projects. The priority for many liable entities under the proposed emissions tax or market will be investment in compliance under that scheme with secondary consideration of any additional and voluntary activities outside the scheme. For this reason, the final mechanisms which link

19 Section 41 of the CFI Act sets out the requirements that must be satisfied to pass the 'additionality test'. 'An offsets project passes the additionality test if the project is of a kind specified in the regulations (the positive list) *and* the project is not required to be carried out by or under a law of the Commonwealth, a State or a Territory' [emphasis added].

CFI projects to the carbon pricing mechanism will be relevant to Indigenous land holders and managers, as these links represent pathways to the highest value commercial markets.

Indigenous involvement and a greater opportunity for Australia

Issues relevant to the interaction between emerging carbon markets and Indigenous peoples in Australia include the following salient matters:

1. Indigenous peoples have unique cultural interests, economic development aspirations and legal rights and interests that must be respected, preserved and promoted where they intersect with carbon market opportunities;
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.

While there have been attempts to engage with and consult Indigenous peoples in relation to policy announcements and regulatory proposals more recently, meaningful engagement with, and analysis of, these issues is yet to be seen by the Australian Government. In contrast the New Zealand Government specifically examined the potential impacts (positive and negative) of an emissions trading scheme on the interests of Māori (Insley and Meade, 2008). This study, undertaken by the New Zealand Government with 37 Degrees South Limited and Cognitus Advisory Services Limited, was preceded by general consultation with Māori in relation to climate change, its impacts and the Kyoto Protocol (DPMC, 2001). The study was designed to inform the consultation processes of the New Zealand Government with Māori and the finalisation of the Government's climate change policy (Insley and Meade, 2008). The final report on the relative impacts of a trading scheme indicates that Māori face increased burdens and restricted opportunities under an emissions trading scheme, unless concessions and exemptions are made (Insley and Meade, 2008). While the magnitude of impacts depend on particular elements of the New Zealand scheme, Māori are more likely to be affected by increased household electricity and fuel prices, more likely to be exposed to increased costs and burdens in the fishing sector (including adverse employment impacts) and parts of the forestry sector. Also, the ability of Māori to mitigate any disproportionately negative impacts or take advantage of Kyoto forestry activities will be constrained relative to non-Māori due to transaction costs and trading scheme related penalties and land use restrictions (Insley and Meade, 2008).

This type of evaluation is critical to the principle of fairness in the Australian Government's assessment of design options for the 'compliance' market (or carbon tax). Meaningful and ongoing engagement with Indigenous communities in climate change responses should involve an examination of the foreseeable impacts (positive and negative) of emissions trading on Indigenous peoples' land use, development opportunities and living expenses. Such an approach is also supported by recommendations of the United Nations Permanent Forum on Indigenous Issues (Tauli-Corpuz and Lynge, 2008).[20]

Climate change, carbon rights and the interests of Indigenous peoples in land and waters

Climate change related laws, regulations and markets have the potential to further decrease or limit Indigenous peoples' rights and interests in country and its resources through the extinguishment or suspension of native title or by restricting rights in relation to the access and use of land and resources. The progressive 'unbundling' of conventional property interests through legislation (for example separating rights and interests in water and carbon from land ownership) creates a regime for the piecemeal appropriation of traditional land and resources.

Most Australian States and Territories have legislated to provide a basis for the legal recognition of carbon rights in trees and natural resource products. However the nature of these carbon rights varies across jurisdictions. There is inconsistency in relation to the land on which carbon rights may be created (private or public or Crown land), whether they create an interest in land (or constitute a new and separate property interest) (DEH, 2005: Ch 2; see also, Hepburn, 2008), and whether harvesting rights are separate from sequestration rights (Peel, 2007: 90). In addition, many State regimes protect a carbon interest holder's rights by registering an instrument on the relevant land title. Registration of interests on titles presents an obstacle for many Indigenous people in Australia as their interests in land often prohibit or restrict the creation of third party interests or require the consent of relevant government ministers to do so, or the tenure interests held by Indigenous communities cannot be registered on the Torrens system. The nature and effect of carbon rights creates a complex interaction with other legal interests, including native title.[21]

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20 For example, a recommendation that the business community and its regulators should incorporate Indigenous peoples' rights into their plans for economic development, as stakeholders, land rights holders and on a human rights basis.

21 See generally for example: *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); *Climate Change Act 2010* (Vic); *Carbon Rights Act 2003* (WA); *Forestry Rights Registration Act 1990* (Tas) as amended by the *Forestry Rights Registration Amendment Act 2002* (Tas).

The use of market mechanisms to address contemporary environmental issues and the requirements for participation in these markets (for example, demonstrating 'additionality', as discussed above) highlight the problems with historic and current conditional land return practices of Australian governments (for example, handback-leaseback arrangements, dedicated conservation areas and conditional tenure interests). This practice impairs the ability of Indigenous peoples to participate in economic development opportunities, a suggestion that is not new to consideration of Indigenous peoples rights in Australia. In 1974, Justice Woodward noted that the provision of adequate and meaningful rights to use and develop land was one way in which to achieve economic development in Indigenous communities (Woodward, 1974). It is essential to Indigenous participation in emerging environmental market opportunities that the statutory and policy infrastructure supporting these markets respect the integrity and comprehensiveness of Indigenous rights and interests in land and water and the rights of Indigenous peoples to derive contemporary benefits from their rights and responsibilities.

Native title

When Britain asserted sovereignty over Australia it also acquired 'radical title' to land in Australia (*Mabo v Queensland [No 2]*, 1992). However, as held by the High Court of Australia, Indigenous law with respect to land and waters survived the Crown's acquisition of sovereignty and 'radical title' (*Mabo v Queensland [No 2]*, 1992). Radical title alone is 'merely' a logical assumption needed to give support to the Crown's power to grant an interest in land to others or appropriate to itself ownership of areas within its territory.[22] Radical title does not of itself confer full and beneficial ownership of land and waters to the Crown; it is qualified or 'burdened' by native title, which is the name given to the rights and interests arising under Indigenous law and custom that are recognised by the common law (*Mabo v Queensland [No 2]*, 1992: 89, 94, per Brennan CJ; *Wik Peoples v Queensland*, 1996: 128, per Toohey J; see also, Bartlett, 2004: 205). As observed by Brennan CJ in *Mabo v Queensland [No 2]*, 1992:

> the common law of this country would perpetuate injustice if it were to continue to embrace the enlarged notion of terra nullius and to persist in characterizing the indigenous inhabitants of the Australian colonies as people too low in the scale of social organization to be acknowledged as possessing rights and interests in land. Moreover, to reject the theory that the Crown acquired absolute beneficial ownership of land is to bring the law into conformity with Australian history. The dispossession of

22 *Mabo v State of Queensland [No 2]* (1992) 175 CLR 1, per Brennan CJ at [52] and [53].

> the indigenous inhabitants of Australia was not worked by a transfer of beneficial ownership when sovereignty was acquired by the Crown, but by the recurrent exercise of a paramount power to exclude the indigenous inhabitants from their traditional lands as colonial settlement expanded and land was granted to the colonists. Dispossession is attributable not to a failure of native title to survive the acquisition of sovereignty, but to its subsequent extinction by a paramount power. (*Mabo v Queensland [No 2]*, (1992) 175 CLR 1, per Brennan CJ at [63])

As such, areas of unalienated Crown land (which could be described as areas of unallocated Crown radical title) remain burdened by native title rights and interests. However, while the rights and privileges conferred by native title were unaffected by the Crown's acquisition of radical title, the acquisition of sovereignty exposed native title to extinguishment by a valid exercise of sovereign power inconsistent with the continued right to enjoy native title.[23]

The content of native title is determined by the laws and customs governing the relationship of an Indigenous group to the country to which it is connected. However, native title is subject to several limitations, some of which are outlined here. First, with a couple of specific exceptions, native title rights and interests have not been found to include a commercial right to trade.[24] Second, the acquisition of sovereignty exposed native title to 'extinguishment' by the valid exercise of sovereign power (in a manner inconsistent with the continued right to enjoy native title) (*Mabo v Queensland*, 1992; see also, *Native Title Act 1993* (Cth) (NTA)). As a result, subject to protections in the NTA, the Crown can validly grant interests in land that are wholly or partially inconsistent with (and override) native title. Third, the laws and customs giving rise to the native title must be traditional, that is, there must be a clear nexus between the contemporary and pre-sovereign societal system (*Mabo v Queensland*, 1992; *Members of the Yorta Yorta Aboriginal Community v Victoria*, 1998). The effects of these limitations on native title holders' participation in measures addressing climate change is addressed below.

Whether the scope of native title includes the right to carbon (or carbon rights) is the subject of debate between governments and Indigenous communities. This debate is likely to intensify as the value of carbon increases. The following discussion explores the nature of native title and scope of potential commercial or trade interests protected by (or associated with) its recognition.

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23 See: *Mabo v State of Queensland [No. 2]* (1992) 175 CLR 1, per Brennan CJ at [51], [62], [63], [66], [67], and [83].

24 It is noted that consent determinations in relation to land in the Torres Strait have recognised commercial native title rights and interests. Further the recent decision in *Akiba v Queensland [2010]* FCA 643 recognised the native title right to trade (this decision was subsequently appealed and at the time of writing the decision remains reserved).

Native title right to trade

Native title is recognised as bundle of rights and interests in relation to land (*Western Australia v Ward*, 2002). The 'inherently fragile' (*Fejo v Northern Territory*, 1998: 105, per Kirby J) nature of native title is likely to restrict the participation of native title holders in carbon markets, particularly where participation requires the creation (and registration) of third party interests in trees or other natural resources.

While exchange and sharing of resources has been demonstrated in the context of native title, there has been a reluctance to recognise a native title right to trade (with the exception of recognition of native title rights and interests in the Torres Strait which may be validly exercised for commercial purposes) (see, for example, *Saibai People v Queensland*, 1999; *Kaurareg People v Queensland*, 2001; *Mabuiag People v Queensland,* 2000; *Masig People v Queensland*, 2000). However, a right to trade may be recognised as part of exclusive rights to use and enjoy land and waters (*Commonwealth v Yarmirr*, 1999: 250, per Beaumont J and Von Doussa J).

The recent decision in *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v Queensland (No 2)* ([2010] FCA 643) provides an example of an actively litigated outcome where the right to trade, or commercial use of native title rights and interests has been recognised. It is noted that, at the time of writing, an appeal against the decision at first instance has been heard and judgement is reserved. In the initial Federal Court decision, Justice Finn found that it was

> by no means apparent … at least in relation to the sea – and particularly in waters with the abundant resources Torres Strait has … absent a legislative regime to the contrary, why marine resources may not be exploited by those who care to do so for trading and commercial purposes, though they lack entirely any exclusive right to possession of the area or do not purport to assert any such right. (*Akiba* [528]–[529])

His Honour accepted that the evidence established that the Islanders sold marine resources for money and that 'the fundamental resource-related right of use was the right to take. Use of what was taken was unconstrained, save by considerations of respect, conservation and the avoidance of waste' (*Akiba* [528]–[529]).

In *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005: 157), the Court found sufficient evidence to support the right to share or exchange subsistence and other traditional resources obtained on or from the land and waters. However, the Court did not find sufficient

evidence to trade in the resources of the area. In this case the Northern Territory argued that the evidence of trade presented by the applicant made no reference to commercial or profit motives or any level of business operation.

As contended by Langton and others (2006a), such a viewpoint neglects the distinct nature of Indigenous peoples' transactions and economic relations and ignores the inherent agency of resources as commodities with multiple meanings and value. It may be argued that a contemporary expression or adaptation of a right of exchange (where evidenced) includes the exchange of resources for money. In the same way that Indigenous communities adapt to contextualise and normalise interactions with new discoveries and foreigners, adaptation of law and custom could clearly accommodate interaction with cash economies. The general absence of contemporary recognition of traditional economies and commercial rights also limits the use of native title as a means of underwriting economic enterprise.[25]

Even where native title right to trade is recognised the susceptibility of native title to regulation or extinguishment may undermine its use as the sole means of accessing emerging environmental markets.[26]

One new and significant market, the CFI, deals with these issues in part by deeming 'exclusive possession' native title interest holders to also hold the relevant carbon rights needed to generate tradeable carbon credit units. Also, the CFI confirms that responsibility for a carbon sequestration project can be transferred (or consented to) by a native title holding group through a registered Indigenous land use agreement. Measures like these are an efficient and effective way of addressing certain obstacles to Indigenous participation in carbon markets. The alternative, forcing parties to go through extensive and costly 'proof' exercises to confirm the requisite carbon right, only delays potential projects and acts as a disincentive to potential project partners.

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25 It is noted that consent determinations in the Torres Strait expressly include economic purposes in recognition of native title rights to conserve, use and enjoy the natural resources of the determination area for social, cultural, economic, religious, spiritual, customary and traditional purposes (see, for example: *Saibai People v Queensland* [1999] FCA 158, *Kaurareg People v Queensland* [2001] FCA 657 (23 May 2001), *Mabuiag People v Queensland* [2000] FCA 1065 (6 July 2000) and *Masig People v Queensland* [2000] FCA 1067 (7 July 2000)).

26 As considered by Justices Beaumont and Von Doussa in *Commonwealth v Yarmirr* [1999] FCA 1668: 'any final consideration of a claim to a right to fish, hunt and gather within these waters for the purposes of trade would need to take into account the impact of the relevant respective fishing legislative regimes of South Australia, the Northern Territory and the Commonwealth, the various forms of applicable fisheries legislation and administrative action there-under, which clearly had at least the potential to affect a claim by any person to fish or hunt in these waters, were summarised by the judge (at 594–599) … it will suffice for us to say that, by this means, any right of the public to fish for commercial purposes, and any such traditional right, were at least regulated and possibly wholly or partly extinguished by statute or executive act, or both' (at 255).

Native title and incidental commercial benefits

In addition to the possible recognition of a native title right to trade, there is scope for legal recognition and preservation of contemporary economic interests deriving from native title. The issue of whether the adaptation of a traditional practice, attracting an economic benefit, means that the practice is no longer considered to be 'traditional' was considered in *Neowarra v State of Western Australia* (2003). In addressing the question whether the use of canvas and the sale of artworks to tourists is consistent with tradition, Justice Sundberg viewed the sale of artworks as an 'incidental spin off'. His Honour accepted the rationale for developing painting on canvas (to educate children about their heritage) and considered the practice to be 'traditional' in the sense of section 223(1) of the NTA.[27] Importantly, Justice Sundberg further accepted that the practice does not lose its 'traditional' character because it has an incidental economic advantage (*Neowarra v State of Western Australia*, 2003: 341).[28]

Extending Justice Sundberg's reasoning to other traditional activities, it may be argued that native title can support the economic use of traditional rights, for example, the maintaining of and caring for country in a manner which provides an incidental economic advantage. As such, native title may provide an opportunity for participation in carbon markets through carbon offset and abatement projects and managing country.

Such an extrapolation is relevant for example in the context of 'patch' burning of the Martu people in the north-western section of the Western Desert. The Martu People are native title holders in this area of Western Australia (*Martu People v State of Western Australia*, 2002). As discussed by the former Desert Knowledge CRC and others (Campbell *et al*., 2007: 9; also cited by, Bird, *et al*., 2005: 443–463), Martu women undertake burning activity, which reveals the tracks and dens of small burrowing animals and improves hunting efficiency (Campbell *et al*., 2007). The burnt areas resulting from the women's use of fire have a collateral benefit of mitigating wild fires and sustaining biodiversity (Campbell *et al*., 2007). The minimisation of wild fires preserves vegetation and increases the capacity of the ecosystem to maintain carbon sequestration

27 Section 223 of the NTA sets out the meaning of native title or native title rights and interests. Native title claimants must satisfy this definition in order to have native title recognised.

28 At [341]: 'I turn to the suggestion that the painting of artworks may not be traditional because they are sold to tourists. At sovereignty the claimants' ancestors painted on rock surfaces and renovated the paintings either annually or as required. While some renovation is still carried out, the remoteness of many Aboriginal people from their Wanjina sites prompted Donny Woolagoodja and his Wanjina Corporation to keep up the painting tradition by encouraging people to paint on canvas so as to educate the children about their heritage. The sale to tourists and others of the works is an incidental spin off. Once it is accepted, as I do, that the rationale for the development of painting on canvas at Mowanjum is that given by Donny Woolagoodja and other artists such as Mabel King, the practice is "traditional" in the sense of that word in s 223(1), and does not lose that character because it has an incidental economic advantage.'

(Campbell *et al.*, 2007). As such, it could be argued that the commercialisation of these activities is a beneficial incidental 'spin off' to native title rights and interests.

Adaptation of traditional laws and customs is relevant in considering protections under the NTA afforded to traditional practices that, incidental or otherwise, mitigate the effects and impacts of climate change.

While native title claimants must demonstrate a clear nexus between the contemporary and pre-sovereign societal system, adaptation and change of laws and customs over time is not fatal to native title (*Members of the Yorta Yorta Aboriginal Community v Victoria*, 2002). In assessing the significance of change to, or adaptation of, traditional law and custom, it is necessary to determine whether the change or adaptation is of such a kind that it can no longer be said that the rights and interests asserted are possessed under the traditional laws acknowledged and traditional customs observed by the relevant peoples (*Members of the Yorta Yorta Aboriginal Community v Victoria*, 2002: 83 per Justices Gleeson, Gummow and Hayne).

Where native title is demonstrated, section 211 of the NTA may operate to protect native title holders from certain attempts to regulate the exercising their native title rights and interests.[29] Despite its positive application, section 211 does not preserve a 'right to trade', as subsection 211(2)(a) stipulates that the preservation of native title rights applies only for the purposes of satisfying personal, domestic or non-commercial communal needs. However, while section 211(2)(a) may limit the preservation of a right to trade or activities carried out for the purposes of commercial benefit, on the basis of the reasoning in *Neowarra* it may be possible for native title holders to enjoy protection under section 211 for practices that are carried out primarily for personal, domestic or non-commercial communal needs yet which attract an indirect and incidental commercial benefit.[30]

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29 Section 211 of the NTA provides for the preservation of certain native title rights and interests where such a right or interest may be otherwise restricted by Australian statute. Effectively, the section provides that where a law prohibits or restricts persons from certain activities other than in accordance with a licence, permit or other instrument, it does not prohibit or restrict the pursuit of that activity in certain circumstances where native title exists and native title rights are exercised for personal, domestic or non-commercial needs. See *Yanner v Eaton (1999)* 201 CLR 351 in which the High Court found that section 211(2) of the NTA prevented Queensland legislative provisions from prohibiting a native title holder from exercising his native title right to hunt for crocodiles.

30 For example traditional burning practices for hunting personal, domestic or non-commercial communal purposes that carry an indirect and incidental biodiversity conservation and fire mitigation benefit *Yanner v Eaton* (1999) 201 CLR 351.

Native title future act regime considerations

The native title future act regime also presents a way in which Indigenous groups may use existing agreement-making mechanisms to participate in carbon offset projects. Participation may be facilitated through negotiated agreements for use and development projects on country (for example through an Indigenous Land Use Agreement). Such negotiations may provide a basis for arrangements under which companies seek to offset carbon emissions for their business or project by supporting Indigenous peoples' rights to care for country. Investment and partnering in such local enterprise may foster knowledge and skill exchanges and help proponents achieve corporate social responsibility and regulatory compliance objectives.[31] However, as noted above, this investment will depend on projects being able to meet relevant eligibility requirements under proposed schemes, which, will be difficult if they are implemented as drafted.

Agreements involving large-scale infrastructure, energy or mining projects are perhaps the most fertile area for negotiating carbon benefits, especially for projects resulting in, or facilitating, significant increases in greenhouse gas emissions. In particular, mining projects provide a specific opportunity to negotiate participation in carbon offset projects due to the statutory requirement to negotiate under the NTA. Looking for ways to expand agreements in this way is consistent with current policy and reform objectives of the Australian Government to optimise benefits from native title agreements.[32]

As set out above, unalienated Crown is burdened by native title (*Mabo v Queensland*, 1992). As a result, trees and vegetation, as fixtures of land, are also 'burdened' by native title rights and interests where these rights and interests have not been extinguished by the valid grant of an inconsistent interest. The trend toward legislation enabling governments to create rights and trade carbon stored in trees and soil on Crown land assumes that the Crown has an unencumbered absolute beneficial interest in the underlying Crown land. However, as a burden on the Crown's radical title and where it has not been extinguished, native title (and the operation of the NTA and *Racial Discrimination Act 1975* (Cth)) limits the manner in which governments can deal with interests in Crown land.

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31 Such as conditions designed to achieve social or environmental outcomes and imposed on proponents as part of planning and environmental approvals processes.

32 At the time of writing, the Australian Government is developing an Indigenous Economic Development Strategy which involves examining ways to improve economic development outcomes for Indigenous people. This initiative also forms part of the Australian Government's broader policy agenda to 'close the gap' between Indigenous and non-Indigenous Australians in key areas of Indigenous disadvantage. The Government released a discussion paper in December 2008, available at: <http://www.fahcsia.gov.au/sa/indigenous/progserv/land/Documents/native_title_discussion_paper/default.htm>

In general, carbon markets (or standards used to accredit offsets generated in certain ways) require a carbon sequestration project proponent to demonstrate that they hold the requisite carbon right (right to benefit from carbon stored in the land). As mentioned above, in order to facilitate the creation and transfer (and trade) of 'carbon' Australian States have enacted legislative frameworks to confirm recognition of carbon rights.

There is unlikely to be an issue where a State or Territory government grants carbon rights to another party where native title has been extinguished (and therefore the grant cannot affect native title rights and interests). However, in circumstances where native title rights and interests have not been extinguished, the grant or creation of carbon rights (and/or the access arrangements needed for a project to exploit these carbon rights) is likely to attract procedural and substantive rights under the NTA future act regime. Where such a future act is valid under the NTA, compensation may be payable for any impairment of the use and enjoyment of native title rights and interests. This affords some protection to native title holders and registered claimants, which is particularly important given the significant consequences statutory schemes like the CFI allow: the ability for a regulator to impose ongoing land management obligations and restrictions on areas used for projects where the proponent (who may not be the landowner/holder) fails to comply with their obligations.[33]

As such, the potential use of land for carbon offsets is also relevant to negotiations permitting a decrease in traditional owner access or use of country. Lost opportunity or income as a result of an alternative land use may be relevant to compensation arrangements in these circumstances. While quantification of native title is a difficult and relatively unprecedented area, over time estimates of lost income from potential carbon abatement activities may be made by reference to market value of projects and carbon yields.

Land rights legislation, specific freehold grants and Indigenous Land Corporation acquisitions

Many States and Territories have enacted land rights legislation that provides for grants of communal freehold land to Indigenous groups. Further, land grants have been made to Indigenous peoples through native title settlements or specific legislation.[34] Land grants typically involve inalienable freehold land

33 See for example the operation of the CFI 'carbon maintenance obligation' (Carbon Credits (Carbon Farming Initiative) Bill 2011, Part 8).

34 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; *Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagalk*

which is held on trust for the benefit of a group. Alternatively, legislation enables the reservation of land for the use and benefit of Indigenous peoples. The Indigenous Land Corporation (ILC) also provides an avenue for Indigenous groups to acquire land in Australia.[35]

More certain land tenure generally provides greater scope to use land for economic development. In contrast to native title holders, Indigenous groups holding freehold land enjoy greater security of tenure which may be used as a platform for direct participation in environmental markets.[36] Full realisation of these interests hinges on the extent to which statutory forms of Indigenous land are recognised under subsequent regulatory and development legislation. This issue is live in relation to tenure requirements for carbon sequestration projects under existing and proposed legislation.

Economic development opportunities

Indigenous peoples in Australia have long performed activities which generate commodity and non-commodity services (for all Australians) from the natural environment (Campbell *et al.*, 2007). 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 threats of climate change and associated 'low carbon' context significantly reinforces the need to more appropriately value these services and provide adequate financial and regulatory infrastructure to enable access to, and growth of, new opportunities.

The West Arnhem Land Fire Abatement Project (WALFA Project) case study is an example of linking traditional practices and knowledge with economic benefits from climate related opportunities. It illustrates the tangible and intangible assets of Indigenous communities that may be realised through

native title determinations: what they mean for the Wimmera region, 2005. See also the Agreements, Treaties and Negotiated Settlements database, Indigenous Studies Program, University of Melbourne, available at: <http://www.atns.net.au/agreement.asp?EntityID=3126> For examples of specific legislative land grants see: *Aboriginal Land (Manatunga Land) Act 1992* (Vic); *Aboriginal Lands Act 1991* (Vic).

35 Further information about the Indigenous Land Corporation is available at: <http://www.ilc.gov.au/site/page.cfm>

36 In the same way as farmers and other private land owners are deciding to take advantage of incentives and payments for changes in land use and management, Indigenous land-owners may be able to increase carbon uptake through revegetation, cultivation of soil and other land management practices. The federal government's 'Working on Country' initiative is an example of such a program designed for Indigenous land holders (although it is noted that long term leasing arrangements in the Northern Territory may add risk to tenure security – and therefore investor confidence – for these purposes). Also, the recent *Caring for Our Country* initiative of the federal government proposes funding to assist Indigenous peoples enter the carbon market: <http://www.nrm.gov.au/funding/future.html>

meaningful and respectful partnerships and investment (Tropical Savannas Cooperative Research Centre, see: <http://www.savanna.org.au/savanna_web/information/arnhem_fire_project.html> accessed 31 October 2008; Aboriginal and Torres Strait Islander Social Justice Commissioner, 2007: Ch 12; Garnaut, 2008: 557). The WALFA Project is a carbon offset project in western Arnhem Land in the Northern Territory, formed to implement strategic fire management for the purposes of offsetting greenhouse gas emissions from a Liquefied Natural Gas plant in Darwin Harbour. The WALFA Project reduces greenhouse gas emissions by adapting traditional fire management practices in areas that are prone to unchecked wildfires. The project has direct and collateral ecological benefits, by reducing net greenhouse gas emissions from wildfire and by conserving environmental and cultural values in the adjacent World Heritage-listed Kakadu National Park (Aboriginal and Torres Strait Islander Social Justice Commissioner, 2007: Ch 12). Over the first four years of the WALFA Project, fire management has abated equivalent to about 488,000 tonnes of CO_2, which exceeds the 100,000 tonnes per year contemplated by the Agreement (see: <http://savanna.cdu.edu.au/information/arnhem_fire_project.html>).

Case study research undertaken by the CSIRO confirms potential commercial opportunities in relation to carbon sequestration on Indigenous lands (Heckbert *et al.*, 2008). Using a price estimate of $20/tonne CO_2 equivalent sequestered, a case study involving fire management on an ILC property in the Northern Territory generated an estimated annual income of $208,000 (Heckbert *et al.*, 2008). Similarly, a forestry case study on a station in Queensland generated a possible yearly revenue at over $200,000 (again assuming a carbon price of $20/tonne CO_2 equivalent). While these projects present exciting opportunities for those who chose to participate, care must be taken in the design and implementation phases, particularly for projects drawing on Indigenous understandings about country, to ensure adequate and appropriate protection of cultural protocols, confidentiality and traditional knowledge.

In addition to the potential for Indigenous peoples to participate in carbon related markets through involvement in land use and development projects, scope also exists for other opportunities through collaborative projects relating to climate change and environmental management, which support and/or foster shared understandings about country (for example existing caring for country programs and the Indigenous weather knowledge project) (DEH, 2004; Climate Change Research Centre, 'Sharing Knowledge', see: <http://www.sharingknowledge.net.au/>; Bureau of Meteorology, 'Indigenous Weather Knowledge' program,<http://www.bom.gov.au/>).[37]

37 The need to adequately protect traditional knowledge and cultural property in relation to these projects is noted.

The Victorian Government's Land and Biodiversity at a time of Climate Change 'Green Paper – White Paper' consultation process prioritises the knowledge, skills and perspectives of Indigenous communities and suggests they should inform land and biodiversity management decisions (DSE, 2008, 2009). The Victorian Government is also examining access and benefit sharing arrangements in relation to the use of Indigenous traditional knowledge and ways of enabling greater involvement of Indigenous peoples in land management (DSE, 2008).[38] These initiatives are a positive step toward realising meaningful development opportunities for Indigenous peoples.

The future of agreement making and meaningful participation

Despite the opportunities for Indigenous peoples to increase their involvement in environmental markets, there are significant access issues in relation to emerging opportunities. These issues centre around financial and human resources, land tenure, water rights and intellectual property (protection of traditional knowledge). In addition, there are commercial risks and potential liabilities that come with many of these opportunities.

Joint and cooperative management arrangements

It is important that legal and policy infrastructure supports Indigenous peoples' access to and participation in environmental markets by recognising the nature of existing Indigenous tenure and land management arrangements and allowing for these interests to grow. Established joint-management agreements in a number of States and Territories provide a basis on which to create underlying contracts and agreements for environmental services and other offset projects. However as mentioned above, these methods of conditional land return will need to be examined by Indigenous parties on a case-by-case basis to assess whether they provide the requisite rights and interests to participate in economic development opportunities such as environmental (carbon) markets.

As mentioned, carbon markets highlight significant issues associated with the historic and current practices of governments for settlement of native title claims and other transactions with Indigenous peoples. In many cases the 'additionality' hurdle means that potential project areas will need to be free

38 It is noted that requirements for access and benefit sharing agreements exist under the Environment Protection and Biodiversity Conservation Regulations 2000 (for biological resources taken from Commonwealth areas). A benefit-sharing agreement under Part 8A of the Regulations must provide for reasonable benefit-sharing arrangements, including protection for, recognition of and valuing of any Indigenous people's knowledge to be used.

of specific funding conditions, conservation covenants and various lease back requirements that may confuse ultimate management rights and responsibilities of participants.

Depending on the underlying tenure arrangements, joint management arrangement (involving the transfer of freehold title to an Indigenous group) may enable Indigenous peoples, as landowners and joint-land managers to develop appropriate management plans and enjoy benefits from carbon sequestration through land use management and forestry activities. The position is less clear for co-operative land management arrangements (which generally do not involve a transfer of title). The ownership of underlying land has relevance in the creation of registerable carbon and forestry rights under State and Territory legislation. Issues of land tenure are critical to the design of carbon projects under the existing and proposed schemes as the involvement of Indigenous peoples can be significantly restricted depending on the nature of their tenure interests across jurisdictions.

Meaningful rights and access issues

Indigenous peoples' access to emerging carbon market opportunities will be significantly and disproportionately affected by less obvious matters such as; access to finance and investment, secure water flows (water rights) and adapting to changing landscapes and country due to the impacts of climate change.

A common issue identified in relation to both the WALFA Project and Martu examples is the vulnerability of these projects to changes in policy and support structures. In particular the centralisation of essential infrastructure away from small remote outstations in favour of larger settlements emphasises the need for meaningful rights, particularly land rights and water rights, to facilitate engagement in development opportunities (see, Campbell, *et al*., 2007; Gerritsen, 2007). This engagement presents an opportunity for Indigenous peoples to support their independent activities and practices, which continue despite changing policy and frameworks. Sustaining these practices and activities is essential to sustaining culture and identity, and providing pathways for support that are independent of changing government policy can assist communities to determine their own futures on their own terms and aspirations.

Maximising Indigenous development opportunities will require governments to revisit the fundamental nature of 'primary' Indigenous tenure rights and the recognition of existing tenure arrangements through 'secondary' schemes. Where ownership of, or interests in, land and waters are granted to Indigenous peoples, these interests must be recognised as a basis on which to participate new opportunities emerging through subsequent policy and legislation.

Access to emerging opportunities may be limited by inadequate financial assistance or related incentives for investment in Indigenous owned, managed or partnered projects. Carbon projects take time, and require financial and human resources (Gerritsen, 2007).[39] All government departments involved in environmental and water management, climate change and Indigenous affairs must collaborate to find ways to promote awareness and establish the foundations necessary to access emerging opportunities. In addition, consultation processes in relation to new and important government initiatives must be culturally appropriate. Detailed and lengthy policy documents, with short consultation timeframes, detailing important opportunities and risks is not an adequate way in which to engage and consult with the majority of Indigenous stakeholders.

The CPRS White Paper noted that water security is a major challenge in southern parts of Australia and that the costs of meeting this challenge will be significant (DCC, 2008b: 2–11). Further, it is noted in this report that stream flows in the Murray Darling Basin could fall by nearly 50 per cent by the end of the century. If such a prediction eventuates, it would obviously lead to significant limitations and impacts on cropping, aquatic ecosystems, terrestrial ecosystems and local and farming communities (Garnaut, 2008, 2011).

Inherent in environmental and ecosystem changes are changes and adaptation of Indigenous peoples' practices, landscapes and existence. According to the Murray Lower Darling Rivers Indigenous Nations, there are approximately 75,000 Indigenous people in the Murray Darling Basin and most of these people are traditional owners belonging to about 40 Indigenous Nations (See MLDRIN website, <http://www.mldrin.org.au/about/> accessed 20 August 2011). The ecological, agricultural and economic significance of the Murray Darling Basin is well known and documented. The impacts of altered stream flows, salinity, fish stocks and associated land and water ecosystems affects traditional owner use and enjoyment of cultural rights and interests in this region. Access to adequate water supplies to support traditional and cultural activities will also affect the degree to which Indigenous peoples can establish appropriate and viable economic and cultural projects.

Alternatives to agreement making and opportunity

Indigenous peoples represent a particularly vulnerable population in relation to climate change and related damage. For some time concern has been expressed about the serious health and lifestyle impacts of climate change on Indigenous

39 For example the WALFA Project took a number of years to eventuate. 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.

peoples (*The Albuquerque Declaration*, 1998).[40] Changes in temperature and the environment are forcing Indigenous peoples to adjust strategies of hunting, fishing and travel, causing interference with residence and lifestyle as well as food security. 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.

It would be a shame if options for conciliatory, interest-based negotiation and agreement making were narrowed or closed completely by emerging law and policy, leaving litigation as the only avenue for Indigenous peoples in Australia to take for recognition, assistance or redress in relation to the impacts of climate change.[41] Litigation carries significant risks including adverse costs, time and emotional wastage and long-term damage to relationships between parties. Every effort should be made in designing new legislation and policy to avoid Indigenous communities finding themselves with litigation as the only option to secure the rights and resources needed to respond to climate change and adapt to its impacts (see, for general discussion, Gerrard, 2008; *Native Village of Kivalina and City of Kivalina v ExxonMobil Corporation and others,* 2008).

Summary and conclusion

In the face of emerging climate change law and policy, the space currently afforded to Indigenous peoples in Australia, in terms of the protection and preservation of their legal rights and interests in country and culture, is vulnerable. Recent reports and initiatives of State, Territory and Federal governments signal an awareness of this issue and the potential opportunities climate change presents for Indigenous communities; however more than cognisance is needed to maximise participation and minimise additional burdens for Indigenous peoples.

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40 And subsequent declarations and principles set out at UNFCCC Conferences since 2000, including media and reports of the UN Permanent Forum on Indigenous Issues: <http://www.un.org/esa/socdev/unpfii/> and referred to in this paper.

41 In Australia, to date, climate related legal action has focused on administrative action against governments and decision makers in planning and environment decisions, with varying degrees of success – see: *Australian Conversation Foundation & Ors v Minister for Planning* [2004] VCAT 2029 (29 October 2004), *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment and Heritage* [2006] FCA 736, *Gray v Minister for Planning & Ors* [2006] NSWLC 720; *Queensland Conservation Council v Xstrata Coal Queensland Pty Ltd & Ors* [2007] QCA 338 and *Gippsland Coastal Board v South Gippsland SC & Ors (No 2) [2008] VCAT 1545*. In contrast, legal action elsewhere in the world has involved negligence and nuisance claims, as well as administrative legal action. Climate-related litigation is a reality, particularly in the United States where action has been taken against private companies, administrative decision and government agencies. (for example: *Cox v Nationwide Mutual Insurance Company No.* 1:05 CV 436 (S.D. Miss. filed. 20 Sept 2005; *Massachusetts, et al, Petitioners v Environmental Protection Agency et al* 549 US (2 April 2007)). While these cases involve laws specific to the United States, analogous arguments may be drawn in relation to environmental and other laws in Australia.

As Australia transitions to a carbon constrained future, which includes market mechanisms, there is a critical opportunity to address potential inequalities affecting Indigenous peoples. Establishing appropriate foundations now will provide effective pathways for development in the future. Without well-designed formal regulatory and institutional support the future of innovative carbon projects is likely to remain dependent on the goodwill of governments. Current reforms present a real and important opportunity to better value and support Indigenous peoples to exercise their right to development in accordance with their needs, interests and aspirations. In order to support a consistent and equal footing for Indigenous participation in emerging opportunities, it is important to further develop and more broadly apply measures similar to the initial positive steps taken in the CFI Bill. Further, it is critical to revisit policies and practices of conditional land return to Indigenous communities.

It is in the public interest for Indigenous peoples, as important knowledge holders and land managers, to be meaningfully and appropriately included in partnerships and in designing responses to climate change. Mitigation and adaptation strategies should provide the legal and practical infrastructure to facilitate the participation of valuable knowledge holders in formulating solutions to the issues facing our future livelihood.

Participation and empowerment, two basic and interrelated principles of the human rights-based approach to development, are particularly important for Indigenous peoples, who have been systematically excluded and marginalised from decision-making on matters affecting them (Stavenhagen, 2007). The involvement of Indigenous peoples in responses to climate change is not only consistent with the United Nations Declaration on the Rights of Indigenous Peoples and general human rights principles, as well as principles of national and international environmental law, it is also very likely to result in more comprehensive and appropriate solutions. The United Nations Declaration on the Rights of Indigenous Peoples provides an additional framework for development policies and actions that will affect Indigenous peoples.

Australia's response to climate change should incorporate the objects of existing domestic legislation or international instruments to which it is a party or has endorsed. A broad-reaching and complex problem necessitates an equally broad-reaching and diverse solution, in which the doors are open to future innovation, partnerships and economic opportunities for Indigenous peoples.

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