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IMPACTS AND OPPORTUNITIES OF CLIMATE CHANGE: INDIGENOUS PARTICIPATION IN ENVIRONMENTAL MARKETS

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ABSTRACT

Climate change presents both an enormous global challenge and an important local opportunity for greater recognition and participation of Indigenous peoples in environmental markets. This paper explores ways in which Indigenous people may choose to participate in environment based commercial activities linked to their historic and contemporary use and knowledge of country and canvasses the ways in which Indigenous peoples may seek redress for damage and loss as a result of climate change.

INTRODUCTION

Climate change is a reality and is affecting hundreds of millions of our people and our territories, resulting in famine, extreme poverty, disease, loss of basic resources in our

[1] The views expressed in this paper do not necessarily represent the views of Native Title Services Victoria Ltd. This paper is based on a presentation delivered at the June 2007 AIATSIS Native Title Conference: The Tides of Native Title. It may not address more recent events in detail. Acknowledgement and thanks to Ms Jessica Weir, Ms Juanita Pope, Ms Alison Murphy and anonymous reviewers for comments and suggestions in relation to the final publication of this discussion paper.

> traditional habitats and provoking involuntary displacements of our people as environmental refugees.[2]

In March 2005 the Commonwealth Government released the report; 'Climate Change, Risks and Vulnerabilities: Promoting an efficient adaptation response in Australia'. The opening paragraphs of the report note that there is little doubt that Australia will face some degree of climate change over the next 30 to 50 years, irrespective of efforts to reduce greenhouse gas emissions.[3]

A growing body of data and scientific opinion demonstrates that global warming or 'climate change' is occurring as a result of human activities (anthropogenic emissions).[4] Acknowledgement of climate change and the potential impacts and consequences of temperature rises has turned the world's attention to strategies for mitigation and adaptation. In Australia, to date there has been little space afforded for dialogue and collaboration with Indigenous Australians who face serious impacts and shifts as a result of climate change.

This paper discusses both the challenges and the opportunities emerging from a changing climate. In light of the rapid development of domestic and international law and policy in this area, this paper presents a conceptual discussion. It begins with an overview of climate change including global responses, Australia's response and the challenges facing Indigenous peoples. A discussion of opportunities that may arise from native title and land rights systems follows, including an overview of two case studies relevant to carbon abatement projects. Finally, this paper sets out what climate related litigation may look like for Indigenous peoples in Australia.

CLIMATE CHANGE, THE KYOTO PROTOCOL AND CARBON ABATEMENT

In 1988 the World Meteorological Organization and the United Nations Environment Programme established the Intergovernmental Panel on Climate Change (IPCC) to examine, monitor and report on matters related to climate change. The first report of the IPCC in 1990 led to the signing of the UN Framework Convention on Climate Change (UNFCCC) at Rio de Janeiro in 1992. The UNFCCC commenced in 1994 and is a significant instrument in its own right but it is also significant because the Kyoto Protocol (the Protocol) is a protocol to this convention. Under the UNFCCC, government parties agree to gather and share information on greenhouse gas (GHG) emissions, policies and best practices. Governments also agree to introduce strategies for addressing GHG emissions and adapting to the expected impacts.[5]

Following lengthy global debate over ratification, the Protocol came into force on 16 February 2005. The Protocol requires 'developed' countries who are signatories to the Protocol to meet

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[2] Article 7, *Declaration of Indigenous Peoples on Climate Change*. Second International Indigenous Forum on Climate Change, The Hague, 15 November 2000. Available at: http://www.austlii.edu.au/au/journals/AILR/2002/18.html

[3] *Climate Risk and vulnerability: promoting an efficient adaptation response in Australia*. AGO report prepared by Allens Consulting. Canberra, March 2005, executive summary p vii.

[4] The IPCC concluded in 2007 that there was a '*very high confidence'* (greater than 90% chance) that global warming is occurring as a result of human activities: *Summary for Policymakers. In: Climate Change 2007: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report to the Intergovernmental Panel on Climate Change* [S. Solomon, D. Qin, M. Manning, Z. Chen, M. Marquis, K. B. Averyt, M. Tignor and H. L. Miller (eds)] Cambridge University Press, Cambridge, United Kingdom and New York, US.

[5] United Nations Framework Convention on Climate Change http://unfccc.int/essential_background/convention/items/2627.php

targets for reducing GHGs during the first commitment period from 2008 to 2012.[6] Parties who meet their targets will be able to trade 'carbon credits' generated through any surplus reduction. Trading will be supplementary to domestic abatement action and parties are allowed to achieve their emission reduction targets by relying on 'flexible mechanisms' under the protocol. These flexible mechanisms include Joint Implementation projects, Clean Development Mechanism (CDM) projects and emissions trading.[7] Essentially these mechanisms enable parties to establish projects in developing countries that reduce GHG emissions and enable the trade of reduction units on an international market.[8]

The Protocol recognises reductions in GHG emissions from forest activities (including afforestation and reforestation since 1990), which can be used to show compliance with binding targets. However, the inclusion of forest sinks in the Protocol has been viewed as creating an incentive for commercial plantations. Indigenous peoples have argued that this is likely to have detrimental effects on ecosystems and Indigenous livelihoods.[9]

A current priority for parties to the UNFCCC and members of the Kyoto Protocol is the negotiation of mechanisms for the second commitment period, post 2012. At the most recent Conference of the Parties to the UNFCCC in Bali, parties agreed to an 'action plan' or 'road map' to guide the negotiation of a post-2012 agreement.[10] Parties also resolved to examine ways in which benefits for avoiding deforestation can be included in current and future mechanisms.[11] A detailed examination of the merits of avoided deforestation will not occur this paper. However, this measure may provide a means of protecting Indigenous and forest-dependent communities from large-scale land clearing (sometimes for Kyoto-compliant forest plantation) and a means of recognising the important role of biodiverse ecosystems in combating global warming. Yet there remain concerns associated with the implementation of such a mechanism. In particular Indigenous peoples and non-governmental organizations are keen to ensure that benefits and resources flow to Indigenous peoples and forest dependent communities rather than governments and companies who may stand to receive financial gains as participants in carbon industries and land managers.[12] Critical methodological issues remain outstanding in relation to an avoided

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[6] The Kyoto Protocol to the UNFCCC: http://unfccc.int/resource/docs/convkp/kpeng.pdf

[7] Seventh Conference of the Parties to the UNFCCC (COP 7) held at Marrakech 29 October – 19 November 2001, (the *Marrakech Accords*).

[8] For more information and statistics on current CDM projects see the UNFCCC website: http://cdm.unfccc.int/index.html

[9] *The Declaration of Indigenous Peoples on Climate Change* delivered at the second International Indigenous Forum on Climate Change. The Hague 15 November 2000, available at: http://www.austlii.edu.au/au/journals/AILR/2002/18.html See also the *Declaration of the First International Indigenous Forum on Climate Change* (the Lyon Declaration) available at: http://www.treatycouncil.org/new_page_5211.htm

[10] Bali Action Plan, also reported as the 'Bali Road Map', agreed at COP 13/CMP 3, Bali Indonesia, December 2007. Further meetings of parties to the UNFCCC will take place during 2008 and 2009. The purpose of these meetings will be to progress negotiation of a post-2012 agreement by the next Conference in Copenhagan in 2009.

[11] UNFCCC COP 13 Decision -/CP.13: Reducing emissions from deforestation in developing countries: approaches to stimulate action.

[12] Statement from the International Forum of Indigenous Peoples and Climate Change made at the 13th session UNFCCC Conference of the Parties in 2007: http://www.forestpeoples.org/documents/forest_issues/unfccc_bali_ifipcc_statement_redd_nov07_eng.shtml and associated media: Graham-Harrison, E "Indigenous people fear double climate hit." *Reuters Media UK*, 13 December 2007.

deforestation scheme under the Protocol and parties to the UNFCCC will continue work on these issues throughout 2008.[13]

Australia's response and a domestic emissions trading scheme

Following intense involvement in debate leading to the creation of the Kyoto Protocol, Australia finally signed ratification documents on 3 December 2007. Australia is now a party to the Kyoto Protocol, providing Australians with a greater opportunity to participate in Protocol opportunities.[14] Prior to Australia's ratification of the Protocol, domestic reforms took place in accordance with obligations under the UNFCCC.[15] In 2006 the Prime Minister's Task Group on Emissions Trading was established to investigate a potential national emissions trading scheme. The Task Group's report in mid-2007 recommended work should commence on the design of a trading scheme with a view to the scheme commencing by 2012.[16]

Since gaining power in November 2007 the Federal Labor Government has ratified the Protocol, and announced that it will create domestic emissions trading scheme by the end of 2008. The scheme is expected to be implemented by 2010.[17] According to the Australian Government's Department of Climate Change, such an emissions trading scheme will be a 'cap and trade' system (to ensure international compatibility and compliance with the Kyoto Protocol), will effectively reduce emissions and will recognise the need for immediate action.[18]

In February 2008, Professor Ross Garnaut released an interim report as part of his Climate Change Review (commissioned by the Australia's States and Territories in April 2007).[19] Professor Garnaut's work and final reports are expected to significantly influence climate policy and the design of an Australian emissions trading scheme. Professor Garnaut also released the *'Emissions Trading Scheme Discussion Paper'* on 20 March 2008, however detailed discussion will not be afforded to it in this paper. The final report is due in June 2008.

In the interim report, Garnaut finds that a 'business as usual' approach to climate change creates a higher risk that dangerous climate change will occur more rapidly than has been generally

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[13] UNFCCC COP 13 Decision -/CP.13: Reducing emissions from deforestation in developing countries: approaches to stimulate action.

[14] The Marrakesh Accords (op. cit at note 7) allow business, non-government organizations and other legal entities to participate in international emissions trading. Australia's ratification of the Kyoto Protocol came into effect in March 2008.

[15] See, for example, the National Greenhouse Gas Inventory, the Greenhouse Challenge Plus including the Greenhouse Friendly™partnership, Mandatory Renewable Energy Certificates and other initiatives: www.ago.gov.au

[16] See http://www.greenhouse.gov.au/emissionstrading/publications/index.html for a link to the archived report. See also: Hartcher, P. "The R Word We Didn't Need", *Sydney Morning Herald*, June 4, 2007. Available at: http://www.smh.com.au/news/environment/the-r-word-we-didnt-need/2007/06/03/1180809340799.html# and 'Government accepts trading recommendations' *CO_2 Futures, Issue 5 June 2007*, available at: http://www.co2crc.com.au/PUBFILES/CO2FUTURES/CO2FUTURES_Issue_05.pdf

[17] http://www.greenhouse.gov.au/emissionstrading/index.html

[18] Ibid.

[19] Garnaut Climate Change Review *Interim Report to the Commonwealth, State and Territory Governments of Australia – February 2008* p 8. Available at: http://www.garnautreview.org.au/CA25734E0016A131/pages/reports-and-papers

understood.[20] Garnaut contends this makes mitigation more urgent and presumably, more expensive.

Garnaut notes the significant adaptation issues facing Australia's neighbours in the region. Many Pacific island nations are grappling with the challenges of rising sea levels and changing weather patterns, however these impacts will also significantly affect Indigenous Australians living in coastal and island communities. Garnaut points out the considerable potential for sequestering large amounts of carbon dioxide through changes to land and forest management and agricultural practices. Further, Garnaut notes that Australia, as a major exporter of uranium and natural gas, may stand to gain from a carbon constrained future and a strong international mitigation effort.[21]

Garnaut's interim conclusions may be seen to forewarn of possible conflicting land uses (agriculture and food production and carbon sequestration or biofuel crops) as well as a continued use, if not expansion, of mining and energy projects. While these activities may present opportunities and benefits, they may also place increased pressure on the homelands and resources of Indigenous people. As such, Professor Garnaut's interim views highlight the importance of engaging Indigenous Australians in the climate debate immediately.

It follows that the design, development and implementation of a domestic emissions trading scheme may significantly impact upon and carry opportunities for Indigenous peoples. Many offset projects (projects that remove a measurable quantity of carbon dioxide from the atmosphere) will involve carbon sequestration in soil, vegetation and forests. Renewable energy projects will continue to use natural resources and will require viable sites and associated infrastructure.

In any event, operating in an increasingly carbon sensitive environment has seen other legal and policy shifts in Australia, including:

- Decision makers factoring GHG emissions and arrangements for offsetting associated impacts into decisions regarding permits and approvals for development;
- Governments creating incentives for land owners to manage areas in more sustainable ways and increasing reporting and accountability in relation to GHG emitting activities; and
- Legislative amendment to allow for the creation and ownership of 'carbon rights' in trees and new legislation to require reporting of GHG emissions – in anticipation of a domestic emissions trading scheme.[22]

Australia's States and Territories have legislated to provide a basis for the legal recognition of carbon rights in trees. 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), whether these carbon rights create an interest in land, and whether harvesting rights are separate from sequestration rights.[23] As a result, the interaction between carbon rights in trees and other legal interests, including native title, is complex.[24] New laws, regulations and

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[20] Ibid.

[21] Garnaut *Interim Report – February 2008*, pp 56 and 57, as cited above at note 18.

[22] *National Greenhouse and Energy Reporting Act 2007* (Cth), which commenced at the end of September 2007 and provides the basis for a single, nationally consistent legislative framework for reporting greenhouse gas emissions, abatement activities and energy consumption and production by companies.

[23] Peel, J, *The Role of Climate Change Litigation in Australia's Response to Global Warming*. (2007) 24 EPLJ 90, LawBook Company.

[24] It is beyond the scope of this paper to discuss in detail the complexities of various State and Territory carbon rights legislation. However see generally for example: *Conveyancing Act 1919* (NSW) as amended by the *Carbon*

markets present the possibility of a further decrease of Indigenous peoples' rights and interests through extinguishment or suspension of native title and restricting rights in relation to access and use of natural and biological resources.

Carbon rights and Indigenous peoples' land and water interests

Climate change, the creation of carbon rights and emissions trading will all impact on the interests of Indigenous people to land and waters. Forests, trees and other vegetation are used to indicate country, land ownership and use rights as well as provide shade, nourishment, medicines, tools and other resources for Indigenous peoples. As such, trees and vegetation are enmeshed with native title, cultural and intellectual property rights. Ever since the creation of the UNFCCC and Kyoto Protocol, Indigenous peoples have raised their concerns in relation to the rise of carbon-markets (in particular the inclusion of 'carbon sinks' as a means of generating tradeable 'carbon credits') in many international forums.[25] It is feared that the creation of incentives in relation to carbon sinks will lead to large-scale forest plantations and a consequent loss of traditional country and abuse of ecosystems, because Kyoto compliant plantations may not consist of native species and frequently involve mono-species incapable of supporting the complex ecosystems they replace.

The Declaration of Indigenous Peoples on Climate Change sets out the position of Indigenous peoples on the UNFCCC and Kyoto Protocol.[26] Articles 7 and 8 of the Declaration state that discussions within the UNFCCC, along with practical implementation of the Kyoto Protocol, do not recognise the right of Indigenous people to adequate participation. Concern is expressed that the 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.[27]

The Declaration rejects the inclusion of carbon sinks as a means of enabling (and encouraging) carbon credits to be gained and traded from forestry activities in developing countries. The Declaration also sets out 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. Creating a commodity out of carbon has been seen by many as a threat to indigenous peoples' systems of law, culture and custom – and identity and existence.[28]

In Australia, native title and other systems for Indigenous land return, cultural heritage, environmental and property laws, along with human rights instruments,[29] provide mechanisms for possible protection and advancement of Indigenous interests in these new environmental markets. It is acknowledged that participating in these economic opportunities may not be considered appropriate by all Indigenous peoples, however, the mechanisms exist to bring traditional practices, caring for country and an economic market together.

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) and the *Forestry Rights Registration Act 1990* (Tas) as amended by the *Forestry Rights Registration Amendment Act 2002* (Tas).

[25] The Declaration of Indigenous Peoples on Climate Change, The Hague, 15 November 2000 and International Forum of Indigenous Peoples and Climate Change as cited at note 11 above.

[26] Ibid.

[27] Ibid. Art 7 and Art 8.

[28] Ibid. Art 10.

[29] For example the *Charter of Human Rights and Responsibilities Act 2006* in Victoria and the *Human Rights Act 2004* in the Australian Capital Territory.

Native Title

Native title raises interesting issues and avenues in relation to participation in carbon markets. In 2002, the High Court in *Western Australia v Ward*[30] confirmed the view that native title comprises a 'bundle of rights' and interests in relation to land and waters, some of which may exist and some of which may have been extinguished by dealings with or activities on country. While it can be contended that freehold land ownership is a strong bundle of rights in land, native title rights are generally more vulnerable to erosion by regulation or the creation of other interests in areas of country.

Native title rights and interests present a complex interaction with other laws relating to the use, development and management of land and natural resources. As such, the interaction between carbon rights in trees, soil and other vegetation, and native title rights is influenced by the nature of the carbon entitlement and the nature of the bundle of native title rights and interests recognised. Likewise, the level of participation for native title holders in environmental markets will be influenced by these considerations. Caring for, and utilising places, sites, flora and fauna are contemporary expressions of traditional laws and customs in many parts of Australia. Accordingly, the continued exercising of these rights and interests in accordance with laws and customs is capable of recognition and protection under the *Native Title Act 1993* (Cth) (NTA).

As confirmed by the High Court in *Ward,*[31] the degree to which the law can recognise native title rights and interests will depend on evidence of a continued system of traditional law and custom giving rise to those rights and, in considering extinguishment, an examination of the intention of any conflicting legislation or any inconsistency in the nature of legal interests conferred by statute.[32] The timing and purpose of new legislation or legislative amendments which create new 'property rights', and therefore a capacity to interfere with the continued use and enjoyment of native title rights, is important in examining the validity of any extinguishing acts.[33]

While the NTA provides some protection for native title rights, courts have held that this protection will generally apply to recognised traditional rights and interests where they are exercised for personal, domestic and non-commercial purposes. The general absence of contemporary recognition of traditional economies and commercial rights (particularly outside the Torres Strait) further limits the use of native title as a means of underwriting economic enterprise.[34]

However there is scope for the legal recognition of contemporary economic interests deriving from native title.[35] The issue of whether the adaptation of a traditional practice, attracting an economic benefit, defeated native title was considered in *Neowarra v State of Western*

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[30] *State of Western Australia v Ward on behalf of the Miriuwung Gajerrong* [2002] HCA 28 (8 August 2002).

[31] *Western Australia v Ward* as cited at note 28 above.

[32] Ibid.

[33] *Western Australia v Ward* as cited at note 28 above; *Yanner v Eaton* (1999) 201 CLR 351.

[34] 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)). See further: http://ntru.aiatsis.gov.au/research/rights_interests/consentdeterminations_qld%20[updated%20080408].pdf

[35] In addition to economic rights recognised in the Torres Strait and cited at note 32, above.

Australia.[36] In addressing the question whether the use of canvass and sale of artworks to tourists is consistent with tradition, Sundberg J viewed the sale of artworks as an 'incidental spin off'. Further, his Honour accepted the rationale for developing painting on canvas and considered the practice to be 'traditional' in the sense of s223(1) of the NTA, and that the practice does not lose that character because it has an incidental economic advantage.[37]

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 that 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.

Native Title Future Act negotiations

The native title future act regime presents a way in which Indigenous groups may use existing agreement-making mechanisms to participate in carbon markets. Participation may be 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 'joint venture' type arrangements, where companies seek to offset carbon emissions for their business or project by supporting Indigenous peoples' rights to care for country.

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 GHG 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.

Emissions from many large-scale projects will also interfere with traditional owner enjoyment of native title rights and interests and therefore may be an additional consideration for impact assessments and negotiation of future acts. In the context of planning and environmental approvals, courts and tribunals appear to have accepted the need to consider GHG emissions and related impacts on the environment when deciding whether to issue approvals and permits.[38] Arguments used in this context may be of benefit to native title groups in project development negotiations.

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

Many States and Territories have enacted land rights legislation that provides for grants of communal freehold land to Indigenous groups. Further, land grants and transfers have been made to Indigenous peoples through native title settlements or specific legislation.[39] These grants

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[36] [2003] FCA 1402.

[37] Ibid at [341].

[38] Environment groups have successfully argued that projects resulting in high levels of GHG emissions will have an adverse impact on the environment and therefore the impacts of climate change should be considered in deciding applications for planning permits and development approvals. For example: *Australian Conversation Foundation & Ors v Minister for Planning* [2004] VCAT 2029 (29 October 2004), *Gray v Minister for Planning & Ors* [2006] NSWLC 720, and *Queensland Conservation Council v Xstrata Coal Queensland Pty Ltd & Ors* [2007] QCA 338.

[39] 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

typically involve inalienable freehold land which is held on trust for the benefit of the group. The Indigenous Land Corporation (ILC) also provides an avenue for Indigenous groups to acquire land in Australia.[40]

More certain legal tenure in land generally provides greater scope to use land for economic development. While some restrictions remain, in contrast to native title holders, Indigenous groups holding freehold land enjoy greater security of tenure which may be used as a platform for more direct participation in environmental markets.[41] In particular, revegetation and environmental restoration projects as well as other land management activities may generate a verifiable and registerable carbon offset for trade.

Discussed below are two examples of projects that present ways in which Indigenous people may apply traditional practices and knowledge to gain economic benefits from climate related opportunities. The first examines the application of traditional practices and land management in the West Arnhem Land Fire Abatement project and the second examines Mallee Eucalypt planting in NSW (a non-Indigenous enterprise).

West Arnhem Land Fire Abatement Project (WALFAP)

The West Arnhem Fire Management Agreement (the Agreement) was signed in August 2006 and effectively establishes a partnership between Darwin Liquefied Natural Gas, the Northern Territory Government (NT Government), the Northern Land Council (NLC) and traditional owners from coastal Maningrida and the headwaters of the Katherine and Mann rivers. Under the Agreement, traditional owners and land managers will implement a fire management strategy involving controlled burning in the 28,000km^2 area defined in the Agreement.[42] Private industry will contribute a minimum of $1 million per year over 17 years for this purpose.[43] The project will employ local Aboriginal land management rangers and support the transfer of Indigenous knowledge between generations as elders work with young people as part of the project.

The Darwin Liquefied Natural Gas plant in Darwin Harbour agreed to offset GHG emissions from the plant as part of its licensing arrangements. Activities under the Agreement are intended to offset about 100,000 tonnes of GHG emissions each year through early season controlled burns. The decrease in GHG emissions stems from controlled burns preventing unchecked

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transferred back to the traditional owners; *Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagalk native title determinations: what they mean for the Wimmera region*, National Native Title Tribunal, Commonwealth of Australia 2005. Available at: http://www.nntt.gov.au/publications/WJJWJ_Determination.html viewed 28 May 2007. See also the Agreements, Treaties and Negotiated Settlements database, Indigenous Studies Program, University of Melbourne: http://www.atns.net.au/agreement.asp?EntityID=3126 For examples of specific legislative land grants see: *Aboriginal Land (Manatunga Land) Act 1992* (Victoria); and *Aboriginal Lands Act 1991* (Victoria).

[40] Further information about the Indigenous Land Corporation can be found at http://www.ilc.gov.au/site/page.cfm

[41] 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

[42] Tropical Savannas CRC; West Arnhem Land Fire Abatement Project, http://savanna.ntu.edu.au/information/arnhem_fire_project.html

[43] Agreements, Treaties and Negotiated Settlements Project database, Indigenous Studies Program, University of Melbourne: http://www.atns.net.au/agreement.asp?EntityID=3638

wildfires in the Northern Territory.[44] The Agreement is not generating direct income from carbon trading. Instead, as a fee for service arrangement, it creates benefits through a carbon offset linked to a specific agreement and project.

The Agreement is attractive to the private sector as it enables private industry to address permit requirements in a manner designed to achieve economic, social and environmental outcomes. While this project has aspects that are somewhat specific to the savanna region, the premise of creating an offset project through partnering with Indigenous land managers clearly has application elsewhere in Australia.

Mallee Eucalypt carbon sink project – New South Wales Greenhouse Gas Abatement Scheme

While the Mallee Eucalypt carbon sink project involves non-indigenous companies, it highlights the potential for some Indigenous entities and land managers to enter into carbon related agreements that support their caring for country and provide economic opportunities. In this case study, a non-Indigenous company has generated and registered carbon credits for trade under the NSW Greenhouse Gas Abatement Scheme (GGAS). The GGAS, which has already been implemented in NSW and the ACT, provides a mechanism through which carbon stored in forests may be traded. A number of projects and enterprises registered under the NSW system currently benefit from the public and private sectors wanting to offset GHG emissions.

CO2 Group Limited's CO2 AUSTRALIA (CO2 Australia) has generated and registered carbon credits under the GGAS.[45] Forestry rights under NSW legislation[46] enable the company to negotiate access to land to plant and manage native trees. Legislation also allows the separate ownership of a 'carbon right' from ownership of the tree.[47] The carbon stored in trees is measured and the 'credit' sold to GHG emitters. CO2 Australia has gained accreditation under the GGAS. This enables the company to generate carbon credits (GHG Abatement Certificates) and register the credits for sale on the NSW GHG Abatement Register. Projects undertaken by the company have resulted in the generation of carbon credits and assisted in biodiversity rehabilitation by reintroducing native Mallee Eucalyptus back into their original environment.[48]

This project may provide a potential economic use of freehold land grants and ILC properties. Sustainable plantations and revegetation work provide a means to promote healthy country and attract investment as an offset provider. Alternatively, Indigenous businesses may choose to seek accreditation and invest in forest or revegetation projects to acquire credits for trade on domestic or international markets.

Both the WALFAP and Mallee project case studies illustrate the potential for Indigenous people 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

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[44] Wildfires account for a substantial percentage of GHG emissions in the Northern Territory, see further discussion at: http://savanna.ntu.edu.au/information/arnhem_fire_project.html

[45] CO2 Group Limited media release and Australian Stock Exchange announcement 146, 2 February 2007 "*CO2 Group creates the first carbon credits from its CO2 AUSTRALIA™ carbon sequestration program*."

[46] *Conveyancing Act 1919* (NSW) see also *Forestry Act 1916* (NSW).

[47] Section 87A *Conveyancing Act 1919* (NSW) as amended by the *Carbon Rights Legislation Amendment Act 1998* (NSW).

[48] Australian Stock Exchange announcement 144, 15 January 2007.

Indigenous weather knowledge project).[49] Options such as these have received support in the recently announced *Caring for Our Country* initiative of the Federal Government. This initiative proposes funding to assist Indigenous Australians to enter the carbon trading market.[50]

CLIMATE EFFECTS AND CLIMATE LITIGATION

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

Land use changes, predominantly deforestation, continue to account for a significant proportion of human-induced carbon dioxide emissions in the world. Indigenous peoples represent a particularly vulnerable population in relation to climate change related damage and destruction.

For some time concern has been expressed about the serious health and lifestyle impacts of climate change on Indigenous peoples.[51] More recently, the UN Permanent Forum on Indigenous Issues released a paper that outlines the treats and challenges that climate change poses for Indigenous peoples.[52] It is anticipated that conclusions and recommendations of this paper may be considered at the seventh session of the UNPFII in late April and early May 2008. In addition the recent UN Convention on Biological Diversity *Working Draft Report on Indigenous and Local Communities Highly Vulnerable to Climate Change* notes the specific vulnerabilities of Indigenous and local communities in the Arctic, small island States and high altitudes.[53] The impacts of global warming of most concern in these areas are accelerated threats such as pollution, drought and desertification. In particular, the report notes concern over the threats of these events to traditional knowledge, innovations and practices. Changes in climate bring with it changes to temperatures, precipitation volumes, ocean salinity, wind patterns and other aspects of extreme weather.[54]

In Australia, global warming is expected to increase the occurrence and magnitude of extreme weather events such as heatwaves, wind speeds, storm surges and cyclones, storms and bushfires.[55]

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[49] See: *Ways to improve community engagement; working with Indigenous Knowledge in natural resource management*. Department of Environment and Heritage, Commonwealth of Australia, Canberra, 2004. See also http://www.sharingknowledge.net.au/ (D Green) and Bureau of Meteorology http://www.bom.gov.au/ 'Indigenous Weather Knowledge' program. The need to adequately protect traditional knowledge and cultural property in relation to these projects is noted.

[50] http://www.nrm.gov.au/funding/future.html

[51] *The Albuquerque Declaration*; November 1998 from the 'Circles of Wisdom' Native Peoples/Native Homelands Climate Change Workshop-Summit held in Albuquerque, New Mexico. Available at: http://www.ienearth.org/globalcc.html 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.

[52] *"Climate Change, an overview"*. Paper prepared by the Secretariat of the UN Permanent Forum on Indigenous Issues, November 2007: www.un.org/esa/socdev/unpfii/documents/Climate_change_overview.doc (downloaded 20 January 2008).

[53] UN Convention on Biological Diversity, *Draft Report on Indigenous and Local Communities Highly Vulnerable to Climate Change*. UNEP/CBD/WG8J/AG/2/3 16 April 2007.

[54] Ibid.

[55] *Climate Risk and vulnerability: promoting an efficient adaptation response in Australia*. AGO report prepared by Allens Consulting. Canberra, March 2005.

One of the severe impacts for Indigenous people in coastal and island areas is sea level rise. There are strong indications that communities in the Torres Strait are already affected by rising sea level and other impacts of climate change.[56] These impacts not only threaten the habitability of areas but also the viability of local enterprise such as fishing, which are heavily influenced by seasonal or environmental variation.

Changes in temperature and the environment are also forcing Indigenous peoples to adjust strategies of hunting, fishing and travel, causing interference with residence and lifestyle as well as food security. These alterations are likely to pressure migration trends and, in some instances cause 'environmental refugees' as people are displaced from their homelands.[57] Further, changes in climate present health risks through an increase in water born diseases such as gastroenteritis and diarrhoea (caused by poor water quality and flooding).[58] Needless to say, the economic, environmental and social costs flowing from these events will be significant.

While the focus of media and political debates in Australia presently rests with the environmental and economic impacts of climate change, inextricably linked to environmental damage is damage to Indigenous peoples' cultural heritage and identity. The devastation of sacred sites, burial places and hunting and gathering spaces, not to mention a changing and eroding landscape, cause great distress to Indigenous peoples.

Climate-related litigation is a reality, particularly in the United States where action has been taken against private companies, administrative decision and government agencies. While these cases involve laws specific to the United States, analogous arguments may be drawn in relation to environmental and other laws in Australia.

Following Hurricane Katrina legal action was taken against several insurance and oil companies for their contribution to global warming.[59] The plaintiffs claimed these activities enabled Hurricane Katrina to develop unseen strength, as a result of which they suffered loss of property, loss of business and/or income, clean-up expenses, disruption to the normal course of their lives, loss of loved ones, and mental anguish and emotional distress.[60] While this case was ultimately unsuccessful for issues associated with jurisdiction, the Judge appeared to accept the plaintiff's position that greenhouse gas emissions contributed to climate change.[61]

In relation to the impacts on Indigenous peoples, in February 2008 the Alaskan native village of Kivalina filed a lawsuit against a number of oil, coal and power companies for their contribution to global warming and the impacts on homes and country disappearing into the Chukchi Sea.[62] 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

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[56] Green, D. "*How might climate change affect island culture in the Torres Strait*" CSIRO Marine and Atmospheric Research Paper 011, November 2006. Commonwealth Scientific and Industrial Research Organisation, Australia 2006.

[57] Adam, D. "*50m environmental refugees by end of decade, UN warns*." The Guardian Newspaper (UK) 12 October 2005.

[58] UN Convention on Biological Diversity*, Draft Report on Indigenous and Local Communities Highly Vulnerable to Climate Change*. Pp18 – 20 UNEP/CBD/WG8J/AG/2/3 16 April 2007.

[59] *Cox v Nationwide Mutual Insurance Company* No. 1:05 CV 436 (S.D. Miss. filed Sept. 20, 2005).

[60] First amended complaint at 11, *Cox v Nationwide Mut. Ins. Co*., No. 1:05 CV 436 (S.D. Miss filed Sept. 20, 2005).

[61] *Comer v Murphy Oil USA et. al*. (US District Court, Southern District of Mississippi; 30 August 2007).

[62] *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).

nuisance and damages caused by certain defendants' acts in conspiring to suppress the awareness of the link between their emissions and global warming.[63]

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.[64] These proceedings are part of a growing body of climate change jurisprudence in Australia and have encouraged governments and industry to focus on creative measures to cap or reduce GHG emissions and to invest in renewable energy, viable offset projects and abatement technologies.[65]

Based on examples from the United States, there may be scope for litigation outside administrative review in Australia. Other possible climate related legal action may exist in negligence or nuisance. Indigenous people do and will continue to suffer loss, damage and substantial interference with their use or enjoyment of country as a result of climate change.[66] This loss and impairment is likely to lead to questions of compensation, including possible native title compensation, and for costs incurred as a result of adapting to a changing environment. In this regard, the progress of the Kivalina Village proceeding will be watched with anticipation.

Climate change litigation is not purely an environmental legal issue. The nexus between environmental law and human rights law is well established at an international level. In December 2005 the Arctic Inuit people petitioned the American Government at the Inter-American Human Rights Commission to establish mandatory limits on GHG emissions and help Artic Inuit people adapt to the unavoidable impacts of climate change. The key 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 Inuit. The action of the Arctic Inuit people resonates with action sought by Indigenous peoples around the world. Legal action taken by Communities in Nigeria against Shell and other oil companies in relation to gas flaring was also successful on environmental and human rights grounds.[67] In this context, the adoption of the *Declaration on the Rights of Indigenous Peoples* by the United Nations General Assembly in September 2007 is a further step toward the promotion and protection of fundamental human and cultural rights of Indigenous peoples.[68]

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[63] Ibid.

[64] *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, and *Queensland Conservation Council v Xstrata Coal Queensland Pty Ltd & Ors* [2007] QCA 338.

[65] In *Australian Conversation Foundation & Ors v Minister for Planning* [2004] VCAT 2029 (29 October 2004), the Australian Conservation Foundation and others successfully argued that a Victorian planning panel was obliged to consider GHG emissions and climate change in deciding whether to grant planning scheme approvals for the Hazelwood coal mine and power station. Following this legal action, the State of Victoria negotiated with the Hazelwood proponent to enter a Greenhouse Gas Reduction Deed in relation to emissions from the project. This approach is similar to that taken more recently by the Northern Territory Government in relation to the Darwin LNG plant.

[66] *Hargrave v Goldman* (1963) 110 CLR 40.

[67] 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 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).

[68] United Nations *Declaration on the Rights of Indigenous Peoples* available at: http://daccessdds.un.org/doc/UNDOC/GEN/N06/512/07/PDF/N0651207.pdf?OpenElement

SUMMARY AND CONCLUSIONS

Climate change and increased environmental awareness present the potential to develop economies that are supportive of Indigenous cultural values and native title rights while creating connections to global environmental markets.[69] In this regard there is a real and important prospect of enabling Indigenous people to remain 'on country' to reinforce and reproduce culture, while providing jobs and opportunities for business development. Land, sea and water management practices that increase the uptake of carbon dioxide present an innovative opportunity for Indigenous peoples to utilise and adapt traditional knowledge and practices for use in a contemporary low carbon economy.

There are numerous parallels to be drawn from international research and dialogue about climate change and its impacts on Indigenous peoples. The historic and contemporary debate over climate change issues at an international level is very relevant to Australia's responses to climate change, in particular, the formulation of a domestic emissions trading scheme.[70] It is imperative that Indigenous peoples participate in the emissions trading debate and are actively engaged in formulating, monitoring and implementing climate adaptation strategies. Greenhouse strategies identify government commitment to supporting land management research programs that focus on emissions abatement as well as to developing partnerships with land managers to enhance carbon sinks. Indigenous people are important land managers who should not be excluded from partnerships with the public and private sector.[71]

It is hoped that the progress toward a carbon-constrained future involves collaboration and opportunity as opposed to litigation. However the pathway will no doubt be shaped by the action or inaction of government and the private sector. The potential for, and threat posed by, litigation should create further incentive for Australian governments to engage with Indigenous peoples in formulating solutions to climate-related problems. The alternative, if this relationship further deteriorates, lies in litigation for loss and damage of lifestyle, identity, sacred places, cultural heritage and impairment of human rights and native title rights and interests. Investment in relationships is, in effect, an investment in mitigating the ecological, economic and human risks associated with climate change.

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[69] See also discussion by John Altman and others: Altman, J "*Sustainable development options on Aboriginal Land; the hybrid economy of the twenty-first century*" Discussion Paper No. 226, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra 2001. See also, Altman, J, Dillon, M. "*A profit-related investment scheme for the Indigenous Estate*" Discussion Paper 270/2004, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra, December 2004.

[70] See discussion in relation to the ecosystem approach in accordance with the United Nations Convention on Biological Diversity, and possible inclusion of social impact assessment criteria in project approvals: Smith, J and Scherr, A. J. "*Forest Carbon and Local Livelihoods: Assessment of Opportunities and Policy Recommendations*." CIFOR Occasional Paper No. 37, Center for International Forestry Research, 2002.

[71] There are limitations within existing initiatives, such as the Federal Government 'Working on Country' program, which currently enables access to funding for projects on Indigenous-held land only.

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