

AN ANALYSIS OF INTERNATIONAL LAW, NATIONAL LEGISLATION, JUDGEMENTS, AND INSTITUTIONS AS THEY INTERRELATE WITH TERRITORIES AND AREAS CONSERVED BY INDIGENOUS PEOPLES AND LOCAL COMMUNITIES

REPORT NO. 18

AUSTRALIA



Stockholm Resilience Centre
Research for Governance of Social-Ecological Systems



Stockholm
University

KALPAVRIKSH



Environmental
Action Group

NATURAL JUSTICE

The ICCA
Consortium

“Land is the foundation of the lives and cultures of Indigenous peoples all over the world... Without access to and respect for their rights over their lands, territories and natural resources, the survival of Indigenous peoples’ particular distinct cultures is threatened.”

*Permanent Forum on Indigenous Issues
Report on the Sixth Session
25 May 2007*

Authored by: Dermot Smyth and Hannah Jaireth

Published by: Natural Justice in Bangalore and Kalpavriksh in Pune and Delhi

Date: September 2012

Cover Photo: Trinity Inlet, Mandingalbay Yidinji Indigenous Protected Area, Queensland. © The Cairns Post

CONTENTS

- 1. Introduction to Australia and its Indigenous People(s): Country description and context**
 - 1.1 Introduction to Australia
 - 1.2 Communities and ecological change
 - 1.3 Indigenous owned land: Indigenous peoples' conserved territories and areas conserved by Indigenous peoples and local communities (ICCAs)
 - 1.4 Conservation, socio-economic and political values of the Indigenous estate
 - 1.5 Governance of Indigenous lands
 - 1.5.1 *Community level arrangements*
 - 1.5.2 *Regional level arrangements*
 - 1.5.3 *Governance issues*
 - 1.6 Sacred natural sites as a particular type of ICCA
- 2. Land/Marine Laws, Sacred Natural Sites**
 - 2.1 Land/Marine laws
 - 2.1.1 *Federal laws*
 - 2.1.2 *State and territory laws*
 - 2.2 Protected areas
 - 2.2.1 *Protected area legislation and administration*
 - 2.2.2 *Shared governance of protected areas*
 - 2.2.3 *World Heritage sites*
 - 2.2.4 *Indigenous Protected Areas*
- 3. Natural resources, Environmental Laws and Policies**
 - 3.1 Natural resources and environment
 - 3.2 Traditional knowledge, intangible heritage, culture
- 4. Human Rights**
- 5. Judgments**
- 6. Implementation**
 - 6.1 Implementation of land rights and native title laws
 - 6.2 Implementation of joint management, IPAs and other forms of ICCA
- 7. Resistance and Engagement**
- 8. Case Studies**
- 9. Law and Policy Reform**

INTRODUCTION

Across the world, areas with high or important biodiversity are often located within Indigenous peoples' and local communities' conserved territories and areas (ICCAs). Traditional and contemporary systems of stewardship embedded within cultural practices enable the conservation, restoration and connectivity of ecosystems, habitats, and specific species in accordance with indigenous and local worldviews. In spite of the benefits ICCAs have for maintaining the integrity of ecosystems, cultures and human wellbeing, they are under increasing threat. These threats are compounded because very few states adequately and appropriately value, support or recognize ICCAs and the crucial contribution of Indigenous peoples and local communities to their stewardship, governance and maintenance.

In this context, the ICCA Consortium conducted two studies from 2011-2012. The first (the *Legal Review*) analyses the interaction between ICCAs and international and national laws, judgements, and institutional frameworks. The second (the *Recognition Study*) considers various legal, administrative, social, and other ways of recognizing and supporting ICCAs. Both also explored the ways in which Indigenous peoples and local communities are working within international and national legal frameworks to secure their rights and maintain the resilience of their ICCAs. The box below sets out the full body of work.

1. Legal Review

- An analysis of international law and jurisprudence relevant to ICCAs
- Regional overviews and 15 country level reports:
 - *Africa*: Kenya, Namibia and Senegal
 - *Americas*: Bolivia, Canada, Chile, Panama, and Suriname
 - *Asia*: India, Iran, Malaysia, the Philippines, and Taiwan
 - *Pacific*: Australia and Fiji

2. Recognition Study

- An analysis of the legal and non-legal forms of recognizing and supporting ICCAs
- 19 country level reports:
 - *Africa*: Kenya, Namibia and Senegal
 - *Americas*: Bolivia, Canada, Chile, Costa Rica, Panama, and Suriname
 - *Asia*: India, Iran, the Philippines, and Russia
 - *Europe*: Croatia, Italy, Spain, and United Kingdom (England)
 - *Pacific*: Australia and Fiji

The *Legal Review* and *Recognition Study*, including research methodology, international analysis, and regional and country reports, are available at: www.iccaconsortium.org.

This report is part of the legal review, and focuses on Australia. It is written by Dermot Smyth and Hannah Jaireth.

1. INTRODUCTION TO AUSTRALIA AND ITS INDIGENOUS PEOPLES

1.1 Introduction to Australia

Australia is an island continent in the southern hemisphere, comprising the mainland, the large island of Tasmania in the south and numerous smaller islands around the mainland coast – including the Torres Strait Islands that lie between Australia and Papua New Guinea to the north. Australia also has jurisdiction over several small island territories in the Pacific and Indian oceans, and asserts sovereignty over a large Antarctic territory, though these external territories are not addressed in this report.

Australia’s climate is dominated by a succession of high pressure systems that roll past the south of the continent, a seasonal monsoon that brings high rainfall to the tropical north during summer months and a continuous mountain range along the east coast that draws moisture from the prevailing southeast wind from the Pacific Ocean. The centre of Australia is flat and arid, and there are small alpine areas in the southeast that experience winter snowfalls.

The influences of summer monsoonal rainfall in the north, the ridge of mountains along the east coast, the vast expanse of the arid interior and a geological history that saw the island continent separate and drift northwards from the super continent of Gondwana about 50 million years ago, resulted in diverse and unique environments and biodiversity. Australia is home to most of the world’s marsupial mammals and a large number of other endemic animal and plant species. In previous times of higher rainfall, Australia was once covered in lush vegetation, but rainforests are now confined to the tropical and sub-tropical ranges and coastal plains, and a vast band of tropical savannah woodland stretches from coast to coast across northern Australia.

Australia is a developed country and the world's thirteenth largest economy. The population of 23 million is highly urbanised. Eighty-five percent live in the coastal zone, mainly in the eastern states.¹ Agricultural industries, particularly cattle and sheep farming and broad acre cropping occupy much of Australia, but the economy is heavily dependent on mineral exports (particularly iron ore and coal) as well as tourism.



Figure 1: Map of Australia

South East Asian and European mariners traded with the inhabitants of the continent and its northern islands (later known as Australia) throughout the 1600s and 1700s, before the first British settlement was established in Sydney in 1788. Subsequently, six separate British colonies were established and then unified as the nation of Australia in 1901. Australia is

¹ Australia. Dept. of Climate Change (2009)

governed as a constitutional monarchy and a federation of six states and two territories (the Northern Territory and the Australian Capital Territory) (see Figure 1).



Figure 2: Australia's maritime territory, Geoscience Australia

Australia's maritime territory and Exclusive Economic Zone (see Figure 2) is vast and a network of marine protected areas is being developed in Commonwealth waters using bioregional spatial planning approaches and zonation that applies the IUCN's protected area management categories. State and territory governments are responsible for the management of the coastal zone up to three nautical miles from the coast. Indigenous Australians often have interests in coastal zone areas and in the impacts of offshore activities on those areas, and also in areas further offshore.

1.2 Communities and ecological change

Prior to British colonisation in the late 19th century, the entire Australian continent had been owned, managed and sustainably used by its Indigenous inhabitants (estimated population 350,000 at the time of colonisation) for approximately 60,000 years. Figure 3 shows an approximation of the Indigenous language areas at the time of colonisation. Each language area represents the traditional territory of a distinct people, typically organised into smaller clan groups with ownership, access and use rights over their own local clan estates. Coastal clan estates included coastal marine areas and islands.

Aboriginal and Torres Strait Islander peoples have profound and complex relationships with Australia's land and sea environments, which are intimately connected with the culture, spirituality, beliefs, knowledge, practices and economy of each Indigenous group. The ecological impacts of 60,000 years of Indigenous occupation, use and management of Australian environments have been the subject of much research, speculation and debate. In particular, the ecological impacts of Indigenous use of fire, and the contribution (if any) of Indigenous hunting to the extinction of giant marsupials, have been hotly contested.² A recent publication, based on historical descriptions of landscapes by early explorers and colonists, suggests that Indigenous management maintained more open, less densely wooded environments than what is today regarded as native bushland.³

² See, for example, Flannery (1994) and Horton (2000)

³ Gammage (2011)

The current population of Australia is derived primarily from British, Irish and European migration over the last 200 years. In recent decades, migration from Asia, Africa and elsewhere has increased substantially, resulting in an increasingly multi-ethnic and multicultural society. There are currently approximately 575,000 Indigenous people in Australia, representing about 2.5% of the total population.⁴

The Indigenous peoples of Australia identify as either Aboriginal (originating from mainland Australia, Tasmania or inshore coastal islands), or Torres Strait Islander (originating from the islands of Torres Strait). Aboriginal people are descendents of the first people who arrived tens of thousands of years ago; Torres Strait Islanders belong to the Melanesian peoples that populated the western Pacific several thousand years ago. Aboriginal and Torres Strait Islander peoples have their own creation stories and beliefs that explain their origins and migrations. Aboriginal people with customary connections and responsibilities to a particular area are typically referred to as “Traditional Owners”, whether or not they have legal title to the area under Australian law.

Australians who are of neither Aboriginal or Torres Strait Islander descent have a cultural relationship with the Australian environment that spans at most 200 years, but for the majority this relationship would be two or three generations or less. Most Australians are urban dwellers and the lives and livelihoods of those in rural areas tend to focus on agriculture, tourism, mining and other economic activities. Following Australia’s adoption of a highly urbanised and industrialised export-oriented development model, a serious erosion of biological diversity occurred, despite Australia having more than 9,400 protected areas, including national parks, Indigenous Protected Areas, private protected areas on rural properties and conservation reserves run by non-profit conservation organisations. The main causes of this have been ‘land clearing, salinity, pollution, nutrient loading and sedimentation of waterways and coastal areas, urbanisation of land on the intensively settled coastal areas, climate changes, diseases and invasive species’ (SoE, 2011).

For most Australians, their cultural connection to the environment is too recent and too focused on economic development to have established what might be regarded as non-Indigenous ICCAs. This does not mean that Australians in general have no affiliation with the Australian landscape, fauna and flora or that individuals and families do not have deep affection, concern or even spiritual connection to special places that they know and love. On the contrary, concern and passion for the Australian environment is very strong among many Australians without Indigenous heritage, and many groups and organisations have been formed to protect, manage and lobby for the protection of particular habitats, species or areas.

Much of this effort is directed at ensuring that governments properly discharge their responsibilities to conserve areas, species or ecosystems and establish and adequately resource a comprehensive network of protected areas, including national parks. For most Australians, therefore, the government system of protected areas, supported by a growing network of privately owned protected areas (PPAs), reflects their community conservation goals, however inadequately or incompletely. This report focuses on Indigenous land and

⁴ Australian Bureau of Statistics estimate for 2012 based on projections from data obtained in the 2006 national census (www.abs.gov.au)

sea management activities and interests in considering the legal context of ICCAs in Australia rather than PPAs. This report also does not include detailed information about forested areas outside of PAs that may be of significance to Aboriginal and Torres Strait Islander communities and where there may be conservation arrangements in place under forestry-specific legislation.⁵

It is important to acknowledge the scope of engagement by the wider Australian community in contributing to biodiversity conservation and sustainable resource use across Australia. Community initiatives, usually undertaken with some form of government support, include:

- A network of regional community Natural Resource Management (NRM) bodies that coordinates community action and provide devolved grants for environmental research, monitoring and rehabilitation across Australia.
- Landcare Australia is a national network of 4000 locally-based Landcare community groups and 2000 Coastcare community groups, made up of volunteers who get involved in a diverse range of natural resource management activities. Landcare and Coastcare activities include:
 - combating soil salinity and erosion;
 - rehabilitating creeks, river systems and wetlands;
 - improving local coastal and marine environments;
 - planting millions of native trees, shrubs and grasses each year on both public and private land.
- Many individual landowners, including some farmers, voluntarily dedicate all or part of their land as a nature refuge under state or territory legislation for the protection of biodiversity values.

Despite these efforts, the initiatives of Indigenous landowners and government programmes such as protected area management and other mechanisms, the 2011 *Australian State of the Environment Report*⁶ notes that biodiversity has declined significantly since European settlement. This decline is seen in all components of biodiversity — genes, species and ecosystems — and the decline is continuing. Declines have historically been greater in southern Australia than in the less populated North; however, recent reports of significant declines in small mammals and birds in northern Australia suggest that at least some components of biodiversity in the North are less secure than previously thought.

1.3 Indigenous Owned Land: Indigenous Peoples' Conserved Territories and Areas Conserved by Indigenous Peoples and Local Communities (ICCAs)

⁵ See for example: Sue Feary, 'Social Justice in the Forest: Aboriginal engagement with Australia's forest industries', (2008) 3(1) *Transforming Cultures eJournal* <<http://epress.lib.uts.edu.au/journals/TfC>>

⁶ www.environment.gov.au/soe/2011/report

Prior to British invasion, colonization and settlement of Australia, the entire landscape and coastal waters formed a mosaic of managed clan estates. During the colonial period, many Indigenous peoples were dispossessed of their lands through forced removals, massacres, introduced diseases, imposed new land uses such as cattle farming and agriculture, mining and other industrial developments and the construction of towns and cities. Large areas of land, primarily in northern and central Australia was not suitable for these purposes, enabling some Indigenous groups to maintain contact with their traditional estates and to maintain their languages, traditional knowledge and other cultural practices. Some Indigenous Australians also migrated to towns and cities in search of easier access to provisions and other resources.

In the 1970s, “land rights” laws and policies started to be introduced to enable Indigenous peoples to claim the return of some of their traditional estates, generally in remote areas of Australia, through a statutory grant of land by governments. In 1992, the recognition of native title (see Part II) provided an alternative legal pathway for recognition of the Indigenous peoples’ rights to land, including co-management arrangements under Indigenous Land Use Agreements (ILUAs) negotiated as part of the native title settlement process. As part of the policy response to the “discovery” of native title, a National Aboriginal and Torres Strait Islander Land Fund was established to enable culturally and environmentally significant lands that had been lost decades earlier to be purchased and returned to Traditional Owners, and land to be purchased for socio-economic development purposes.

There are therefore three unique pathways to Indigenous ownership of land in Australia:

1. Statutory grant of land by governments to Indigenous people as the result of successful claims under state or territory “land rights” laws;
2. Determination (recognition) of native title (continuing pre-colonial customary title) under the federal Native Title Act (and complementary state and territory native title legislation); and
3. Purchase of land by Indigenous people, utilising funds provided by government or from other sources.

As a result of land obtained through land grants, land purchases and native title determinations, approximately 20% of the Australian land mass is now under some form of Indigenous ownership and management. Most of these lands lie in remote areas of central and northern Australia, but there is some Indigenous-owned land in all-Australian jurisdictions (see Figure 4 below).

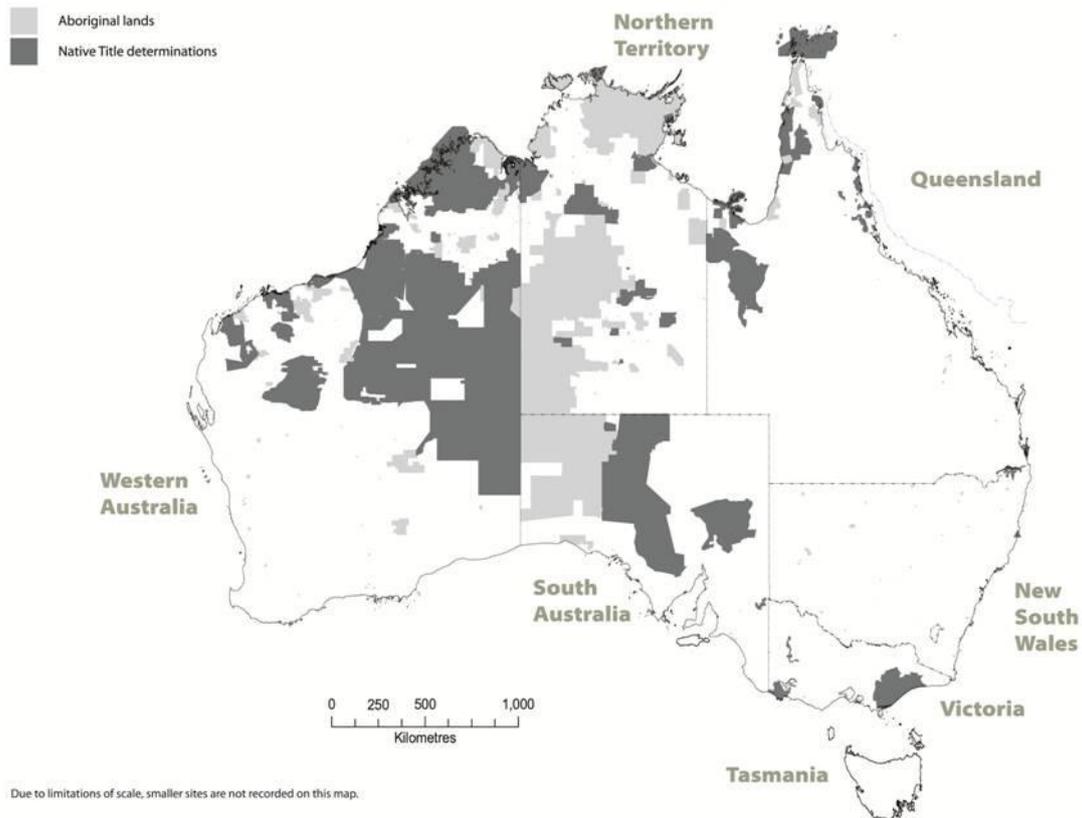


Figure 3: Areas of Indigenous held land in Australia in 2012, including land held in trust for Indigenous communities, land granted to Indigenous groups and native title determinations. Courtesy of John Hughes, Centre for Aboriginal Economic Policy Research, Australia National University, Canberra.

1.4 Conservation, socio-economic and political values of the Indigenous estate

No comprehensive assessment has been made of the biodiversity and conservation significance of Indigenous held lands in Australia, but Altman et al. (2007), in undertaking a preliminary assessment of the conservation priorities of the Indigenous estate, have noted that:

- Indigenous estate includes an enormously rich diversity of ecosystems spanning a continental-scale climatic gradient from some of the wettest areas in the monsoonal tropics in the north of Australia to some of the driest desert areas in the arid centre; and
- Significant portions of the Indigenous estate remain relatively ecologically intact and have not been subjected to the intense level of development pressure experienced in many other areas, particularly in southern Australia.

Many areas of the Indigenous estate across Australia are likely to have characteristics equivalent to ICCAs, but it would be presumptuous and inappropriate to give them this label without the engagement and informed consent of the Indigenous owners and custodians of these areas. Nevertheless, there is increasing recognition by government conservation

agencies and by conservation non-government organisations (NGOs) of the current and potential contributions of Indigenous people to the national conservation effort.

Throughout Australia, Indigenous people adopted the word ‘Country’⁷ as an English language approximation for describing the complex layers of meaning associated with their place of origin and belonging. The precise meaning of Country varies from place to place and over time. For example, in parts of Australia, Country may be used to describe defined clan estates, while in other areas Country may refer to an assemblage of clan estates or a larger area where a particular language is or was spoken. For most of Australia’s 50,000 years of human history, Country has been the fundamental geographical unit of cultural and natural resource management.

Despite the cultural, social, political and legal changes that have occurred since British colonisation of Australia over more than two centuries, the concept of Country remains central to identity and cultural authority for many, possibly most, Aboriginal and Torres Strait Islander people throughout Australia. Whether or not traditional land has been alienated from or retained by Indigenous people, and whether or not Indigenous people continue to live on or near their ancestral land, Country as a place of origin, identity and belonging remains an enduring cultural, social and political reality.

Caring for Country embraces a combination of long-established cultural practices, such as species-specific ceremonies, seasonal use of traditional resources or use of fire to maintain desired environmental conditions, as well as contemporary practices such as managing feral animals and weeds, surveying biodiversity and tracking the movement of marine turtles and other species, including by satellite.

In many locations across Australia, these ‘caring for Country’ activities are undertaken by Indigenous rangers employed by local or regional Indigenous organisations with responsibilities for land and sea management. The first few Indigenous rangers groups were established in the 1980s and early 1990s with little or no support from governments. In recent years all levels of government have responded to various extents through policy innovations, partnerships and funding support. The Australian Government is currently the major investor in this field, primarily through the Indigenous Protected Area and Working on Country programs (discussed further below), but state and territory governments have also developed various strategies to support management of Indigenous held lands in their jurisdictions.

Indigenous ranger groups are generally engaged in patrolling, managing and monitoring areas of Indigenous land that have returned to Aboriginal or Torres Strait Islander ownership as a result of land claims or the recognition of continuing native title under the *Native Title Act 1993* (Cth). Increasingly, however, Indigenous ranger groups also engage in land and sea management activities in areas that may not be formally under Indigenous ownership but which lie within the traditional land and sea estates of the groups involved. This trend from “tenure-based” to “Country-based” Indigenous engagement in land and sea management reflects a growing appreciation by government agencies and the wider community that

⁷ It is becoming common practice to use a capital ‘C’ in ‘Country’ to distinguish this use of the word from other meanings.

Indigenous caring for Country rights, interests and obligations are based on cultural connections to traditional estates irrespective of their current tenure. This trend can be observed, for example, in increased Indigenous engagement in terrestrial and marine protected area management, whether or not these areas have been returned to Indigenous ownership. This trend is also consistent with modern bioregional and landscape-scale approaches to 'connectivity conservation'.⁸

Some Indigenous ranger groups provide the workforce for Indigenous Protected Areas (IPAs), which are areas of land and/or sea that are voluntarily declared as protected areas by Indigenous land owners. IPAs are recognised by federal, state and territory governments as part of the National Reserve System and government funding is provided to support IPA planning and management. IPAs are discussed further in section 4.

Indigenous landowners are able to develop sustainable development opportunities on their land, including ecotourism activities and utilisation of natural and cultural resources, subject to statutory restrictions. Some landowners are pursuing new carbon market opportunities under the Carbon Farming Initiative (CFI). The CFI legislation enables Australian carbon credit units to be traded by foresters, landholders (including Registered Native Title Bodies Corporate) and farmers.⁹ Program and project funding for conservation management activities is often accessed by Indigenous landowners.

In recent years Indigenous ranger groups and independent researchers (Garnett and Sithole, 2007; Campbell et al. 2011) have reported that involvement in caring for Country projects has resulted in significant enhancement in Indigenous wellbeing, including:

- Financial independence;
- Increased pride, self-esteem, independence and respect from peers;
- Improved organisational skills;
- Increased involvement in the community, including sports and governance;
- Improved skills in interacting with the wider community;
- Improved outlook on work, life and family;
- Better nutrition, increased physical activity and fitness;
- Weight loss, giving up smoking, reduced consumption of alcohol;
- Reduced expenditure on health services;
- Increased access to healthy bush food resources; and
- Improved contemporary life skills, including obtaining drivers licences.

⁸ See generally Sandwith and Lockwood (2006)

⁹ *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth)

These findings indicate that caring for Country initiatives may make a significant contribution to closing the gap between Indigenous and non-Indigenous populations with respect to many social indicators, including health, education, poverty, employment and life expectancy – all measures for which Indigenous people rate poorly in comparison with the general Australian community.

1.5 Governance of Indigenous lands

In pre-colonial times, caring for Country was undertaken by individuals and clan groups with inherited rights and responsibility to particular land and sea estates, under the guidance of initiated elders and other knowledge-holders. These cultural rights and practices still underpin all contemporary land and sea management activities, but they have adapted and evolved over time and are delivered under a diversity of local and regional governance arrangements.

1.5.1 Community level arrangements

There are several hundred community-managed Indigenous land and sea management groups or organisations around Australia. Some of these comprise ranger groups employed by local community councils, while others are more fully developed Indigenous land and sea management agencies employing specialist planning and research staff as well as operational rangers, often with Indigenous governance arrangements separate or complementary to local community councils. Governance arrangements for IPAs vary from place to place – sometimes undertaken by longstanding land-owning groups or organisations and sometimes by new organisations established specifically for IPA management with input from the landholding group. While the majority of these groups and organisations are located in remote communities in northern and central Australia, Indigenous ranger groups and other caring for Country initiatives occur throughout Australia, including the southern mainland states and Tasmania.

1.5.2 Regional level arrangements

Regional level arrangements include Indigenous organisations that coordinate or support local ranger groups and other land and sea management initiatives, as well as “mainstream” regional organisations, such as natural resource management bodies, that have explicit policies and programs to support Indigenous engagement in environmental, natural resource management or cultural heritage management. Regional Indigenous organisations include Aboriginal land (and sea) councils and native title representative bodies which coordinate a wide range of policy, research, planning and on-ground activities, including the training and employment of rangers. Other examples of regional organisations include the:

- North Australian Land and Sea Management Alliance (NAILSMA), an alliance comprising the Northern Land Council, Carpentaria Land Council and Balkanu Cape York Development Corporation, which supports land and sea management activities across northern Australia;
- Giringun Aboriginal Corporation, which coordinates land and sea management activities on behalf of nine tribal groups in north Queensland between Ingham and Innisfail;

- Murray Lower Darling Rivers Indigenous Nations (MLDRIN), an alliance of 10 Traditional Owner groups from along the River Murray and its tributaries in southern Australia; and
- Torres Strait Regional Authority (a statutory body established under Commonwealth legislation) coordinates support for island-based ranger groups and plays a significant role in fisheries, coastal and marine research and management, including measures aimed at achieving sustainable harvest of dugong and marine turtles and combating coastal erosion associated with climate change and sea level rise.

1.5.3 Governance issues

Successful governance of Indigenous lands is one of the greatest challenges facing Indigenous people in Australia. In areas where good governance arrangements have developed, there are currently many opportunities for training, employment, partnership-building and support for maintenance of cultural knowledge and practices. In areas where governance remains weak, it is more difficult to access these opportunities, which in turn contributes to less capacity building and weaker governance. The challenges facing good governance include:

- Balancing the conflicting priorities and expectations of kin-based customary governance arrangements with contemporary democratic governance arrangements;
- Meeting the sometimes competing interests of funding agencies (which tend to focus on management outcomes and financial accountability) and community expectations (which tend to focus on engagement processes and compliance with cultural protocols);
- Negotiating the complex layers of legal and cultural authorities that result from co-existing regimes of Indigenous cultural law, statute law, multitudes of tenures and native title – in some areas the same Country may be subject to the authority of an elected Community Council, a Land Trust established under state land rights legislation and a Prescribed Body Corporate established under national legislation to manage native title; and
- Managing the diaspora of Indigenous people with inherent cultural rights and interests in Country; after more than 200 years since British colonisation, many Indigenous people now live far removed from their traditional Country for which they retain customary rights, interests, obligations and responsibilities – making it very difficult for under-resourced Indigenous organisations to ensure ongoing engagement of the appropriate Indigenous people in decision-making for Country.

1.6 Sacred natural sites as a particular type of ICCA

There are many locations, areas and features of Australian landscapes and seascapes that can be broadly referred to as sacred sites. These include:

- Songlines and Dreaming tracks that mark the ancient journeys of the ancestral

spirit beings that Aboriginal and Torres Strait Islander peoples believe created the rivers, mountains, plants, animals, people and other features of Australia's terrestrial and marine environments;

- Ceremonial places where traditional songs, dances, storytelling and other rituals were and are conducted to maintain and nurture aspects of culture and resources, including “increase ceremonies” that ensure the wellbeing of culturally significant species and environments;
- Story places associated with particularly significant events involving creation ancestors during the Dreamtime period; story places often include prominent geographical features, such as mountain tops, river bends, reefs, rocky outcrops, caves etc. where creation ancestors may have camped, fought, died or transmuted into landscape features;
- Danger or poison places, often isolated patches of vegetations, submerged marine features, unusual geological formations etc., where local cultural protocols forbid access or constrain resource use; local cultures typically prescribe severe consequences to those who transgress or ignore these protocols; and
- Archaeological sites, such as ancient galleries of rock art, stone tool quarry sites, seasonal camping sites etc. that have profound cultural significance to local Indigenous groups. In recent times, some archaeological sites have taken on increased cultural significance for Indigenous groups most impacted by social, legal, political and cultural changes since British invasion and colonisations in the 18th century.

In the Australian context, therefore, sacred sites vary greatly in size, from localised geographic features to Songlines extending hundreds of kilometres, and include places (such as art sites) modified in some way by Indigenous people as well as places unmodified by people but imbued with deep cultural meaning.

Where sacred sites occur on Indigenous owned land, local Indigenous people have control over the protection and management of sites. Many sacred sites, however, occur on land or in marine areas where Indigenous people no longer have ownership or control. In most Australian jurisdictions, planning laws and policies now provide a degree of protection to sacred and archaeological sites during the development of major construction projects, such as new roads and buildings. In some locations, Indigenous groups undertake fee-for-service cultural heritage and site surveys of proposed development areas. Further information on laws and policies to protect natural sacred sites are provided in Part II.

2. LAND/MARINE LAWS, SACRED NATURAL SITES

2.1 Land/marine laws

Generally, laws relevant to ICCAs (i.e. land tenure, environmental management, use of natural resources and protection of cultural heritage) are the responsibilities of state and territory governments. However, there are some issues that are the responsibility of the

federal government, especially native title legislation and environmental and cultural matters of national and international significance. The federal government is also signatory to international conventions and other instruments (for example the Convention on Biological Diversity and the declaration on the Rights of Indigenous People) that apply across Australia.

Whereas Aboriginal and Torres Strait Islander custom recognises clan ownership of marine areas as part of coastal estates, there is limited recognition of Indigenous ownership of marine areas in contemporary Australian law. The *Aboriginal Land Rights (NT) Act 1976* (Cth) provides for Aboriginal ownership of coastal intertidal land and waters, and the living resources within intertidal waters, but this law only applies in the Northern Territory. Under Queensland's land claim legislation, tidal land must be declared by regulation to be 'available State land' before a claim application can be made.¹⁰ The *Native Title Act 1993* (Cth) also recognises Aboriginal customary rights in the sea, but these rights generally must coexist with the rights of other stakeholders to fish and travel in the area. Further information on both these laws is provided below.

2.1.1 Federal laws

The main federal land and marine law relating to ICCAs, other than environmental law which is dealt with in Part III, is the *Native Title Act 1993* (Cth) (NTA). The NTA was enacted in 1993 in response to a 1992 High Court decision, popularly known as 'the Mabo decision'¹¹ (based on a claim by Eddie Mabo and others) which determined that Indigenous customary title to land (native title) had survived British colonisation of Australia and persisted in areas where land had not been explicitly alienated by the creation of some form of permanent exclusive tenure (such as freehold tenure) and where the local Indigenous population retained a customary relationship with the land. This decision represented a significant change to previous understanding of Australia's legal history. Prior to the Mabo decision it was generally understood that Australia was *terra nullius* (land belonging to no-one) when the United Kingdom claimed sovereignty.

In some instances, such as on existing national parks and leasehold farm land, native title can be determined as a "co-existing" right alongside the rights of national park agencies or farmers. Co-existing native title rights usually must yield to the rights of others wherever competing interests occur.

The Mabo decision, which was based on a claim of customary ownership of land on Mer Island in Torres Strait, did not address the issue of native title in marine areas. Nevertheless, the NTA made provision for native title determinations to be made over the sea, though the recognition of exclusive native title in marine areas is considerably more difficult to achieve than on land. Where native title is recognised in the sea it is more common for native title rights to co-exist with the rights of others (e.g. commercial and recreational fishers, seafarers etc.).

¹⁰ *Aboriginal Land Act 1991* (Qld) s 27; *Torres Strait Islander Land Act 1991* (Qld) s 22.

¹¹ *Mabo v Queensland (No 2)* (1992) 175 CLR 1

The “discovery” of native title has had profound effects on the recognition of Indigenous peoples’ rights and interests in national parks, even though the original native title claim on Mer did not include a national park. In his leading judgment in the Mabo case, Justice Brennan (with whom Chief Justice Mason and Justice McHugh concurred)¹², specifically referred to national parks as an example of a land tenure where he anticipated that native title would have survived:

*Native title continues to exist where waste lands of the Crown have not been appropriated or used or where the appropriation and use is consistent with the continuing concurrent enjoyment of native title over the land (e.g. land set aside for national parks).*¹³

Although the Mabo decision arose from a land claim in a remote island in Torres Strait, the governments of the day recognised that the judgment had significant implications across Australia. The consequential federal NTA (and native title state and territory provisions legislation) applies in all Australian jurisdictions.

The NTA is administered through several federal government agencies:

- Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) provides funding to Native Title Representative Bodies (Indigenous organisations authorised to pursue native title claims on behalf of Indigenous claimants);
- National Native Title Tribunal registers and administers native title claims, and facilitates negotiations between stakeholders with an interest in native title claim areas;
- Federal Court formally makes a determination of native title, either as a result of contested court hearing processes or by recognising the outcomes of negotiations between interested parties (known as a consent determination).

2.1.2 State and Territory laws

Northern Territory

The *Aboriginal Land Rights (NT) Act 1976* (Cth) (ALR(NT)A) is federal government legislation that only applies in the Northern Territory. Although self-governing, the Northern Territory and its Indigenous communities experience legislative interventions by the federal government to a greater extent than do the states, although federal legislation does apply to some states and territories in some circumstances.¹⁴

¹² forming the majority with Justices Deane, Gaudron and Toohey who also rejected the traditional doctrine that Australia was *terra nullius* (land belonging to no-one) at the time of European colonisation.

¹³ (1992) 175 CLR 1 at para 83.

¹⁴ See for example the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth); *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* (Cth); *Aboriginal and Torres Strait Islanders*

The ALR(NT)A provides for grants of land to Aboriginal people in the Northern Territory, establishes land councils to oversee the management of granted land, sets out the regime for development, exploration and mining on that land, and includes a mechanism for the payment of mining royalty equivalents to Aboriginal people and their representative organisations.

Under the ALR(NT)A, land claims are assessed on the basis of traditional cultural connections between the Aboriginal claimants (Traditional Owners) and the claimed land. However, a successful land claim results in a statutory grant of land rather than a recognition of continuing customary ownership (native title). In some areas, native title claims under the NTA are now being pursued over land already transferred under the ALR(NT)A.

Through successful claims under the ALR(NT)A approximately 50% of the Northern Territory is now Aboriginal land, including over 80% of the coastline (which includes intertidal land, water and living resources – see Part V Blue Mud Bay judgment).

Land granted under the ALR(NT)A is held as inalienable Aboriginal freehold tenure – a form of communal tenure that cannot be sold or mortgaged. This form of tenure ensures that granted land will always remain in Aboriginal ownership, but also means that the land cannot be used as security for raising funds for development.

The era of land claims that began with the passage of the ALR(NT)A in 1976 is drawing to a close, with the focus now shifting to land management and community development. The ALR(NT)A is administered by the Land Administration Division of the Northern Territory Department of Lands and Planning.

Australian Capital Territory

Other than the NTA which applies nationally, there are no Aboriginal land rights laws in the Australian Capital Territory.

New South Wales

The New South Wales Parliament enacted the *Aboriginal Land Rights Act* (ALRA(NSW)) in 1983. That Act establishes a state-wide “New South Wales Aboriginal Land Council”, as well as regional and local land councils to claim “crown” (government owned) land, and hold tenure to and manage granted lands. Membership of local Aboriginal land councils can be based on local residency and Aboriginal identity, ownership of land as an Aboriginal landowner, or association with the area.¹⁵ Customary association with a particular land area is not a prerequisite. Under this regime, Aboriginal people from any part of NSW, or any part

(Queensland Reserves and Communities Self-Management) Act 1978 (Cth); *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975* (Cth). More contentious federal legislation such as the *Northern Territory National Emergency Response Act 2007* (Cth) and *Stronger Futures in the Northern Territory Bill* (Cth) 2012, and related social security and budget measures, also impact on Indigenous communities, attempting to address complex and longstanding social problems.

¹⁵ *Aboriginal Land Rights Regulation 2002* (NSW).

of Australia, can become a member of a land council and acquire a communal interest in land by living within the land council boundaries.

Since 1996 the *National Parks and Wildlife Act 1974* (NSW) has provided for Aboriginal people to claim land in certain national parks and to enter into joint management arrangements for those parks – discussed further in Part III.

Administration of land claims in NSW is undertaken by the Registrar, *Aboriginal Land Rights Act 1983* (NSW). The functions of the Registrar, a statutory position answerable to the NSW Parliament, includes registering land claims and maintaining the Register, approving land council rules, investigating complaints, issuing compliance directions, providing advice to the Minister for Lands on the administration of Aboriginal land councils, and the mediation, conciliation or arbitration of disputes relating to the operation of the ALRA(NSW).

Queensland

From the late 1900s to the 1970s many Aboriginal people were confined to living in Aboriginal missions run by various Christian church denominations or on government-run Aboriginal reserves. This regime began to change in the late 1970s when Aurukun and Mornington Island Aboriginal Communities in Cape York Peninsula were granted 50-year leases following the passing of the *Local Government (Aboriginal Lands) Act 1978* (Qld). Since the 1980s Queensland has provided for ‘deeds of grant-in-trust’ (DOGIT) title to former reserves and the grant of freehold estates to locally-elected Aboriginal or Torres Strait Islander councils.¹⁶ In the early 1990s the Queensland Parliament enacted the *Aboriginal Land Act 1991* (Qld) and the *Torres Strait Islander Act 1991* (Qld). Under the legislation, any group of Indigenous people may claim land on the grounds of traditional affiliation for Aboriginal people or customary affiliation for Torres Strait Islanders, historical association or economic or cultural viability. The Acts limit claims to those areas described by the legislation as transferable lands or claimable claims, including lands granted under earlier legislation.

Transferable lands are defined as DOGIT land, Aboriginal reserve land, Aurukun Shire lease land, Mornington Island Shire lease land and available Crown land declared in the Act or by regulation to be transferable. Claimable lands are primarily available state land declared by regulation to be claimable or transferred land, with certain land uses omitted. National parks are declared to be available State land.¹⁷ Claims are pursued by lodging an application with the Land Tribunal which determines the validity of the claim and recommends to the minister whether, and to whom, land should be granted.

As noted above, Mer (Murray Island) in the Torres Strait, was the location of the first common-law recognition of native title (see Part V The Mabo Judgment).

More recently, the *Cape York Peninsula Heritage Act 2007* amended the *Aboriginal Land Act 1991* and the *Nature Conservation Act 1992* to provide for the transfer of ownership of national parks in far northern Queensland to Aboriginal freehold title under the newly

¹⁶ *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act 1984* (Qld).

¹⁷ *Aboriginal Land Act 1991* (Qld) s 30; *Torres Strait Islander Land Act 1991* (Qld) s 25.

designated tenure “National Park (Cape York Peninsula Aboriginal Land)”, which requires that transferred areas always be managed as national parks under the Act. The 2007 Act provides for the cooperative management, protection and ecologically sustainable use of land in the Cape York Peninsula Region, including by providing for indigenous community use areas to be declared for economic activities.

South Australia

The creation of the Aboriginal Lands Trust of South Australia on 8 December 1966 was the first step taken by any Australian government to grant freehold title of land to Australia’s Indigenous people.¹⁸ The *Aboriginal Land Trust Act 1966* (SA) established the Trust, comprised of Aboriginal members, and provided for the transfer of former Aboriginal reserves to the control and management of Aboriginal communities.

One of the Trust’s largest holdings, an area of 770,772 hectares along the coastal region of the Great Australian Bight, was formally declared the Yalata Indigenous Protected Area in 1999.

The *Aboriginal Land Trust Act* has responsibility for managing all former Aboriginal reserve lands except the Pitjantjatjara and Maralinga lands, which are governed by two separate statutes:

- The *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (PLRA) was the first negotiated land rights settlement in Australia; the legislation resulted in the transfer of 102,650 square kilometres of land to a body now known as the Anangu Pitjantjatjaraku Yankunytjatjara, the corporate entity which is composed of the Traditional Owners of north-west South Australia.
- The *Maralinga Tjarutja Land Rights Act 1984* (SA) (MTLRA) resulted in an area of 81,373 square kilometres being granted to Maralinga Tjarutja in an area located to the south of the Pitjantjatjara lands.

Together the PLRA and the MTLRA have resulted in the transfer of 18 per cent of land in South Australia to Indigenous owners. It is held in a form of inalienable freehold title similar to that under the Northern Territory ALRA. Unlike the Northern Territory there is no provision for granting additional land through a claims procedure. Notably, the land conveyed to Aboriginal ownership under the two statutes is primarily confined to remote areas of the north and west of the state.

As in other jurisdictions, many claims in South Australia under the native title regime are ongoing.

Victoria

In Victoria there are six separate land rights statutes. Five of these were passed by the Victorian legislature and one by the Commonwealth. In the main, the statutes were passed

¹⁸ The *Pastoral Act 1936* (now repealed) provided for the granting of leaseholds of up to 2600m² as Aboriginal reserves.

to allocate title of small parcels of former reserve lands to local Aboriginal communities. The *Aboriginal Lands Act 1970* (Vic) resulted in the granting of freehold title to the residents of Lake Tyers and Framlingham on 24 July 1971. In 1982 the Victorian Parliament passed the *Aboriginal Lands (Aborigines' Advancement League) (Wall St, Northcote) Act 1982* (Vic) which vested the facilities and land to the Aborigines Advancement League (AAL). The grant is subject to the condition that the land continues to be used for Aboriginal cultural and recreational purposes. This later became the *Aboriginal Land (Northcote Land) Act 1989* (Vic).

In the mid 1980s the Victoria Government repeatedly tried to pass limited land rights but was blocked by the Legislative Council (upper parliamentary chamber). As a means of circumventing the deadlock, the Victorian Government asked the Commonwealth Government to pass its own legislation leading to the passing of *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* (Cth). The Act vests ownership of the respective areas in Aboriginal Corporations. This legislation was an abridged version of the intentions of the Victorian Government and it was site-specific rather than having state-wide application.

The two other statutes in operation in Victoria are the *Aboriginal Lands Act 1991* (Vic) and the *Aboriginal Land (Matatunga Land) Act 1992* (Vic). The 1991 Act revoked the reservation of three missions (the Ebenezer Mission near Dimboola, the Ramahyuck Mission near Stratford in Gippsland and the Coranderrk Mission near Healesville) and authorised the granting of those lands to certain Aboriginal organisations. The 1992 Act provided for the granting of a small area of four hectares of Crown land at Robinvale in north-western Victoria to the Murray Valley Aboriginal Cooperative. The legislation prescribes that the land must be used for Aboriginal cultural purposes.

The Victorian Native Title Settlement Framework established by the Victorian Parliament in 2010 is an alternative claim that has a focus on direct negotiation between Traditional Owners and the state. The aim of the statutory framework is to reduce the cost, delay and complexity associated with native title claims previously conducted in Victoria (see Part V).¹⁹

Tasmania

With the enactment of the *Aboriginal Lands Act 1995* (Tas) (ALA) 15 areas of culturally significant land were vested in the Aboriginal Land Council of Tasmania (ALCT). These areas include six of the Bass Strait islands, historical sites at Risdon Cove and Oyster Cove near Hobart, and four other cultural sites. The total area of land granted under the legislation amounted to 4,604 hectares or only 0.06 per cent of land in the state. Subsequently, the former Wybalenna mission on Flinders Island was transferred to the ALCT to be co-managed by traditional Aboriginal owners of the island.

Some of the land transferred to Aboriginal ownership in Tasmania, including several islands in Bass Strait have been voluntarily declared Indigenous Protected Areas.

Western Australia

¹⁹ *Traditional Owner Settlement Act 2010* (Vic)

Under the *Aboriginal Affairs Planning Authority Act 1972* (WA) (the AAPA Act), and *Community Services Act 1972* (WA) (repealed), Crown land reserved for the use or benefit of Aboriginal people was vested in the Aboriginal Affairs Planning Authority (AAPA). More recently this can occur under the *Land Administration Act 1997* (WA). The AAPA Act establishes the Western Australian Aboriginal Land Trust (WAALT) which is comprised of Aboriginal people appointed by the Minister. The WAALT has responsibility for acquiring and managing land in the interests and wishes of Aboriginal people. Those lands identified as 'reserves', which comprise around 20 million hectares, are vested with the WAALT for the benefit of Aboriginal people and have been leased to communities for 99 years at peppercorn rental. Other landholdings include pastoral leases and other forms of '50 year' special leases from the Department of Land Administration (DOLA). Prior to the creation of the WAALT most of the reserves and lease land were managed by other government departments such as the now defunct Native Welfare Department.

In 1996, the Western Australian Aboriginal Affairs Department (AAD) reviewed the WAALT. The review recommended that title to lands managed by the Trust, approximately 27 million hectares, be transferred to Aboriginal corporations in trust for Aboriginal people by 2002. The area of land under the review was 12 per cent of Western Australia, comprising 250 Aboriginal reserves, six pastoral stations, ten special leases, one Crown grant in trust and 59 blocks of freehold land. The first of the hand-backs took place in December 1999 when the title of Pandanus Park, a block of 87 hectares situated 45 kilometres south of Derby, was transferred to the Pandanus Park Aboriginal Corporation.

Prior to these initiatives, community Indigenous ownership of land in Western Australia was restricted to those groups who had been successful in receiving grants to acquire land. In the absence of statutory land rights legislation in Western Australia, claims under the *Native Title Act 1993* (Cth) and *Native Title (State Provisions) Act 1999* (WA) represent an important opportunity for recognition of Aboriginal connection and rights to land and sea Country in that state.

Sacred site and cultural heritage legislation:

Heritage protection in Australia expanded significantly after the National Trust movement took hold in Australia in the 1940s, and again after Australia became a party to UNESCO's *Convention Concerning the Protection of the World Natural and Cultural Heritage* in 1972. Heritage is protected by legislation enacted by all levels of government. An indicative list of the main legislation protecting cultural heritage, including sacred sites, is listed in the table below. Such legislation can be used by and for Aboriginal and Torres Strait Islander people to identify, assess, record, access, use and/or protect from injury or desecration areas and objects of particular significance to Aboriginal and Torres Strait Islander people, and to preserve the integrity of all or part of an ICCA. Natural and Indigenous heritage places of outstanding national value can be listed under the *Environmental Protection and Biodiversity Conservation Act 1999* (EPBC Act) on the National Heritage List, Commonwealth Heritage List and Register of the National Estate and be protected for their world and/or national heritage values as matters of national environmental significance. State and territory governments also maintain lists or registers of important heritage places in their jurisdiction, protect heritage in PAs and fund community programs. Conservation covenants, contracts, conservation agreements, and financial incentives programs are also available in

some states and territories to assist with heritage management on private lands. Local councils' town planning instruments and community programs also protect and celebrate local level heritage.

This cooperative national approach to heritage management was agreed in the Intergovernmental Agreement on the Environment in 1992 and enshrined in legislation subsequently.

Jurisdiction	Legislation and strategies
Australian Capital Territory	<p><i>Australian Capital Territory (Planning and Land Management Act) 1988 (Cth)</i> <i>Heritage Act 2004</i> <i>Human Rights Act 2004 (ACT)</i> <i>Nature Conservation Act 1980</i> <i>Native Title Act 1994</i> <i>Planning and Development Act 2007</i> See generally: www.environment.act.gov.au/heritage</p>
Commonwealth	<p><i>Aboriginal and Torres Strait Islander Heritage Protection Act 1984</i> <i>Australian Heritage Council Act 2003</i> <i>Aboriginal and Torres Strait Islander Act 2005</i> <i>Australian Institute of Aboriginal and Torres Strait Islander Studies Act 1989</i> <i>Environment Protection and Biodiversity Conservation Act 1999</i> <i>Native Title Act 1993</i> <i>Protection of Movable Cultural Heritage Act 1986</i> See generally: Australia. Department Sustainability, Environment, Water, Population and Communities (2012), <i>Australian Heritage Strategy Public Consultation Paper</i> (April) <http://www.environment.gov.au/heritage/index.html></p>
New South Wales	<p><i>Environment Planning and Assessment Act 1979</i> <i>Heritage Act 1977</i> <i>Mining Act 1992</i> <i>National Parks & Wildlife Act 1974</i> (and other legislation dealing with national parks) <i>National Trust of Australia (New South Wales) Act 1950</i> <i>Native Title (New South Wales) Act 1994</i> <i>Marine Parks Act 1997</i> New South Wales Government (2000) NSW Government Heritage Policy: Heritage Week Directions Statement. Available online at www.heritage.nsw.gov.au See generally: Heritage Council of NSW Strategic Plan 2010-2011, www.heritage.nsw.gov.au</p>
Northern Territory	<p><i>Aboriginal Land Act (NT)</i> <i>Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)</i> <i>Cobourg Peninsula Aboriginal Land, Sanctuary and Marine Park En 1981(NT)</i> <i>Environmental Assessment Act 1982 (NT)</i></p>

	<p><i>Heritage Act 2011</i> <i>Mineral Titles Act 2010</i> <i>Nitmiluk (Katherine Gorge) National Park Act 1989 (NT)</i> <i>Northern Territory Aboriginal Sacred Sites Act (NT)</i> <i>Parks and Reserves (Framework for the Future) Act 2004 (NT)</i> <i>Parks and Wildlife Commission Act (NT)</i> <i>Territory Parks and Wildlife Conservation Act (NT)</i> <i>Validation (Native Title) Act</i> See generally: www.nretas.nt.gov.au/knowledge-and-history/heritage</p>
Queensland	<p><i>Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act 1984</i> <i>Aboriginal Cultural Heritage Act 2003</i> <i>Integrated Planning Act 1997</i> <i>Land Court Act 2000</i> <i>Marine Parks Act 2004</i> <i>Nature Conservation Act 1992</i> <i>Native Title (Queensland) Act 1993</i> <i>Queensland Heritage Act 1992</i> <i>Recreation Areas Management Act 2006</i> <i>Sustainable Planning Act 2009</i> <i>Torres Strait Islander Cultural Heritage Act 2003</i> <i>Transport Infrastructure Act 1994</i> <i>Wet Tropics World Heritage Protection and Management Act 1993</i> See generally: Department of Environment and Resource Management, (2009) Queensland Heritage Strategy: a ten-year plan. Available online at www.derm.qld.gov.au/heritage/index.html</p>
South Australia	<p><i>Aboriginal Heritage Act 1988</i> <i>Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981</i> <i>Development Act 1993</i> <i>Heritage Places Act 1993</i> <i>Maralinga Tjarutja Land Rights Act 1984</i> <i>Mining Act 1971</i> <i>National Parks and Wildlife Act 1972</i> <i>Marine Parks Act 2007</i> <i>Native Title (South Australia) Act 1994</i> <i>Native Vegetation Act 1991</i> <i>Natural Resources Management Act 2004</i> <i>Petroleum and Geothermal Energy Act 2000</i> <i>Wilderness Protection Act 1992</i></p>
Tasmania	<p><i>Aboriginal Lands Act 1995</i> <i>Aboriginal Relics Act 1975</i> <i>Historic Cultural Heritage Act 1995</i> <i>Land Use Planning and Approvals Act 1993</i> <i>National Parks and Reserves Management Act 2002</i></p>

	<p><i>Nature Conservation Act 2002</i> <i>National Trust Act 2006</i> <i>Native Title (Tasmania) Act 1994</i> See generally: Department of Tourism, Arts and the Environment (DTAE) (2007) Managing our heritage position paper. Available on-line at www.heritage.tas.gov.au/act_reform.html</p>
Victoria	<p><i>Aboriginal Heritage Act 2006</i> <i>Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987 (Cth)</i> <i>Charter of Human Rights and Responsibilities Act 2006 (Vic)</i> <i>Crown Land (Reserves) Act 1978</i> <i>Forests Act 1958</i> <i>Heritage Act 1995</i> <i>Land Titles Validation Act 1994</i> <i>Mineral Resources (Sustainable Development) Act 1990</i> <i>National Parks Act 1975</i> <i>Petroleum Act 1998</i> <i>Planning and Environment Act 1987</i> <i>Traditional Owner Settlement Act 2010</i> See generally: Department of Planning and Regional Development (2011) Heritage Council Strategic Plan. Available online at www.dpzd.vic.gov.au/heritage/about/heritage-victoria/heritage-council-of-victoria/hc-strategic-plan Victorian Aboriginal Heritage Council (2011) Strategic Plan. Available online at www.dpzd.vic.gov.au/data/assets/pdf_file/0011/76898/VAHC-Plan-Version-web-2.pdf Parks Victoria (2011) Strategic Plan. Available online at parkweb.vic.gov.au/about-us/who-we-are/vision,-purpose,-values</p>
Western Australia	<p><i>Aboriginal Affairs Planning Authority Act 1972</i> <i>Aboriginal Heritage Act 1972</i> <i>Aboriginal Heritage (Marandoo) Act 1992</i> <i>Conservation and Land Management Act 1984</i> <i>Heritage of Western Australia Act 1990</i> <i>Land Administration Act 1997</i> <i>Planning and Development Act 2005</i> <i>Reserves (National Parks and Conservation Parks) Act 2004</i> <i>Conservation and Land Management Act 1984</i> <i>Wildlife Conservation Act 1950</i> See generally: Government of Western Australia (2011) State Cultural Heritage Policy. Available online at www.heritage.wa.gov.au</p>

For a summary of relevant statutory protections and administrative arrangements see: 'Appendix 2: Provisions for protection of Indigenous heritage under Commonwealth, state and territory heritage legislation' in (Schnierer et al. 2011).

As indicated in the review above, opportunities for Indigenous people to regain ownership of their traditional territories vary considerably between jurisdictions, as do the criteria and processes for achieving successful land claims. While many land claims, both statutory and native title, remain outstanding, Australia is emerging from an era of Indigenous claims to an era of collaboration and support for the management of Aboriginal and Torres Strait Islander lands. Many Indigenous groups remain disappointed and frustrated by the limited outcomes from their long legal and political campaigns to recover their lost territories; but for many other Indigenous groups who have regained ownership of land, or who have had their native title recognised or who have successfully negotiated a role in the management of their former estates that now lie within protected areas, there are growing opportunities to forge a new economic niche in managing Country.

In 2011–12 the Australian Government has been developing a high level national heritage strategy that will set directions and outline priorities for Australia's heritage over the next decade. It is being developed with expert input from the Australian Heritage Council, state and territory heritage agencies, Indigenous organisations, representatives of conservation organisations and public input resulting from this process. Heritage Ministers from each jurisdiction will consider the strategy prior to its adoption. Consultations for the development of the strategy started in 2011, and an essay series, accessible at <www.environment.gov.au/heritage> was released to stimulate discussion.

A public consultation paper released in April 2012 summarised the national 'report card' on heritage protection in Australia's *State of the Environment Report 2011* (SoE 2011) as follows:²⁰

[W]hile the current condition and integrity of Australia's listed heritage appears to be good, some deterioration is evident over recent years. Climate change, development and population pressures are the biggest threats to heritage, and there is scope to add more sites to the lists of protected natural and cultural places so that they are truly representative. The report also draws attention to Indigenous cultural heritage management and protection, particularly the way that individual assessment and development applications are causing incremental destruction of irreplaceable cultural resources.

The report concludes that the future for Australia's heritage will depend on government leadership in two areas: 1) ensuring adequate areas of protected land and comprehensive heritage

²⁰ Australian Government, Department of Sustainability, Environment, Water, Population and Communities (2012) *Australian Heritage Strategy Public Consultation Paper*, April, <http://www.environment.gov.au/heritage/strategy/submissions.html#paper>> viewed 3 June 2012, 3–4.

inventories, and 2) changing heritage management paradigms and resource allocation in response to emerging threats. There is also a need for a clearer picture on the nature and extent of Indigenous cultural heritage.

The consultation paper noted that many Australians regret that they do not know more about Indigenous Australians' and minority communities' heritage, notwithstanding that "Indigenous communities are playing an important role in the identification and management of Indigenous heritage".²¹ At least one of the key issue essays about the heritage strategy noted that a collaborative "cultural landscape" approach supported by science and participatory governance could embrace both Indigenous and non-Indigenous heritage, and that this would be a way forward for better heritage management.²²

2.2 Protected areas

2.2.1 Protected area legislation and administration

Several national parks and marine parks are established under federal legislation, but most terrestrial and marine protected areas in Australia are established under state and territory legislation.

Federal Government:

The *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) is the principal Commonwealth legislation for establishing and managing protected areas. The Director of National Parks is a corporation established under the Act, with the function of managing Commonwealth reserves. The Director is assisted in performing this function by the staff of Parks Australia (a division of the Department of Sustainability, Environment, Water, Population and Communities).

Some Federal Government protected areas are managed in conjunction with a Board of Management, and advisory committees provide advice to the Director on the management of other reserves.

Under the EPBC Act, the Director of National Parks is responsible for:

- Administration, management and control of Commonwealth reserves and conservation zones;
- Protection, conservation and management of biodiversity and heritage in Commonwealth reserves and conservation zones;

²¹ Ibid 4, 8.

²² Australian Government, Department of Sustainability, Environment, Water, Population and Communities (2012) *Australian Heritage Strategy*: Commissioned essay: Peter James AM (Heritage Law Specialist, JNP Pawsey and Prowse) and Joann Schmider (Indigenous woman from the Mamu People, Millaa Millaa), "Whose Heritage is it?" <<http://www.environment.gov.au/heritage/strategy/documents.html>> viewed 3 June 2012, 13.

- Protection, conservation and management of biodiversity and heritage in areas outside Commonwealth reserves and conservation zones;
- Consulting and cooperating with other countries with regard to matters relating to the establishment and management of national parks and nature reserves in those countries;
- Provision of training in the knowledge and skills relevant to the establishment and management of national parks and nature reserves;
- Research and investigation relevant to the establishment and management of Commonwealth reserves;
- Making recommendations to the Australian Government Minister for the Environment; and
- Administration of the Australian National Parks Fund.

Parks Australia is responsible for the management of the following national parks:

- *Kakadu National Park*, a World Heritage Area located in the north of the Northern Territory that is managed jointly with the Aboriginal Traditional Owners of the area;
- Uluru - Kata Tjuta National Park, a World Heritage Area located in central Australia that is managed jointly with the Aboriginal Traditional Owners of the Area;
- *Booderee National Park*, located in Jervis Bay Territory, on the southeast Australian coast, that is managed jointly with the local Aboriginal community.
- *Norfolk Island National Park and Botanic Garden*, located on Norfolk Island in the Pacific Ocean off the east Australian coast;
- *Christmas Island National Park*, in the Indian Ocean off the north-west coast of Australia; and
- *Pulu Keeling National Park*, on North Keeling Island in the Indian Ocean off the Western Australian coast.

Parks Australia is also responsible for managing a network of marine parks and research in Commonwealth (Federal) waters beyond three nautical miles from the Australia coast (see Figure 5). The Great Barrier Reef Marine Park, established under the *Great Barrier Reef Marine Parks Act 1975* (Cth) is managed by the Great Barrier Reef Marine Park Authority in collaboration with Queensland Parks and Wildlife Service, local Indigenous groups and other stakeholders.

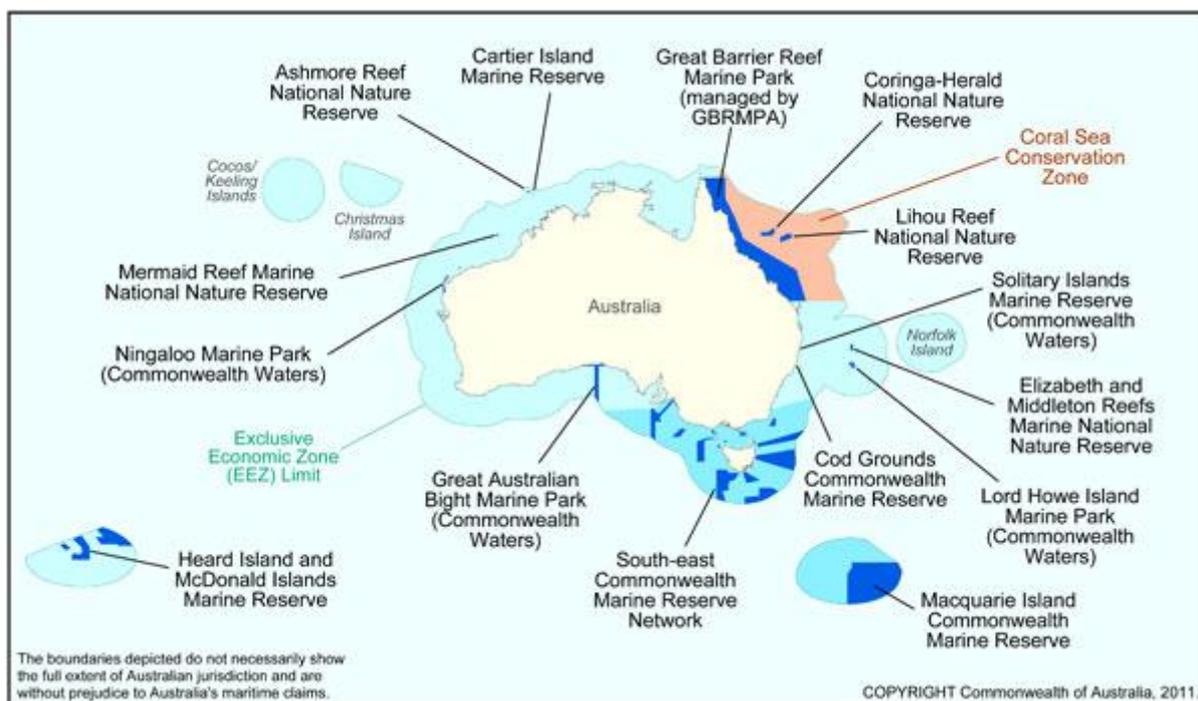


Figure 4: Australia's federal marine protected areas

The *Great Barrier Reef Marine Parks Act* contains several provisions for Indigenous engagement in the management of the marine park, including:

- Indigenous representation on the Board of the Great Barrier Reef Marine Park Authority;
- Indigenous representation on area-based and issues-based advisory committees, including the Indigenous Reef Advisory Committee;
- the accreditation of Traditional Use of Marine Resource Agreements (TUMRAs), which are developed by local Traditional Owner groups to prescribe the traditional use of cultural significant marine resources, including dugongs and marine turtles.

States and territories

The main protected area Acts and management agencies for each state and territory are listed in the table below:

Jurisdiction	Legislation	Management Agency
Australian Capital Territory	<i>Australian Capital Territory (Planning and Land Management Act) 1988 (Cth)</i> <i>Nature Conservation Act 1980</i> <i>Planning and Development Act 2007</i>	National Capital Authority ACT Department of Territory and Municipal Services
New South Wales	<i>Marine Parks Act 1997</i>	New South Wales National

	<i>National Parks & Wildlife Act 1974</i> (and legislation for specific park reservations or estate areas)	Parks & Wildlife Service
Northern Territory	<i>Cobourg Peninsula Aboriginal Land, Sanctuary and Marine Park Act 1981</i> <i>Nitmiluk (Katherine Gorge) National Park Act 1989 (NT)</i> <i>Parks and Reserves (Framework for the Future) Act 2004 (NT)</i> <i>Territory Parks and Wildlife Conservation Amendment Act 2000</i>	Department of Natural Resources, Environment and The Arts
Queensland	<i>Nature Conservation Act 1992</i> <i>Marine Parks Act 2004</i>	Queensland Parks and Wildlife Service
South Australia	<i>Linear Parks Act 2006</i> <i>National Parks and Wildlife Act 1972</i> <i>Marine Parks Act 2007</i>	South Australian National Parks and Reserves
Tasmania	<i>Living Marine Resources Management Act 1995</i> <i>National Parks and Reserves Management Act 2002</i>	Tasmania Parks and Wildlife Service
Victoria	<i>National Parks Act 1975</i> <i>Parks Victoria Act 1998</i>	Parks Victoria
Western Australia	<i>Reserves (National Parks and Conservation Parks) Act 2004</i> (and legislation for specific park reservations or estate areas) <i>Conservation and Land Management Act 1984</i>	Department of Environment and Conservation (Western Australia)

While the management of protected areas is the responsibilities of the individual jurisdictions within which they are located (with the exception of Kakadu National Park and Uluru Kata-Tjuta National Park which are located in the Northern Territory but managed by the Federal Government), collectively Australia's terrestrial protected area network constitutes the National Reserve System of Protected Areas (NRS). The NRS includes more than 9,400 protected areas covering nearly 14 per cent of the country – almost 106 million hectares. It is made up of federal, state and territory reserves, Indigenous lands and protected areas run by non-profit conservation organisations, as well as ecosystems protected by farmers on their private working properties. There is a separate National Reserve System of Marine Protected Areas (NRSMPA).

2.2.2 Shared governance of protected areas

Since about 1975, there has been growing recognition within governments and the wider Australian community of the continuing cultural and economic relationship between Indigenous Australians and the continent's landscape, fauna and flora. This, in turn, has led to the development of various mechanisms for the involvement of Indigenous Australians in the management of protected areas, including the transfer of ownership of some national parks to Indigenous groups and the development of formal co-management arrangements (usually referred to in Australia as "joint management").

These developments have occurred at different rates in different jurisdictions but legislation and policies are now in place in all Australian states and territories to provide some roles for Aboriginal people in protected area governance and/or management, though their implementation remains patchy within and between jurisdictions. Typically, where legal recognition of Aboriginal rights to traditional lands is strong, protected area joint management arrangements provide for significant Aboriginal involvement in decision-making, accompanied by rights to live within and use resources of protected areas, albeit subject to provisions of plans of management. Where such legal recognition is weak or unresolved, Aboriginal input into decision-making tends to be advisory only, and rights to living areas and resource use are often constrained.

The various approaches to joint management in different states and territories reflect differing local histories and differing legal recognition of Indigenous peoples' rights to their traditional lands in each jurisdiction. Joint management arrangements represent both an attempt to find common ground and a trade-off between the rights and interests of Indigenous people and the rights and interests of government conservation agencies and the wider Australian community.

Typically, but not always, joint management arrangements involve the transfer of ownership of a national park to Aboriginal people in exchange for continuity of national park status over the land in perpetuity and shared responsibility for park management.

A key element in these arrangements is that the transfer of ownership back to Aboriginal people is conditional on their support (through leases or other legal mechanisms) for the continuation of the national park. While many Aboriginal Traditional Owners have benefited from and are proud of their involvement in joint management arrangements, they may not have been free to choose whether or not their land should become a protected area. It is an arrangement that can be described variously as a mutually beneficial partnership, or as a partnership of convenience, or as a partnership based on coercion, depending on one's views. Joint-management brings the benefits of recognition and involvement, but can be accompanied by the tensions that stem from contested authorities and cross-cultural partnerships not freely entered into.

Several approaches to joint management are currently in operation across Australia. They differ according to provisions in the enabling legislation, the existence and provisions of a lease, provisions of the plan of management, levels of resourcing and particularities of on-ground management arrangements. Examples of these approaches are summarised below.

Northern Territory:

- ***Garig Gunak Barlu National park***

Garig Gunak Barlu National Park, located 200 km northeast of Darwin in the NT, became Australia's first co-managed protected area in 1981. The key features of the joint management of Garig Gunak Barlu National Park include:

- Declaration of the Park under its own legislation (*Cobourg Peninsula Aboriginal Land, Sanctuary and Marine Park Act 1981*);
- Aboriginal ownership of the Park;
- Board of Management comprising eight members, of whom four are Aboriginal Traditional Owners, and four are representatives of the NT government;
- Board is chaired by one of the Traditional Owner members who also has a casting vote;
- Payment of an annual fee by the government to Traditional Owners for use of their land as a National Park;
- Day to day management by the NT Parks and Wildlife Service; and
- Recognition of the rights of Traditional Owners to use and occupy the Park.

- ***Uluru Kata-Tjuta National Park***

Uluru Kata-Tjuta National Park, located in central Australia and managed by the Australian Government, became Australia's second co-managed protected area in the mid 1980s. The governance arrangements and benefits to the Aboriginal owners of the Park are similar to those in Garig Gunak Barlu National Park, with the important distinction that the Park is leased to the Australian government for a period of 99 years. Recognition of Aboriginal rights to live in, use and jointly manage the Park are laid out in the lease document, rather than in separate legislation as for Garig Gunak Barlu National Park. Membership and powers of the Board of Management are prescribed in the EPBC Act. Similar joint management arrangements have been developed for:

- Two other mainland national parks managed by the Australian Government - Kakadu National Park in the Northern Territory; and Booderee National Park in Jervis Bay Territory; and
- Several national parks managed by the Northern Territory Government, utilising NT legislation (e.g. *Nitmiluk (Katherine Gorge) National Park Act 1989*).

The Australian High Court decision (*Western Australia v Ward* [2002] HCA 28) dealt with a native title dispute in the East Kimberley District in Western Australia and adjoining land in the Northern Territory. A majority found that the establishment of Keep River National Park in the Northern Territory did not extinguish the native title in the area held by the Miriung and Gajerrong peoples, and the operation of the *Racial Discrimination Act 1975* (Cth) was to render ineffective the territory law authorising interests in land without taking account of native title rights and interests not covered by the *Validation (Native Title) Act 1994* (NT). The resulting uncertainty about the validity of many other national parks in the NT led to a negotiated agreement with the two main Aboriginal land councils and new legislation recognising Aboriginal rights and interests in national parks across the Northern Territory.

As a result of this agreement, the NT Government passed the *Parks and Reserves (Framework for the Future) Act 2003* and amended the *Territory Parks and Wildlife Conservation Act 2000* to establish a framework. It allocates 27 protected areas to one of three categories of Indigenous Land Use Agreements and provides for agreements under the *Native Title Act (1993)*. Commitments relating to joint management under the Framework Act include:

- Recognition and incorporation of Aboriginal culture, knowledge and decision making processes;
- Addressing the need for institutional support for capacity building in both management partners; and
- Recognising the importance of community living areas.

Australian Capital Territory

Aboriginal families in the national capital have been involved in the management of Namadgi National Park through an interim Namadgi advisory board and educational, research and conservation programs, such as the 2008 rock art site assessment. Monitoring and maintenance protocols and skills to assist their management were identified for development. The Namadgi National Park Plan of Management 2010 came into effect on 24 September 2010. It permits "Aboriginal cultural camps" subject to negotiation and protocols for the Ngunnawal, Ngarigo and Walgalu people who traditionally used the area. The Plan recognises and will promote Aboriginal connection to land through interpretative activities delivered, as far as practicable, by Aboriginal people. Heritage management partnerships and/or formal agreements with individuals, families and communities having traditional links to Namadgi and with community groups having an interest in cultural heritage management will be established.

Queensland

A modified form of the joint management approach used for Uluru Kata-Tjuta National Park was developed in Queensland in the early 1990s (*Aboriginal Land Act 1991* and *Nature Conservation Act 1991*), but the Queensland Government's insistence at that time that lease-back of jointly managed parks to the government should be in perpetuity for no lease

payment meant that no transfer to Aboriginal ownership or joint management of protected areas occurred under that legislative regime because Aboriginal Traditional Owners did not accept those conditions.

In 2007 the *Cape York Peninsula Heritage Act (Qld)* amended the *Nature Conservation Act* to provide for:

- A new category of national park called '*National Park (Cape York Peninsula Aboriginal Land)*';
- Such areas to be managed as national parks but in a way that is, as far as possible, compatible with Aboriginal tradition for the area;
- Transfer of all national parks on Cape York to the new category;
- Land to be granted freehold but leased in perpetuity to the state;
- Creation of Indigenous Management Agreements (IMAs) that provide for detailed local requirements;
- Regional and sub-regional committees comprised of representatives of Indigenous people, including representatives from Aboriginal land trusts; and
- A Regional Protected Area Management Committee (RPAMC) with representation from sub-regional committees or Indigenous regional organisations in the Cape York Peninsula Region ` to advise the responsible Minister about matters relating to the protected area estate in Cape York Peninsula including:
 - park management plans;
 - employment opportunities to increase Indigenous representation in the national park workforce;
 - provision of resources for management of the protected areas.

Several Aboriginal-owned and jointly managed national parks have now been established in Cape York Peninsula under these provisions. Negotiations for establishing similar joint management arrangements for a national park on Stradbroke Island near Brisbane are currently underway, while statutory provisions for joint management of protected areas elsewhere in Queensland are currently not available.

Meanwhile, some Aboriginal groups elsewhere in Queensland are utilising the framework of Indigenous Protected Areas (IPAs) as an alternative pathway to co-management of protected areas (see further discussion on IPAs below).

Western Australia

There is a long history, going back to the 1970s, of attempts to negotiate comprehensive joint management arrangements for national parks in Western Australia (WA). The difficulties in achieving joint management are in part due to the failure of WA governments

to implement the recommendations of the 1983 Aboriginal Land Inquiry in that state. The WA government released a co-management discussion paper in 2003 indicating support for co-management arrangements consistent with the Uluru approach and negotiations are underway to implement such arrangements as part of the negotiation of native title determinations in parts of the Kimberly region. Meanwhile, park councils were established for some existing WA national parks to provide an advisory role for Aboriginal people in park management.

As a result of native title claims under the federal *Native Title Act*, several agreements were reached to jointly manage several protected areas in the north of Western Australia:

- The Yoorrooyang Dawang Regional Park Council was established in 2006 to facilitate the development of a Parks Management Plan, and develop local Indigenous training and employment opportunities in the management of conservation parks. The agreement provides for a range of benefits to the Miriwung and Gadjerrong Corporation which will hold freehold title over the conservation areas, to be leased back to the state under a joint management arrangement between the Department of Environment and Conservation (DEC) and the Corporation.
- In 2010 the Yawuru Area Agreement ILUA, DEC provided for the negotiation of joint management of a 'conservation estate' to include freehold land, town site areas, and Cable Beach intertidal areas under the *Land Administration Act 1997 (WA)*, and also over Roebuck Bay.

In 2011 the *Conservation and Land Management Act 1984 (CALM)* and the *Wildlife Conservation Act 1950* were amended to enable joint management between DEC and other landowners including Aboriginal people, of lands and waters including private land, CALM Act reserve land, pastoral lease and other Crown land above the low water mark. The amended legislation also gives force to the earlier native title agreements referred to above.

South Australia

The South Australian government has developed several mechanisms to recognise Aboriginal interests in protected areas, including:

- Protected areas owned by an Aboriginal group and managed by a board representing Traditional Owners and the government;
- Protected areas owned by the state, leased to an Aboriginal group and managed by a board; and
- Protected areas owned by the state with an advisory structure that includes Aboriginal representatives.

Witjira National Park, located in the north of SA, was established in 1985 under an agreement between the Aboriginal Traditional Owners, represented by the Irrwanyere Aboriginal Corporation, and the South Australian Government. The agreement provides for a Board of Management and recognition of Aboriginal rights and interests similar to the Uluru approach. A significant difference, however, is that Witjira National Park remains

under government ownership and is leased to the Irrwanyere Aboriginal Corporation for a period of 99 years.

In 2004 Mamungari Conservation Park (formerly known as the Unnamed Conservation Park in the north of South Australia) in the north of the state became the first (and currently the only) government-declared protected area to be owned by Aboriginal people in South Australia.

In 2008 the Mannum Aboriginal Community Association Incorporated (MACAI) entered into a co-management agreement for the management of Ngaut Ngaut Conservation Park near Mannum, although decision-making power ultimately resides with the state.

Elsewhere in South Australia, Aboriginal groups have negotiated levels of involvement in park management that may not formally be regarded as joint management, but nevertheless involve recognition and benefits to local Aboriginal traditional Owners. In Vulkathunha-Gammon Ranges National Park, in the state's mid north, for example, all park staff are currently local Adnymathanha Traditional Owners.

Tasmania

No formal joint management arrangements are in place for any national parks in Tasmania. However, Aboriginal people do participate on advisory councils for national parks, and have direct involvement in the recording and maintenance of cultural sites within national parks. In 1995, the Tasmanian Parliament passed legislation transferring title to Aboriginal people over 12 parcels of land, totalling approximately 4500 hectares. The land includes areas and places of cultural, spiritual or historical importance to Aboriginal people; some of the areas lie with existing protected areas, or comprise historic reserves such as Oyster Cove and Risdon Cove.

Victoria

Until 2010 Aboriginal people in Victoria had secured scant practical recognition of their social economic and cultural rights despite protracted litigation through the native title system. No formal joint management arrangements were in place for any national parks, although Aboriginal people were extensively involved in cultural site management and were represented on some advisory committees and had responsibilities for the management of cultural centres (e.g. Brambuk Cultural Centre at Gariwerd National Park).

In 2004, Victoria's Aboriginal people were recognised as the 'original custodians of the land' in the state Constitution, and in 2006 Victoria's *Charter of Human Rights and Responsibilities Act 2006* (Vic) included rights to identity and culture.

A significant reform was enacted in 2010, when the Traditional Owner Settlement Act provided for the recognition of traditional owner groups in Victoria, and for agreements to give effect to traditional land and natural resource rights. The legislation was enacted in response to perceived difficulties with the native title system, which required assessments of whether previous dealings with parcels of land had extinguished native title, which was a complex and expensive process that created uncertainty for many stakeholders and created often-insuperable hurdles for Traditional Owners.

In 2008, the Victorian Government established a Steering Committee for the Development of a Native Title Settlement Framework comprising key government agencies, traditional owner representatives from the peak Victorian Traditional Owners Land Justice Group, and representatives from Native Title Services Victoria. It was chaired by prominent Indigenous Australian and 2009 Australian of the Year, Professor Mick Dodson. In 2009 the Government accepted the committee's report and recommendations, subject to Commonwealth funding.

The *Traditional Owner Settlement Act 2010* (Vic) enables the Victorian Government to negotiate Indigenous Land Use Agreements registrable under the *Native Title Act 1993* (Cth) directly with traditional owner groups, and to recognise traditional rights in relation to access, ownership, management, use, and development of certain public land, provided native title litigation is not pursued. Under the Act, overarching “recognition and settlement” agreements sit above sub-agreements. “Land agreements” deal with land grants or joint management of land, including national and state parks. Registrable “land use activity agreements” will recognise and protect traditional owner rights in public land, as well as existing third party rights in relation to four types of future acts. The Victorian Civil and Administrative Tribunal (VCAT) has jurisdiction to resolve disputes where a proponent and a traditional owner group entity have been unable to agree about activities proceeding. “Funding agreements” establishing income-earning trusts will be negotiable to support traditional owner corporate entities to perform their functions. “Natural resource agreements” will deal with non-commercial forms of access and use of natural resources such as traditional hunting and gathering for personal, domestic or non-commercial communal needs.²³

New South Wales

There are several statutory and non-statutory joint management arrangements in place for national parks in New South Wales. These include:

- Aboriginal ownership and lease-back of national parks under the *Parks and Wildlife Act 1974*;
- Indigenous Land Use Agreements, based on credible evidence or determination of native title, setting out how native title rights and interests will be recognised in park management; and
- Memoranda of Understanding between the National Parks and Wildlife Service and an Aboriginal community, setting out each group's shared involvement in park planning and management.

Other options include informal agreements between Aboriginal communities and the NPWS, and Aboriginal participation in NPWS advisory committees.

The locations of current and potential jointly managed national parks in New South Wales are shown in Figure 6.

²³ Victorian Parliament. Premier John Brumby MP, “Second reading speech Traditional Owner Settlement Bill”, Hansard, 28 July 2010, 2750–2755.

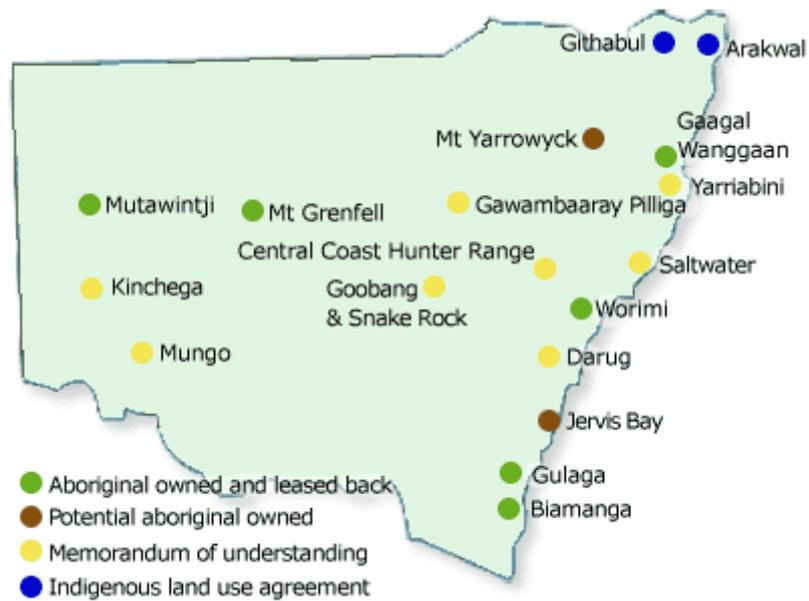


Figure 5: Map showing jointly managed national parks in New South Wales

Native title and joint management

As noted above, the determination of native title over national parks has stimulated the development of joint management legislation in several jurisdictions. But even in the absence of specific joint management legislation, recognition of native title, typically through the development of an Indigenous Land Use Agreement (ILUA) under the *Native Title Act 1993* (Cth), provides additional opportunities for Indigenous people to negotiate joint management or other involvement in the management of protected areas.

In 2001, Arakwal National Park, on the north coast of NSW, was the first protected area in Australia to be established under an ILUA. The Arakwal ILUA recognises Aboriginal rights to use traditional resources within the Park (subject to a Plan of Management) and provides for a Joint Management Committee that advises the NSW National Parks and Wildlife Service about the management of the Park. Unlike the Boards of Management in statutory joint management arrangements, however, the Arakwal Joint Management Committee does not have decision-making powers.

The determination of Djabugay people’s native title in 2004 led to the negotiation of an ILUA outlining Djabugay native title rights and interests in Barron Gorge National Park in north QLD, including the rights to hunt, fish, camp, conduct ceremonies and protect cultural sites. The ILUA also provides for the involvement of Djabugay people in the development of a Plan of Management, but falls short of delivering comprehensive joint management arrangements.

The diversity of approaches to the engagement of Indigenous people in Australian protected areas has been summarised in Smyth and Ward (2009) and Bauman and Smyth (2007a). The policy implications are discussed in Smyth and Bauman (2007b). Earlier overviews of Indigenous involvement in protected area management across Australia are summarised in Smyth (2001a) and Smyth (2001b) for terrestrial and marine protected areas respectively.

2.2.3 World Heritage Sites

The federal EPBC Act provides automatic protection for world heritage properties and imposes substantial civil and criminal penalties on a person who takes an action that has, will have or is likely to have, a significant impact on the world heritage values of a declared World Heritage property.

The EPBC Act sets out an environmental impact assessment process for proposed actions that will, or are likely to, have a significant impact on the world heritage values of a declared World Heritage property. This process allows the Commonwealth Minister to grant or refuse approval to take an action, and to impose conditions on the taking of an action.

All properties that have been inscribed on the World Heritage List are automatically “declared World Heritage properties” and are therefore protected. The EPBC Act also gives the Commonwealth Minister for the Environment the power to declare other properties where:

- The property has been nominated for, but not yet inscribed on the World Heritage List, or
- The property has not been nominated for World Heritage Listing but the Minister believes that the property contains world heritage values that are under threat.

Of the 19 Australian World Heritage sites, two (Kakadu National Park and Uluru Kata-Tjuta National Park) are owned and jointly managed by Aboriginal Traditional Owners, as described above. Other World Heritage Sites, such as the Wet Tropics of Queensland and the Great Barrier Reef have specific legislation that prescribes Aboriginal representation on management boards and advisory committees and a degree of recognition of Aboriginal cultural values in management of the sites. However, the designation of these areas as World Heritage Sites did not occur with the free, prior and informed consent of the Aboriginal peoples associated with these areas; such consent was not required by the World Heritage Committee at the time these properties were added to the World Heritage List.

Three current initiatives indicate the development of new approaches to addressing Indigenous interests in World Heritage nomination:

- In the Wet Tropics of Queensland extensive research and consultation has taken place to initiate the possible re-listing of the area for its Aboriginal cultural values, in addition for the natural and scenic values for which it was originally listed.
- In Victoria the Gunditjmarra Traditional Owners are leading the development of a World Heritage nomination for part of their traditional Country²⁴ over which they have already succeeded in achieving National Heritage status; and

²⁴ An area of lava flow and wetlands in which Aboriginal people have maintained a complex system of weirs and other management strategies to sustainably harvest freshwater eels, which formed a key resource for permanent Aboriginal settlements in the area.

- In Cape York Peninsula, the Queensland and Australian governments are leading a consultation and assessment process for the nomination of parts of the Peninsula for World Heritage, with assurances that no areas will be included in a nomination without the consent of the Traditional Owners.

2.2.4 Indigenous Protected Areas

Indigenous Protected Areas (IPAs) emerged from the Australian Government’s 1992 commitment to establish a system of protected areas that is comprehensive, adequate and representative of all the terrestrial bioregions of Australia – the National Reserve System (NRS). As some of the bioregions occur only on Aboriginal-owned land, a program was developed in collaboration with Indigenous representative organisations to provide funding and other support to enable Indigenous groups to establish protected areas on their own lands. IPAs are planned, voluntarily declared (or dedicated) as protected areas and managed by Indigenous people themselves; the IPA Program is an Australian Government initiative to support these activities, and to formally recognise IPAs as part of the NRS, but the IPAs are not government protected areas.

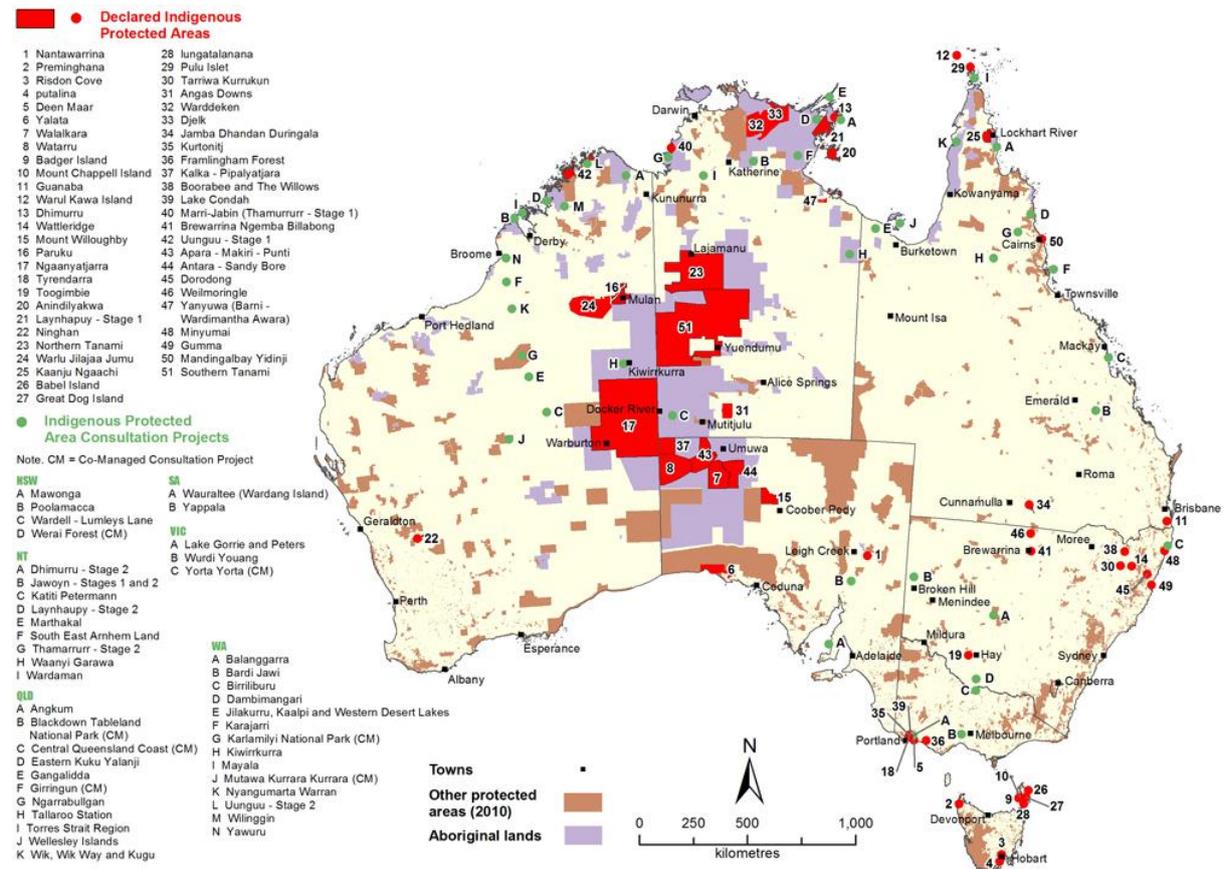


Figure 6: Map of Indigenous Protected Area projects in Australia (July 2012)

In recognition that many government protected areas had already been established on traditional estates without Indigenous peoples’ consent, the IPA Program also includes funding to enable Indigenous peoples to negotiate enhanced engagement in the management of existing government-declared national parks and other protected areas.

The first IPA was established in Nantawarrina in South Australia in 1998 and there are now over 50 IPAs across all Australian states and mainland territories (except the Australian Capital Territory) – see Figure 7 below. There are currently an additional 34 IPA projects being planned, as well as seven “co-management” IPA projects focusing on enhanced Indigenous engagement in existing protected areas. Funding and advice to support the planning and management of IPAs is provided by the Australian Government but IPAs are established by Indigenous people independently of legislation, in accordance with the International Union for the Conservation of Nature (IUCN) protected area *Guidelines* which state that protected areas can be managed by “*legal and other effective means*”. In practice, IPAs are typically managed by a combination of legal means (land ownership, community by-laws, legislated rights to use natural resources etc.) and other effective means (customary law, ranger patrols, liaison, education, signage, partnerships with conservation agencies, research etc.). IPAs are a form of ICCA that formally contribute to the national and international protected area system.

A national meeting of Indigenous representatives in 1997 defined an IPA in the following way:

An Indigenous Protected Area is governed by the continuing responsibilities of Aboriginal and Torres Strait Islander peoples to care for and protect lands and waters for present and future generations.

Indigenous Protected Areas may include areas of land and waters over which Aboriginal and Torres Strait Islanders are custodians, and which shall be managed for cultural biodiversity and conservation, permitting customary sustainable resource use and sharing of benefit.

This definition includes land that is within the existing conservation estate, that is or has the ability to be cooperatively managed by the current management agency and the Traditional Owners.

For the first 13 years of the IPA Program, IPAs were established only on Indigenous-owned land, and IPAs now comprise over 25% of the total terrestrial protected area estate (the National Reserve System). More recently, some Indigenous groups whose traditional estates have been alienated by the establishment of government national parks, forest reserves, marine protected areas etc. have been exploring the idea of establishing IPAs that co-exist with government protected areas. The first of these IPAs based on Indigenous Country rather than Indigenous tenure was dedicated by Mandingalbay Yidinji people over their traditional estate near Cairns in north-east Queensland in December 2011.²⁵ The Mandingalbay Yidinji IPA includes all or part of the following government-declared conservation areas: national park, forest reserve, environmental reserve, terrestrial and marine world heritage areas, marine park, fish habitat area and local government reserve. The IPA management plan²⁶ provides the framework for the recognition of Mandingalbay Yidinji cultural rights, interests and values across all the tenures within the IPA. Dedication of the IPA has been recognised by each of the government agencies with legal responsibility

²⁵ www.environment.gov.au/indigenous/ipa/declared/mandingalbay

²⁶ See www.djunbunji.com.au

for the management of the separate tenures within the IPA and collaboration occurs through an implementation committee chaired by a representative of Mandingalbay Yidinji people. Further Country-based, multi-tenure IPAs are expected to be declared or dedicated²⁷ by other Indigenous groups in the coming years.



Mandingalbay Yidinji Indigenous Protected Area, Queensland

While the Australian Government’s IPA Program is initially the main source of funding for IPA planning and contributes to ongoing IPA management, most IPAs also develop partnerships with other government agencies, conservation NGOs, research institutions, philanthropic organisations and commercial corporations, and engage in fee-for-services activities, such as undertaking surveys for the Australian Quarantine and Inspection Service (AQIS). In the Northern Territory the government conservation agency has developed a program to co-locate its rangers or scientists on IPAs by invitation of the IPA managers, thereby providing additional day-to-day resources for managing the IPAs without threatening the autonomy of IPA managers.

Australia’s terrestrial protected area estate (the National Reserve System) totals about 106 million hectares (about 14% of the nation’s total land area), of which about 36.5 million hectares are contributed by IPAs. This large and growing protected area network represents both a challenge and an opportunity to Indigenous peoples’ economic opportunity and connection to Country. For many Indigenous groups, protected areas have alienated them from their traditional estates as part of the wider colonial project that led to dispossession and catastrophic cultural changes. For an increasing number of Indigenous groups, however, protected areas present an opportunity to strengthen culture and identity through employment and governance partnerships that are valued by the Indigenous community and the wider Australian society. Protected areas as a focus for reconciliation rather than dispossession is a relatively recent phenomenon and the journey is continuing. Of particular interest is the convergence of national parks (and other government protected areas) and IPAs, which began as very separate protected area concepts and which are now showing signs of merging as a contemporary expression of Country.

Conclusions

²⁷ The first 49 IPAs were “declared” by their respective Indigenous groups; Mandingalbay Yidinji people chose to use the term “dedicate” when establishing their IPA because it was found to engender greater acceptance among their government agency partners and is consistent with the IUCN protected area definition.

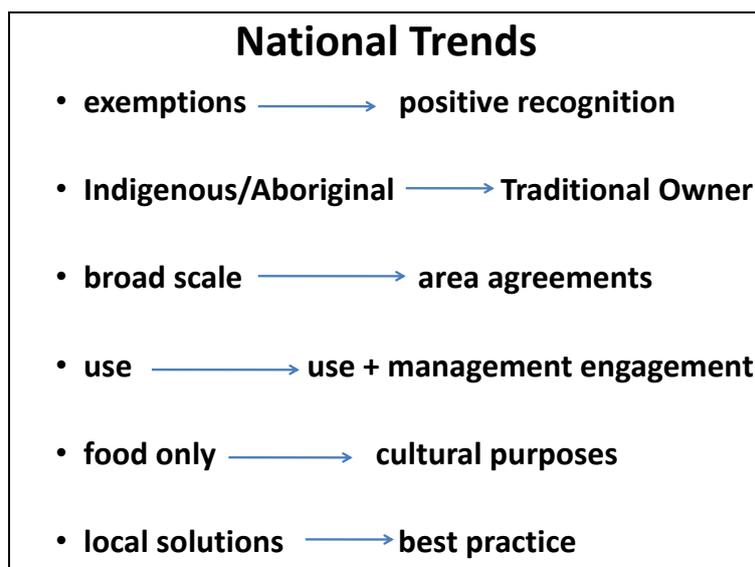
IPAs developed as an innovative response to a reconsideration of the IUCN’s PA Guidelines and a conceptual re-evaluation of how PAs could be established and managed in Australia. The first IPAs were declared in response to Aboriginal and Torres Strait Islander communities’ desires to remain connected with their Country and to continue their cultural obligations, which dovetailed well with governments’ interests in developing an NRS that represented all of Australia’s bioregions in the Interim Biogeographic Regionalisation of Australia. Governments recognised that there were many common interests to be met by partnering with and providing support to IPA initiatives. Across Australia, more than 50 IPAs had been declared as at 2012. The enthusiasm amongst Indigenous communities for IPAs has outstripped the capacity of the Australian Government’s IPA Program budget to provide appropriate support, but this is likely to ensure that the Program will continue to evolve and innovate in response to recognised needs.

3. NATURAL RESOURCES, ENVIRONMENTAL LAWS AND POLICIES

3.1 Natural Resources and Environment

Indigenous management of Country, through shared governance of government protected areas (joint management), Indigenous Protected Areas or other areas that may be considered ICCAs (though not known by this term in Australia) is supported by laws and policies in each jurisdiction that provide differing levels of access and rights to use culturally significant natural resources and environments.

The term Free Standing Right (FSR) is used in the table on the following page to indicate the presence, absence or extent of legal recognition of Indigenous peoples’ right to access and use customary resources. While considerable differences exist between jurisdictions, there is a general trend in legislation and policies towards greater recognition of Indigenous rights to use and manage natural resources of cultural significance, as summarised in the box below.



National trends in the statutory recognition of Indigenous rights to access and use natural resources

Exemptions to positive recognition

Earlier legislation relating to both terrestrial and marine resources tends to provide recognition of Indigenous rights to natural resources, if at all, through exemption from licencing requirements or defence against prosecution on the basis of Aboriginality and/or engaging in traditional cultural practices. More recent legislation (e.g. fisheries legislation in NSW and South Australia) provides positive statutory recognition of Aboriginal rights to access and use of traditional resources.

Indigenous/Aboriginal to Traditional Owner

Earlier legislation relating to both terrestrial and marine resources tends to provide recognition, if at all, to Indigenous people generally, albeit with some reference to engaging in “traditional” or “customary” practices. More recent legislation, in part influenced by the *Native Title Act* 1993 (Cth), tends to provide greater emphasis on the connections of particular Indigenous people (i.e. Traditional Owners) to particular areas (i.e. traditional Country).

Table 1: Legislative recognition of Indigenous rights to access and use natural resources in Australian jurisdictions, including fishing as an example

Jurisdiction	Use of Natural Resources	Access	Recognition of Aboriginal fishing	Exemption from recreational fishing licence
Commonwealth [EPBC Act also applies to external territories]	<i>Native Title Act 1993</i> <i>Environment Protection and Biodiversity Conservation Act 1999</i> <i>Great Barrier Reef Marine Park Act 1975</i> <i>Environment Protection and Biodiversity Conservation Act 1999</i> <i>Torres Strait Fisheries Act 1984</i> <u>Fisheries Management Act (Commonwealth)</u>	rights of Indigenous peoples with a native title right to hunt, gather, collect and fish or conduct a cultural or spiritual activity are protected.		

	1991			
Victoria	Negotiable in natural resource agreements under <i>Traditional Owner Settlement Act 2010</i> ; by permit or Authorisation Orders under the <i>Fisheries Act 1995</i> (Vic); <i>Charter of Human Rights and Responsibilities Act 2006</i> (Vic) an interpretative aid Parks Victoria Act 1998 National Parks Act 1975 Wildlife Act 1975 Flora and Fauna Guarantee Act 1988 <i>Fisheries Act 1995</i>	By permit	“Traditional” use included as an objective of the Act. Permit required to take fish for Indigenous cultural ceremony	No
New South Wales	Freestanding right (FSR) under the <i>Fisheries Management Act 1994</i> (NSW) <i>National Parks and Wildlife Act 1974</i> (NSW) <i>Marine Parks Act 1997</i> (NSW)	FSR to negotiate	“Aboriginal Cultural Fishing” recognised as a distinct fishery statutory Aboriginal Fishing Advisory Council (AFAC) established. Meeting agendas and outcomes are accessible online.	Yes
South Australia	FSR under <i>Fisheries Management Act 2007</i> (SA) <i>National Parks and Wildlife Act 1972</i> <i>Wilderness Protection Act 1992</i> <i>Native Vegetation Act 1991</i>	an aboriginal traditional fishing management plan can be made and published for a zoned area under an ILUA	“Aboriginal traditional fishing” for “personal, domestic or non-commercial communal needs” recognised.	Not always

			Conditional permits can be issued by the Minister.	
Tasmania	Licence exemption for non-commercial sea fishing and processing under <i>Living Marine Resources Management Act 1995</i> , <i>National Parks and Reserves Management Act 2002</i> , <i>Threatened Species Protection Act 1995</i> , <i>Nature Conservation Act 2002</i>	all fisheries rules apply except for licence requirement. Total allowable catch can be set.	“Aboriginal activity” (non-commercial use and taking for manufacture of artefacts) in relation to the sea and its resources recognised. Permit for Aboriginal cultural and ceremonial activities may be requested if activity otherwise unlawful.	Yes
Western Australia	FSR (except for nature reserves & wildlife sanctuaries) under <i>Fish Resources Management Act 1994</i> and <i>Conservation and Land Management Act 1984</i>	By connection or with consent of Traditional owners FSR on pastoral leases	Aboriginal Customary Fishing Policy 2009 applies for non-commercial, cultural fishing. No licence needed, with exceptions)	Yes
Queensland	Defence to prosecution under <i>Fisheries Act 1994</i> (Qld) FSR on Aboriginal Community land only By permit in national parks Subject to management plans on Aboriginal-owned parks <i>Biodiscovery Act</i>	FSR on Aboriginal Community land By permit on National Parks Accreditation of Traditional Use of Marine Resource Agreements in the GBR Marine Park	Aborigines fishing according to Aboriginal tradition and Torres Strait Islanders fishing according to Islander custom protected from prosecutions (though fishing apparatus can be proscribed) Special	n/a

	<i>2004 Nature Conservation Act 1992 Marine Parks Act 2004</i>		recognition of Torres Strait Islander customary fishing - <i>Torres Strait Treaty</i>	
Northern Territory	<i>FSR under Fisheries Act (NT) Biological Resources Act 2006 Territory Parks and Wildlife Conservation Act</i>	FSR	Aboriginals who have traditionally used the resources of an area of land or water in a traditional manner are exempt from provision of the <i>Fisheries Act</i>	n/a
Australian Capital Territory	<i>Nature Conservation Act 1980 Human Rights Act 2004 (ACT) an interpretative aid; recognises cultural rights.</i>	<i>Human Rights Act 2004 (ACT) an interpretative aid; recognises cultural rights.</i>	<i>Human Rights Act 2004 (ACT) an interpretative aid; recognises cultural rights.</i>	n/a

Broad Scale to Area Agreements

As part of the trend to give greater recognition to Traditional Owners' connection to their traditional Country, there is a trend to refine jurisdiction-wide rights through the recognition of area-based rights, sometimes delineated by a formal agreement. The negotiation of native title framework agreements in Victoria is consistent with this national trend.

Use to Use + Management

Earlier legislation that recognised Indigenous traditional use of natural resources tended to be associated with little or no statutory mechanisms for Indigenous involvement in the management of the resources to which they had a statutory right to use. More recent legislation, policy and practice tend towards far stronger links between use rights and management engagement.

Food Only to Cultural Use

Earlier legislation, some of which remains current, restricts recognition of Indigenous rights to access and use of natural resources for the purpose of personal, domestic food consumption. More recent legislation and policy tends to recognise the broader relationship between Traditional Owners and their traditional Country, which includes the use (and

management) of traditional resources for domestic and communal food gathering, medicinal purposes, ceremonial purposes and maintenance and transmission of traditional knowledge and practices.

Local Solutions to Best Practice

Earlier legislation and policies were based on local solutions to address what were perceived as local issues. More recently there has been a growing awareness that recognition of Indigenous peoples' right to access, use and manage their traditional environments and resources is a matter of national and global concern, with the development of best practice solutions to address those concerns. Internationally, the Convention on Biological Diversity, to which Australia is a signatory, has played a major role in encouraging governments to link the recognition of Indigenous environmental and natural resource rights to the conservation and sustainable use of biodiversity. This and other relevant international instruments have been supported by the United Nations Declaration on the Rights of Indigenous People, which Australia ratified in 2009. While there will always be a need to tailor legislative and policy measures to local contexts, increasingly these are being informed by national and international best practice.

How is the FSR operationalised?

In most jurisdictions, management agencies devote few operational resources to monitoring or managing the exercise by Traditional Owners of their FSR to use natural resources *per se*. Fisheries agencies, however, are beginning to establish dedicated staff positions or advisory bodies to support the development and implementation of Indigenous fishing strategies.

Increasingly, Traditional Owners are "operationalising" their FSR by developing their own plans and strategies which they then use to build partnerships to manage and monitor the natural resources to which they have statutory rights. Much of the funding and technical support for these Traditional Owner-led initiatives currently comes from Commonwealth Government programs (such as Caring for Our Country, Working on Country and the Indigenous Protected Area Program), though increasingly state and territory agencies are also supporting these initiatives.

3.2 Traditional Knowledge, Intangible Heritage, Culture

Australia is a party to the Convention on Biological Diversity and mechanisms for equitably sharing the benefits of access to genetic resources, particularly where traditional knowledge is involved, have been developed with reference to the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilisation. This followed the endorsement in 2002 by the Natural Resource Management Ministerial Council of an intergovernmental agreement - the Nationally Consistent Approach for Access to and the Utilisation of Australia's Native Genetic and Biochemical Resources. Detailed information on the legislation applicable in each jurisdiction is accessible on

government websites and in Australia's national reports under the Convention, as are the papers from a national forum in 2011 on biodiscovery and traditional knowledge.²⁸

Australia is a signatory to various international legal and policy instruments that contribute to the protection of Indigenous traditional knowledge innovations and practices, including:

- International Covenant on Economic, Social and Cultural Rights;
- International Covenant on Civil and Political Rights;
- Convention on Biological Diversity;
- Convention on the Elimination of all Forms of Racial Discrimination;
- Convention on the Rights of the Child;
- Rio Declaration on Environment and Development; and
- United Nations Declaration on the Rights of Indigenous Peoples.

Intellectual property is protected under various intellectual property laws, including the *Copyright Act 1968* (Cth), the *Patents Act 1990* (Cth) and the *Trademarks Act 1995* (Cth), but these laws offer limited scope for the recognition of Indigenous information. Indigenous traditional knowledge is recognised in environmental protection regulations, particularly concerning knowledge held by Indigenous people about biological resources.

The *Native Title Act 1993* (Cth), establishes principles for the recognition of customary property rights, including rights in knowledge, based on the traditional laws and customs observed and practiced by the native title holders. While Traditional Owners are required to disclose their traditional knowledge in order to have their native title recognised, it provides some protection for Indigenous traditional knowledge particularly in relation to information about particular sites that may be classified by the Traditional Owner groups as being sacred. This information is classified as confidential, in many instances held by the Native Title Representative Body or Land Council, and access is restricted only to those who have been nominated by the Traditional Owners of that information.

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1986* also has the potential to provide broader protection for Indigenous traditional knowledge. The purpose of this legislation is to preserve and protect areas and objects on lands and waters that are of particular significance to Indigenous people in accordance with their traditional law and custom. Although this legislation is currently limited to the protection of physical heritage, and provides no mechanism to protect the secret and sacred knowledge relating to significant areas, the Minister has the power to make a declaration in relation to areas of significance to Indigenous peoples which are under threat.

²⁸ *Australia's Fourth National Report to the United Nations Convention on Biological Diversity March 2009* <http://www.cbd.int/doc/world/au/au-nr-04-en.pdf>; Australia, Department of Sustainability, Environment, Water, Population and Communities, 'Australia's Biological Resources' <http://www.environment.gov.au/biodiversity/science/access/forum.html> viewed 4 June 2012

Provisions provide for both emergency coverage of threatened areas for up to 60 days, and coverage for longer periods of time as declared by the Minister. Additionally, the National Heritage List and the Commonwealth Heritage List are established under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act), the Australian Government's central piece of environmental legislation. However, this Act and the Heritage lists are limited to matters of national environmental significance. Issues of non-national significance come under the jurisdiction of the states.

The Australian Heritage Council, the expert advisory body on heritage matters which draws on the knowledge of Indigenous experts, and the Indigenous Advisory Committee (IAC) provide advice to the Minister on the operation of the EPBC Act taking into account their knowledge of the land, conservation and the use of biodiversity.

At the local level, Indigenous people are also actively developing strategies for recording and protecting their traditional knowledge. For example, Traditional Owners on Cape York Peninsula have been actively recording their knowledge about the biodiversity and ecosystems of their lands and waters, through the Traditional Knowledge Revival Pathways (TKRP). Through a grassroots methodology, the project is connecting Indigenous groups, to recognise and strengthen traditional knowledge to benefit environment and community well being, for present and future generations.

Many other Indigenous groups have initiated projects, often with the support of government grants, to record, store and transmit traditional knowledge using digital recording, storage and retrieval technology. Increasingly access to this technology provides opportunities for younger generations to access information held by elders and to apply this knowledge to management of traditional Country.

Another form of information recording undertaken in some areas is "Use and Occupancy Mapping", which documents how Country has been and is used by individuals and groups, as well as the knowledge associated with that use, and then representing this information geo-spatially. This approach recognises the contemporary influences on the lives of Indigenous people, such as changing technologies and introduced natural resources since the time of British colonisation, rather than exclusively focusing on ancient "traditional" knowledge alone.

Traditional knowledge is far from secure in Australia. The Australian Institute of Aboriginal and Torres Strait Islander Studies has identified the following threats:

- Political pressures – the recognition and standing of Indigenous traditional knowledge, including involvement in policy and legislative development;
- Cultural integrity;
- Social and economic pressures – assimilation, poverty, education, marginalisation of women, loss of language;
- Territorial pressures – deforestation, forced displacement and migration;
- Exploitation of traditional knowledge – bio-prospecting, objectification;

- Development policy – agricultural and industrial development; and
- Globalisation and trade liberalisation.

4. HUMAN RIGHTS

As noted above, Australia is a party to many international human rights instruments, and litigation based on the legislation incorporating international human rights obligations into domestic law has had a profound impact on the evolution of Aboriginal and Torres Strait Island peoples' rights in relation to Country. The Australian Parliament passed the *Racial Discrimination Act* in 1975 for example, to incorporate the Convention on the Elimination of All Forms of Racial Discrimination into Australian law. In *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, by a narrow majority, the High Court of Australia upheld the Act as an implementation of the Convention in exercise of the Constitution's external affairs power. The Act was relied on to overturn the Queensland Government's attempt to block the purchase of a lease over traditional Country. In a later case, *Mabo and Another v The State of Queensland and Another Date* (1988) 166 CLR 186, the High Court held 4:1 that Queensland Government legislation attempting to extinguish native title rights was invalid for inconsistency with the *Racial Discrimination Act*. More recently the Act has been used to hold a newspaper publisher liable for comments posted by readers underneath articles in the online version of the paper, which amounted to racial vilification.²⁹ In September 2011 two articles written by an Australian columnist had also been found to constitute racial vilification under the Act.³⁰

Australia's human rights framework has been the subject of a national reform consultation in recent years, but recommendations made in 2009 that a national bill of rights be enacted were not accepted by the Australian Government. In December 2008, the Commonwealth Attorney-General announced a national public consultation into the need for better human rights protection in Australia. In October 2009 the report of the National Human Rights Consultation recommendations numerous ways to improve the promotion and protection of human rights in Australia, including through the enactment of a statutory national bill of rights. In April 2010, the Australian Government released its 'Human Rights Framework for Australia' which instead included features such as:

- A broad range of education initiatives to promote a greater understanding of human rights in Australia;
- The establishment of a Parliamentary Joint Committee on Human Rights to scrutinise legislation for compliance with international human rights obligations;
- A requirement that each new Bill introduced into Parliament be accompanied by a statement of compatibility with international human rights obligations;
- combining federal anti-discrimination laws into a single Act to remove unnecessary regulatory overlap and make the system more user-friendly; and

²⁹ *Clarke v Nationwide News Pty Ltd trading as The Sunday Times* [2012] FCA 307 (27 March 2012)

³⁰ *Eatock v Bolt* [2011] FCA 1103 (28 September 2011)

- creating an annual NGO Human Rights Forum to engage non-government organisations on human rights matters.³¹

The Australian Government is also developing a new National Human Rights Action Plan following consideration of a detailed a Baseline Study of key human rights issues for Australia and existing measures to address them. Proposed measures in the Action Plan that are of particular significance to Aboriginal and Torres Strait Islander people include:

- Developing better data collection and rights indicators;
- A new Federal Children's Commissioner;
- A National Disability Insurance Scheme;
- Investigating ways that the justice system can better address mental illness and cognitive disability;
- Research into rates of imprisonment, with a focus on vulnerable groups and alternative sentencing options; and
- A new National Anti-Racism Partnership and Strategy led by the Australian Human Rights Commission.³²

The Australia Government submits national reports to international treaty bodies as required, and in response to the use of treaty complaints mechanisms,³³ but it has attracted some criticism following scrutiny of its response to various expert human rights committee recommendations.³⁴

Australia's administrative machinery for addressing human rights issues in Australia has had a strong influence on improving Aboriginal and Torres Strait Islander peoples' rights. The Commonwealth established what is now known as the Australian Human Rights Commission (AHRC), in 1981.³⁵ The AHRC promotes and protects human rights in a number of ways. The Commission reviews and monitors legislation, conducts public inquiries, investigates and conciliates complaints, provides policy advice and delivers human rights education to promote greater understanding of human rights issues in Australia.

In 1992 the Federal Parliament established the position of the Aboriginal and Torres Strait Islander Social Justice Commissioner within the AHRC in response to the findings of the

³¹ Australian Government. Attorney-General's Department, "Australia's Human Rights Framework", <<http://www.ag.gov.au/Humanrightsandantidiscrimination/Australiashumanrightsframework/Pages/default.aspx>>, viewed 3 June 2012.

³² See generally: <<http://www.ag.gov.au/Humanrightsandantidiscrimination/Australiashumanrightsframework/Pages/NationalHumanRightsActionPlan.aspx>>, viewed 3 June 2012.

³³ See for example Australian Government, Attorney-General's Department, National Reports I–V, <<http://www.ag.gov.au/Humanrightsandantidiscrimination/Internationalhumanrights/Pages/UniversalPeriodicReviewNationalReportPartVKeyNationalPriorities.aspx>> viewed 3 June 2012.

³⁴ See for example: Matilda Bogner, Regional Representative for the United Nations Office of the High Commissioner for Human Rights (OHCHR) Regional Office for the Pacific, based in Suva, Fiji, "Northern Territory intervention law must comply with Australia's human rights obligations (22 May 2012)", <<http://www.hrlc.org.au/content/topics/indigenous/northern-territory-intervention-law-must-comply-with-australias-human-rights-obligations/>>, viewed 3 June 2012.

³⁵ *Human Rights Commission Act 1981* (Cth)

Royal Commission into Aboriginal Deaths in Custody,³⁶ the *National Inquiry into Racist Violence*³⁷ and also in response to the extreme social and economic disadvantage faced by many Indigenous Australians.

The Aboriginal and Torres Strait Islander Social Justice Commissioner's role includes reviewing the impact of laws and policies on Indigenous peoples, reporting on Indigenous social justice and native title issues and promoting an Indigenous perspective on issues. In addition, the Aboriginal and Torres Strait Islander Social Justice Commissioner monitors the enjoyment and exercise of human rights for Indigenous Australians.

In 2011 the Social Justice Commissioner identified the achievement of recognition for Aboriginal and Torres Strait Islander people in Australia's Constitution as the next major human rights challenge for Australia, and outlined steps to achieve that.³⁸ The Commissioner called for the establishment of legislation, programs and policies that were consistent with international human rights standards and that the Australian Government formally respond to and implement recommendations made by international human rights mechanisms, including treaty reporting bodies, the Special Rapporteur on the rights of indigenous peoples, and the United Nations Permanent Forum on Indigenous Issues Expert Mechanism on the Rights of Indigenous Peoples. The Social Justice Commissioner also called on the Australian Government to implement recommendations made in the annual Social Justice Reports. The Commissioner also identified a need for the Australian Government to work in partnership with Aboriginal and Torres Strait Islander peoples to develop a national strategy to ensure the principles of the United Nations Declaration on the Rights of Indigenous Peoples are given full effect.³⁹

Apart from provisions of the *Native Title Act* and various federal, state and territory laws relating to protected areas, environment and natural resource management discussed above, there are generally no specific human rights laws relating to ICCAs in Australia. In Victoria, however, the *Charter of Human Rights and Responsibilities Act 2006* (Vic), an Act requiring legislation to be construed, and decisions by public authorities to be made in accordance with international human rights standards where consistent with a relevant statutory purpose, and for bills to be assessed for compatibility with those standards, has recognised a FSR for Traditional Owners to access and use natural resources in that state. The *Charter* states that the distinct cultural rights of Aboriginal people and their communities 'must not be denied', including the right to:

³⁶ Australia. Commissioner Elliott Johnston QC (1991) *Royal Commission into Aboriginal Deaths in Custody* (AGPS Canberra)

³⁷ Australia. Human Rights and Equal Opportunity Commission (Irene Moss, chair) (1991) *Racist Violence: Report of the National Inquiry into Racist Violence in Australia* (AGPS Canberra)

³⁸ Recommendations in a report by the Expert Panel on Constitutional Recognition of Indigenous Australians led to funding being provided by the Australian Government to Reconciliation Australia to undertake a community awareness initiative to build support for that recognition.

³⁹ Australian Human Rights Commission, Aboriginal & Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2011*, ch 1.

<http://www.hreoc.gov.au/social_justice/sj_report/sjreport11/chap1.html> viewed 3 June 2012.

*‘...maintain their distinctive spiritual, material and economic relationship with the land and waters **and other resources** with which they have a connection under traditional laws and customs’ (s.19(2)).*

The Victorian Charter was enacted after the apparent success of the Australian Capital Territory’s *Human Rights Act 2004* (ACT) and ACT Human Rights Commission. Positive case law in these jurisdictions include the validation of targeted recruitment of Aboriginal and Torres Strait Islander employees (including in relation to employment in Victoria’s PAs) as a “special measure” to redress disadvantage caused by earlier discrimination; the return of Aboriginal children to the care of a family member; improving the rights of Indigenous detainees, convicted prisoners and young people on remand, and statutory interpretation generally so that it is consistent with human rights⁴⁰

5. JUDGMENTS

The key judgments that have enabled Aboriginal groups to manage their traditional lands, whether as jointly managed protected areas, IPAs or other arrangements equivalent to ICCAs, have related in one way or another to either statutory land claims or the recognition of enduring native title. Some of these key judgments are briefly summarised below:

Gove Land Rights Judgment 1971

In 1971 Justice Blackburn of the Federal Court in *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 ruled against the Yolgnu people living at Yirrkala in the Northern Territory who had brought an action against the Nabalco Corporation which had secured a twelve year mining lease from the Federal Government. The Yolgnu had claimed they enjoyed sovereign rights over their land and sought declarations to occupy the land free from interference pursuant to their native title rights. Justice Blackburn ruled that communal native title was not and had never formed part of the law of Australia, despite recognising that the Yolgnu had a subtle and elaborate system of social rules and customs that was recognisable as a system of law, and that Nabalco had acquired valid proprietary interests under the lease.

As a result of the failure of the Yolgnu claim, the Federal Government established a Commission of Inquiry into Aboriginal land rights in the Northern Territory that ultimately led to passage by the Australian Parliament of the *Aboriginal Land Rights (NT) Act 1975* (Cth), discussed above in Part II.⁴¹ Passage of this legislation led to the granting to Northern

⁴⁰ See for example: *Parks Victoria (Anti-Discrimination Exemption)* [2011] VCAT 2238 (28 November 2011); *Cummeragunja Housing & Development Aboriginal Corporation (Anti-Discrimination Exemption)* [2011] VCAT 2237 (28 November 2011); *Department of Human Services & Department of Health (Anti-Discrimination Exemption)* [2010] VCAT 1116 (29 June 2010); *In the matter of an application for bail by Lacey* [2010] ACTSC 82 (10 August 2010); *Re an application for bail by Merritt (No.2)* [2010] ACTSC 7 (8 January 2010); *Secretary to the Department of Human Services v Sanding* [2011] VSC 42 (22 February 2011). For an overview of the Territory Act see <http://www.hrc.act.gov.au/res/Human%20Rights%20T2%20Sept10.pdf>

⁴¹ Australia. Aboriginal Land Rights Commission (AE Woodward, Commissioner) (1973), *First Report: July 1973* (AGPS Canberra); Australia. Aboriginal Land Rights Commission (AE Woodward, Commissioner) (1974), *Second Report: April 1974* (AGPS Canberra). See also: Ranger Uranium Environmental Inquiry (RW Fox, Commissioner) (1976), *First Report*, (AGPS, Canberra); Ranger

Territory people of large areas of land, some of which is now incorporated into IPAs and jointly managed national parks.

Meanwhile, the legal understanding that native title did not exist in Australia remained in force until it was overturned by the *Mabo* judgment in 1992 (see below).

Mabo Native Title Judgment 1992

The *Mabo* native title judgment (*Mabo & Ors v The State of Queensland [No 2]* (1992) 175 CLR 1), which led to the ‘discovery’ of native title in Australia, has been described briefly in Part II. Eddie Mabo and others had sought recognition of their native title to their areas of land on Mer (Murray Island) in Torres Strait, in response to attempts by the Queensland Government to lease the island to the local elected council. The case was essentially a re-run of the Gove land rights case, but on this occasion the final determination was made by the Australian High Court.

The High Court ruled, with a majority of 6:1, that:

‘.....the Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the lands in the Murray Islands.’⁴²

The most important findings of the Court were that the native title of the Meriam people had survived the Crown's acquisition of both sovereignty and radical title, and that the Crown's sovereignty was not justiciable (capable of being determined) in an Australian municipal court. Native title was found to be vulnerable to extinguishment by a valid exercise of sovereign power by state or federal Parliaments inconsistent with the continued right to enjoy native title. Extinguishment could occur where the Crown had validly alienated land by granting an interest that was wholly or partially inconsistent with a continuing right to enjoy native title, but only to the extent of the inconsistency. To prove the continued existence of native title, Traditional Owners would have to establish their connexion with the land according to their laws and customs.

The *Mabo* judgment overturned the doctrine that Australia was *terra nullius* (no man's land) at the time the British Crown asserted its sovereignty. A year later the Federal Parliament passed the *Native Title Act 1993* (Cth) which has led to successful native title determinations and Indigenous Land Use Agreements in most jurisdictions. In some instances native title determinations have been the catalyst for developing joint management arrangements for national parks and for establishing IPAs.

The Wik Judgment 1996

The Wik and Wik-Way peoples' native title determination covers approximately 6,000 square kilometres of Aboriginal-held land on the western Cape York Peninsula. The Wik claim, lodged in 1994, achieved national prominence when it was the subject of an historic

Uranium Environmental Inquiry, Inquiry (RW Fox, Commissioner) (1977) *Second Report*, (AGPS, Canberra) which documented customary title and associations in the Kakadu region of the Northern Territory.

⁴² (1992) 175 CLR 1 [para 97]

High Court decision in 1996 (*Wik Peoples v Queensland* ('Pastoral Leases case') (1996) 187 CLR 1) which found that native title may co-exist with a pastoral lease.

The High Court's *Wik* judgment found that the grant of a non-exclusive pastoral lease did not necessarily confer rights to exclusive possession on the grantees, nor extinguish all incidents of native title to a pastoral lease area. Native title rights could co-exist with the rights of a lessee. The Court held that the terms of the grant of each pastoral lease and the legislation that authorised it had to be examined to determine the extent to which the incidents of native title had been extinguished. The Court also held that where there was a conflict of rights, the rights of the pastoralist would prevail over those of the native title holder.

As pastoral leases cover large areas of northern and central Australia, the *Wik* decision substantially expanded the land area where potential native title claims could succeed. The judgment also highlighted the concept of native title rights co-existing with other rights, which has expanded opportunities for joint management arrangements in terrestrial and marine protected areas and the establishment of IPAs.

The Yanner Judgment 1999

In the Gulf country of far north Queensland an Aboriginal man (Murrandoo Yanner) speared two small crocodiles for food and was subsequently charged with taking fauna without a statutory permit under the Queensland *Fauna Act*. His defence that he was acting pursuant to his native title was accepted by the presiding magistrate, but the Queensland Government successfully appealed the decision in the Queensland Supreme Court. Yanner then appealed to the Australian High Court which accepted his defence with a majority of 5:2 in *Yanner v Eaton* (1999) 201 CLR 351 finding that legislation may regulate the exercise of native title rights without abrogating them

The Yanner judgment confirmed the validity of s 211 of the *Native Title Act* which protects the rights of native title holders to take wildlife for the purpose of:

- (a) Satisfying their personal, domestic or non-commercial communal needs; and
- (b) In exercise or enjoyment of their native title rights and interests.

Recognition of native title rights to use wildlife has enhanced the role of Indigenous people in the development of sustainable wildlife use and management regimes, including in protected areas and other forms of ICCA.

Yorta Yorta Judgment 2001

The Yorta Yorta people made a native title application over 2,000 square kilometres of land in northern Victoria and southern New South Wales. In 2001 a full bench of the Federal Court upheld Justice Olney's 1998 Federal court judgment that the 'tide of history' had washed away any real acknowledgment by the Yorta Yorta people of their traditional laws and any observance of their traditional customs. A subsequent appeal to the High Court affirmed that view. The Court found that the Native Title Act required that native title rights interests, and the society from which both they derived, must have had a substantially

continuous existence since the assertion of Crown sovereignty. Since the claimants had ceased to occupy their traditional lands in accordance with traditional laws and customs, and there was no evidence that those laws and customs had continued to be observed, their claim failed (*Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422).

Although the Yorta Yorta native title claim did not succeed, it had the effect of encouraging the Victorian Government to explore alternative mechanisms, such as consent determinations and cooperative management agreements, to achieve a degree of reconciliation with Aboriginal groups marginalised by the process of colonisation and its aftermath.

Wotjobaluk People's Judgment

In *Clarke on behalf of the Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagulk Peoples v Victoria* [2005] FCA 1795 Justice Merkel of the Federal Court made a consent determination for an agreement reached between the applicants (Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagulk peoples) and the respondents (which included the state, mining, fishing, telecommunications and several other interests). The Court recognised the Wotjobaluk people's non-exclusive native title rights and interests over parts of the land and waters the subject of the claim.

In the course of his reasons for judgment, Justice Merkel noted that the 'tide of history' had not 'washed away' the observance of traditional laws and customs of the Wotjobaluk People. The Court acknowledged that traditional laws and customs are not fixed and unchanging but may evolve over time in response to new or changing social and economic circumstances. The judgment acknowledges that the question of whether such evolution of laws and customs still amounts to them being described as 'traditional', and therefore sufficient to found a claim for native title in Australia, is one of degree that needs to be resolved on a claim by claim basis.

In this case, however, the Court was satisfied that the tide of history had not washed away all the Wotjobaluk's entitlement to native title. Accordingly, by the consent of the parties, the Court recognised the Wotjobaluk People's non-exclusive rights to hunt, fish, gather and camp for personal, domestic and non-commercial communal needs over part of the claim area.

This determination shows that despite the extensive dispossession, degradation and devastation wrought upon the Aboriginal inhabitants and their land, particularly in southern parts of Australia, courts may still recognise the survival of native title. The judgment is a reminder that it cannot be assumed that native title no longer exists in the more extensively settled southern parts of Australia, countering the impression given by the Yorta Yorta case summarised above.

Croker Island Judgment 2001

The Croker Island case (*Commonwealth v Yarmirr* [2001] 208 CLR 1) started in 1994 and was the first native title determination over areas of sea beyond the mean high tide mark. The Native Title Act recognises native title rights and interests in land or waters, with 'waters'

being defined to include a sea, a river, a lake, a tidal inlet, a bay, an estuary, a harbour or subterranean waters or the bed or subsoil under or airspace over any waters, including Australia's territorial sea (ss 6, 253). In July 1998 Justice Olney of the Federal Court found that native title existed in relation to the sea and sea bed within the claim area surrounding Croker Island off the Northern Territory coast north-east of Darwin. However, Justice Olney also found that there was no evidence that the applicants had historically had exclusive possession, occupation, use and enjoyment of the waters, noting the large numbers of fishermen from the port of Macassar (now known as Ujang Pandang) in southern Sulawesi who had gathered trepang (also known as beche-de-mer or sea cucumber) in the claimed area since about 1720, and noting also the Aboriginal custom of permitting other Aboriginal groups to fish in the area provided permission was granted. Justice Olney said that exclusive possession would be inconsistent with the common law right to fish and navigate through the area, as well as the right of innocent passage. This finding was subsequently confirmed by the full bench of the Federal Court in 1999 and by then by the High Court in 2001, which found that native title in respect of the sea and sea-bed beyond the low water mark was capable of being recognised and protected by the common law, and that this was not inconsistent with assertions of Crown sovereignty over the claimed area. The Court held that the Native Title Act protected and in some respects enhanced the rights and interests that the common law recognised, including in the sea and sea-bed below low water mark.

The Croker Island judgment paved the way for enhanced Indigenous involvement in the management of marine areas, including marine protected areas and also established the principle that native title rights in the sea must 'yield' to other co-existing rights, such as commercial and recreational fishing and navigation.

Blue Mud Bay Judgment 2008

The decision in *Northern Territory of Australia v Arnhem Land Aboriginal Land Trust* [2008] HCA 29 (30 July 2008) (the Blue Mud Bay judgment) dealt with the scope of statutory land rights over the sea within two kilometres of Aboriginal land under the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth), rather than native title as in the Croker Island case. It found that public rights to fish in the area had been abrogated by that Act, and the *Fisheries Act* did not by itself authorise or permit entry into the grant areas. Without permission from a land council, a person holding a fishing licence could not fish in tidal waters within the grant areas.

Blue Mud Bay is a large, shallow, partly enclosed bay on the eastern coast of Arnhem Land, in the Northern Territory of Australia, facing Groote Eylandt on the western side of the Gulf of Carpentaria. Its name was given to this landmark judgment that found that the Aboriginal Traditional Owners of much of the Northern Territory's coastline have exclusive rights over commercial and recreational fishing in tidal waters overlying their land.

The Blue Mud Bay High Court judgment established that Aboriginal ownership extends to the water (including the fish and other and living resources in the water) that flows over the intertidal land when the tide comes in. The judgment essentially means that intertidal land and water (and the fish in the water) are the communal private property of the Aboriginal land-owners.

The implications of the Blue Mud Bay judgment are still being considered and negotiated by Aboriginal land councils, fishing organizations and governments. Already, however, it is clear that the judgment will provide greater leverage for recognition of Aboriginal rights and interests in the sea, including the management of coastal and marine protected areas and IPAs – at least in the Northern Territory.

6. IMPLEMENTATION

6.1 Implementation of Land Rights and Native Title Laws

Implementation of statutory land rights legislation and native title claims raises questions of what is meant by effectiveness. While it could be said that these laws have been implemented as intended by the Australian, state and territory parliaments that enacted them, they have led to less than satisfactory outcomes for many Indigenous groups. On the other hand, many Indigenous groups have successfully used statutory and/or native title claims as watershed events in their social and economic development, leading to increased employment and other opportunities, including the negotiation of protected area joint management agreements, the establishment of IPAs or the implementation of other conservation and sustainable use regimes on land and sea Country that could equate to ICCAs.

Challenges, constraints, frustrations and disappointments in the implementation of statutory and native title land and sea claims include the:

- High financial cost of pursuing claims;
- Excessive time required to achieve an outcome – 10 years and more;
- Emotional trauma of providing evidence about cultural connection to Country as part of land claim hearings;
- Passing away of knowledgeable elders before land claims have been finalised;
- Disappointment and grief when a claim is unsuccessful (such as the Yorta Yorta case) despite years of emotionally draining court proceedings;
- Lack of resources and capacity to manage or benefit from land once it is successfully claimed;
- Social and economic divisions created within Indigenous communities as a result of successful claims benefitting some groups and not others;
- Disappointment that successful land claims may not bring an end to social and economic marginalisation for Indigenous groups.

Many social indicators (health, education, housing, imprisonment rates, life expectancy) remain poor and sometimes declining, despite the restitution of land.

Though there are many statutory land claims and native title claims yet to be settled, Australia is currently undergoing a transition from an era dominated by rights-based Indigenous legal claims and conflicts to an era focused on the sustainable development of Indigenous communities and the pursuit of opportunities that successful land claims may or may not have opened up. Such a transition requires not only a refocus of effort from the legal to the economic, but it also requires a psychological shift from contestation to collaboration. It also requires a change of mindset from Indigenous people as victims of history to leaders of their own destiny.

6.2 Implementation of Joint Management, IPAs and other Forms of ICCA

There is currently no uniform implementation of protected area joint management arrangements across Australia. As noted above, different joint management arrangements have emerged in each jurisdiction, and there remain parts of Australia where opportunities for joint management are few or non-existent. Nevertheless, there has been a steady growth in such opportunities over the last 30 years, and the legal and policy frameworks surrounding joint management continue to develop. In 2012 there are several nationally funded research projects, workshops and conference sessions devoted to sharing ideas and developing best practice between jurisdictions.

There remain, however, several fundamental challenges within current joint management frameworks that may limit their achievement even if and when they become uniformly available across Australia, including that:

- Joint management arrangements are prescribed by government legislation and constrained by government budgets, resulting in an inevitable power imbalance between government conservation agencies and joint management Indigenous partners;
- Resulting from this imbalance and exacerbated by often limited capacity within Indigenous groups, there is a tendency for government agencies to take the lead in planning, agenda-setting and management, and for Indigenous partners to be more reactive than proactive; and
- There remains a degree of coercion in almost all joint management arrangements, in that the return of land ownership to Aboriginal people is contingent on their acceptance of a protected area on their traditional Country.

IPAs, being voluntarily established by Indigenous people themselves, are less coercive and less constrained by legislation. But without a legislated government partner, IPAs are potentially less financially stable. On the other hand, IPAs have the freedom to negotiate multiple partnerships which, under effective leadership, may result in a more secure funding base through partnership diversity. Some of the more successful IPAs have budgets, personnel, equipment and other resources equivalent to or exceeding those found in government protected areas.

IPAs established over one or more protected area, such as the Mandingalbay Yidinji IPA near Cairns in north Queensland and others currently being planned, offer both the

independence of an IPA and an alternative pathway to joint management. Without underpinning legislation, however, the long-term security of these arrangements depends on ongoing leadership by Indigenous people themselves, and ongoing willingness by government agencies and other partner to collaborate.

For much of Australia's colonial and post-colonial history, governments and non-Indigenous organisations and enterprises, with some notable exceptions, were unsympathetic and antagonistic to the rights, interests and well-being of Aboriginal and Torres Strait Islander peoples. While the legacy of those times remains, often reflected in inter-generational social disadvantage, there are now many opportunities for Indigenous people to forge a brighter future for themselves; opportunities in jointly managed protected areas, IPAs and other forms of ICCA are part of that future.

7. RESISTANCE AND ENGAGEMENT

Coinciding with the era of Aboriginal land claims, beginning with the passage of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), Indigenous groups and organisations continued or re-asserted their cultural obligations to care for their traditional estates by establishing their own ranger groups to manage successfully claimed land and by seeking involvement in the management of national parks. Key events in this period include the early examples of joint management at Kakadu National Park and Gurig National Park in the Northern Territory and the development of Aboriginal ranger training and employment programs in most states and territories. The establishment of the Aboriginal Ranger Service on Palm Island in 1983 and Kowanyama Land and Natural Resource Management Office in 1990 (both in Queensland) heralded a new direction for contemporary Indigenous land management independent of government agencies that subsequently spread to all states and territories.

Aboriginal engagement in national park management, through formal joint management arrangements and other mechanisms, now occurs or is emerging in all Australian jurisdictions; the concept of independent Aboriginal and Torres Strait Islander ranger groups and other locally managed Indigenous land and sea management organisations has now extended across Australia and employs several thousand Indigenous people.

During the 1990s, the concept of Indigenous Protected Areas emerged from a coincidence of interests between government and Indigenous people: governments wanted a comprehensive system of protected areas that included all bioregions across Australia (some of which only exist on Aboriginal-owned land) and Indigenous people wanted support for managing their traditional Country. Indigenous people have responded to this opportunity with enthusiasm – there are now over 50 declared IPAs across Australia, with a similar number being planned. Demand for support for establishing new IPAs currently outstrips the capacity of the Australian Government's IPAs Program budget and alternative mechanisms for funding new IPAs are being explored.

A feature of the history of these caring for Country initiatives is their origins as Aboriginal initiatives rather than government policies. Previously, government agencies had maintained a monopoly on employing rangers and managing national parks. Many of the early Indigenous ranger groups relied exclusively on Community Employment Development

Program (CDEP) (work for the dole) funding; some of the groups supplemented their income through fee-for-service contracts and funding from non-government sources, while others struggled to maintain continuity of ranger employment, lacked adequate coordination and closed down.

The exponential growth in Indigenous engagement in protected area management and other forms of ICCAs results from government policy responses to pressure and commitment from Indigenous groups to re-assert their rights and responsibilities to their culture and Country, and to forge a new economic niche within contemporary Australian society as managers of the Australian environments – something their ancestors and cultures have been doing successfully for millennia.

8. CASE STUDIES

Three case studies have been selected to reflect the issues discussed in this report. They are:

- Booderee National Park, which provides an example of a jointly managed national park, owned by an Indigenous community and managed in collaboration with a government conservation agency;
- Dhimurru Indigenous Protected Area, which provides an example of a protected area voluntarily declared on Aboriginal owned land, by Aboriginal Traditional Owners and managed by an Aboriginal land and sea management agency, in collaboration with government and non-government partners;
- Mandingalbay Yidinji Indigenous Protected Area, which provides an example of a protected area voluntarily dedicated over multiple tenures, including government-declared terrestrial and marine protected areas and managed in voluntary collaboration between Aboriginal Traditional Owners, government conservation agencies and other stakeholders.

8.1 Booderee National Park

Koori people (Aboriginal people of South Eastern Australia) have lived in the Jervis Bay Region for at least 20,000 years, when the sea level was considerably lower and the coastline was about 20 km further east than at present. Material found in middens and the concentration of axe-grinding grove sites in coastal rock formations indicate that since the stabilisation of the current sea level about 6000 years ago people associated with what is now Booderee National Park have relied on fish and other marine resources, a tradition that continues today. The spread of British colonists along the coast of south-eastern Australia during the early 1800s, the resulting frontier conflict and occupation of Koori land led to significant reduction in the Koori populations. Some Aboriginal reserves were established to provide refuge for Koori people, but the reserves were reduced in size or revoked over time in response to demands by the colonists for additional land.

In the early 1900s some Koori people established a settlement at Wreck Bay on the southern shore of the Peninsula. In 1925 the Wreck Bay Aboriginal Community came under the administration of the Board of Protection for Aborigines in NSW, though the land

occupied by the community was not officially given the status of an Aboriginal Reserve until the 1950s.



The 1979 blockade at the Summercloud Bay, Jervis Nature Reserve

The Jervis Bay Nature Reserve was proclaimed in 1971, resulting in a considerable reduction in the size of the Wreck Bay Aboriginal Reserve. On Australia Day in 1979 residents of Wreck Bay blockaded the access road to the popular tourist picnic area at Summercloud Bay within the Nature Reserve, resulting in the start of negotiations between the Community and the Commonwealth government over ownership of land in Jervis Bay Territory. In 1986 under the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* an area of 403 h of freehold land was vested in the WBACC.

In 1992 the Jervis Bay National Park was proclaimed over the area of the Jervis Bay Nature Reserve and the WBACC was offered two places on the newly established Board of Management for the National Park. This offer was rejected and the Community continued to pursue their goal of ownership of the National Park and majority membership on the Board of Management. In 1995 the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* and the *National Parks and Wildlife Conservation Act 1975* were amended by the Commonwealth Parliament to transfer freehold title of the National Park to the WBACC on condition that the Park was leased to the Australian government's Director of National Parks for 99 years. At the same time, the Jervis Bay National Park Board of Management was established with a majority of members from the Wreck Bay Aboriginal Community. The Park was renamed *Booderee National Park* in 1998 and the first Management Plan for the Park was published in 2002.

Booderee National Park (BNP) is located in the Jervis Bay Territory, Bherwerre Peninsula in Jervis Bay Territory on the coast of South Eastern Australia, about 200 km south of Sydney. The Park, which includes Bowen Island and a portion of the Jervis Bay marine environment, is owned by the Wreck Bay Aboriginal Community Council (WBACC) and jointly managed by WBACC and the Director of National Parks (the statutory body responsible for managing Commonwealth protected areas). Located within the Park is Booderee Botanic Gardens, Australia's only Aboriginal-owned botanic gardens.

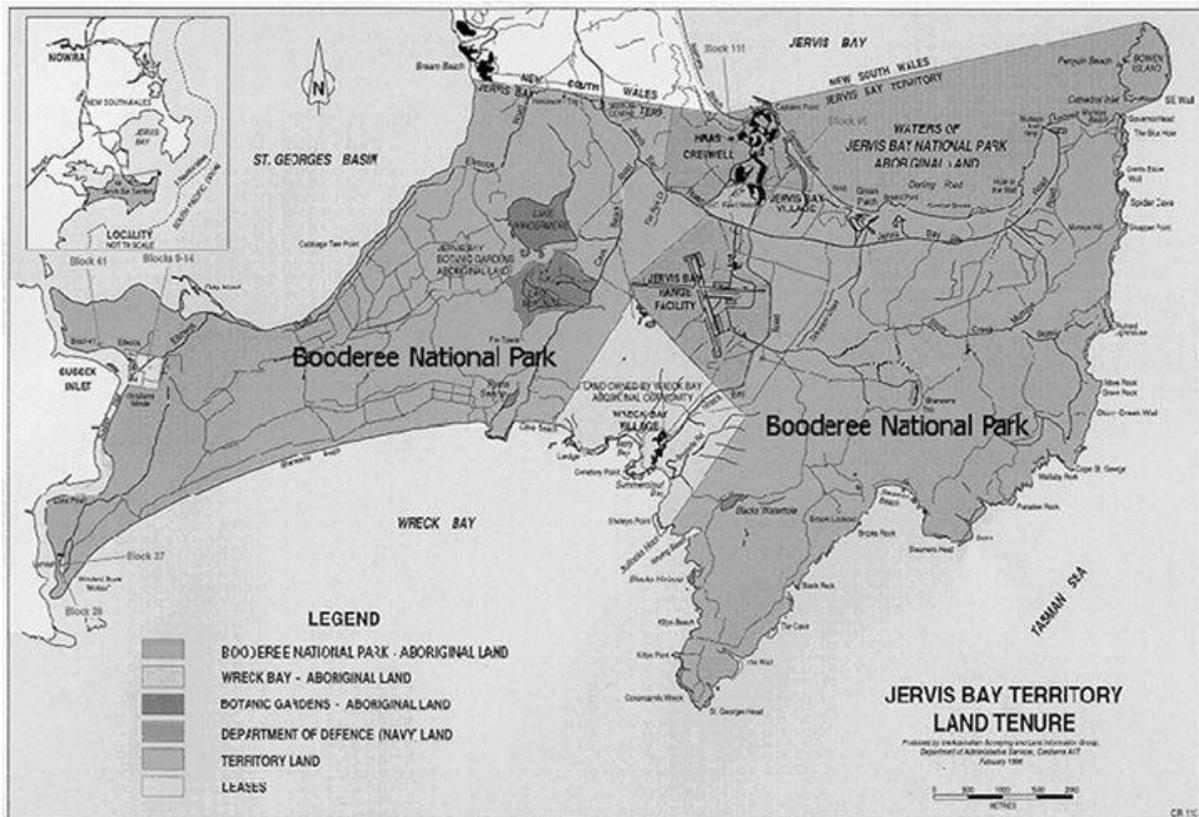


Figure 7: Jervis Bay Territory Land Tenure

A memorandum of lease between the Director of National Parks and Wildlife and the Wreck Bay Aboriginal Community Council was signed in December 1995. The park and Botanic Gardens are managed in accordance with relevant legislation, a management plan and the decisions of the Board of Management, which was established in 1996. The Booderee Board of Management includes a majority of Aboriginal Traditional Owners. The board oversees the management of the park and Botanic Gardens and for preparation of plans of management.

The Wreck Bay Aboriginal Community's interest in Booderee is legally reflected in the lease agreement, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth). The lease agreement requires that the park is managed with the interests of the Traditional Owners in mind. The lease sets out the terms and conditions governing joint management for a period of 99 years with provision to review the lease every five years.

The Act allows traditional use of the area for hunting, food gathering and ceremonial purposes in areas of the park determined by the Director and the Aboriginal Traditional Owners.

The Booderee Management Plan explicitly outlines the Community Council's goal of 'sole management' of the Park, as set out in the vision statement at the beginning of the Plan:

Wreck Bay Aboriginal Community Council seeks to be a respected equal and valued part of a culturally diverse Australian society. By controlling and managing its own lands and waters, the Community aims to become self sufficient and able to freely determine its future and lifestyle. The Community desires to do this by protecting its interests and values while preserving for future generations, its unique identity, heritage and culture. To achieve this vision Wreck Bay Aboriginal

Community Council's Goals are:

- *Sole ownership of all lands and waters within the Jervis Bay Territory.*
- *Sole management of its freehold land and waters, allowing for Community responsibility, empowerment and self-determination.*
- *Sole representation of the Community's united and democratically agreed interests, at all levels of Government and in all external dealings so as to protect Community and members rights.*
- *Environmentally sustainable development, to allow a productive economic base for the Community.*
- *By managing Booderee as an ongoing park, the Community seeks to protect the land and waters while earning income, creating jobs and achieving financial security.*
- *Social and cultural development, linked with appropriate cultural training and education, to improve Community empowerment and management, security and wellbeing, while preserving Community value.*
- *Improved health, housing and living standards, to levels at least comparable with good practice in other Australian communities.*

Recognition and support from the wider Australian community and Government, to achieve these worthwhile and positive goals.

While sole management is a clear goal for the Wreck Bay Aboriginal Community, current Aboriginal engagement in the management of Booderee National Park involves:

- Aboriginal membership of the Board of Management;

- Aboriginal employment as rangers and other staff within Parks Australia, the Australian Government management agency; and
- Aboriginal employment within Wreck Bay Enterprises Ltd, a contracting company owned by Wreck Bay Aboriginal Community that delivers various park management, administrative and maintenance services to the Park.

Dhimurru Indigenous Protected Area

Dhimurru Indigenous Protected Area (IPA) is located on Aboriginal land surrounding Nhulunbuy in northeast Arnhemland, incorporating the area between Melville Bay in the north, Port Bradshaw in the south and Cape Arnhem in east. The total land area is about 92,000 hectares, including Bremer Island offshore to the north of Nhulunbuy. The IPA also includes almost 9000 hectares of coastal waters bounded by Cape Arnhem (*Nanydjaka*), Port Bradshaw (*Yalanbara*), Mount Dundas (*Djuwalpawuy*) and Bremer Island (*Dhambaliya*). *Dhimurru* is the Yolŋu language name for the East wind that brings life-giving rain.

Northeast Arnhemland is the site of the first legal claim in Australia brought by Aboriginal people to assert their traditional ownership of land under their own customary law (see Part V Gove Land Rights judgment). Though the Federal Court denied the claim, the case led to a Royal Commission into Aboriginal land rights and subsequently to the passage of the *Aboriginal Land Rights (NT) Act 1976* (Cth), under which former Aboriginal Reserves in Arnhemland, including the land within the Dhimurru IPA, were transferred to Traditional Owners.

The Dhimurru Land Management Aboriginal Corporation was established in 1992 by members of 11 clans (subsequently increased to 13 clans) whose lands were being impacted by the activities of the increasing number of miners and their families who had settled in Nhulunbuy since the 1970s. Dhimurru manages a permit system that enables Nhulunbuy residents and tourists to visit designated areas for recreation. Fees raised through sale of the permits help meet the costs of managing the recreation areas, with additional funds contributed by a suite of government and non-government organisations, including the local bauxite mining company.

Many Traditional Owners work as rangers on the IPA, monitoring and protecting the wildlife. Part of their job is surveying turtle and crocodile numbers to make sure the populations are healthy. Another key role is the removal of marine debris washed up on beaches. Every year the rangers remove tonnes of discarded fishing nets known as ghost nets, rescuing turtles and other marine life entangled and injured in the plastic mesh.

Local schoolchildren, including students from Nhulunbuy and Yirrkala Primary Schools, go on interpretive walks with rangers to learn about their work, cultural traditions and how they protect the environment. The rangers also assist Australian Quarantine and Inspection Services with ship inspections (to guard against introduced species), and talk to visitors about the IPA.

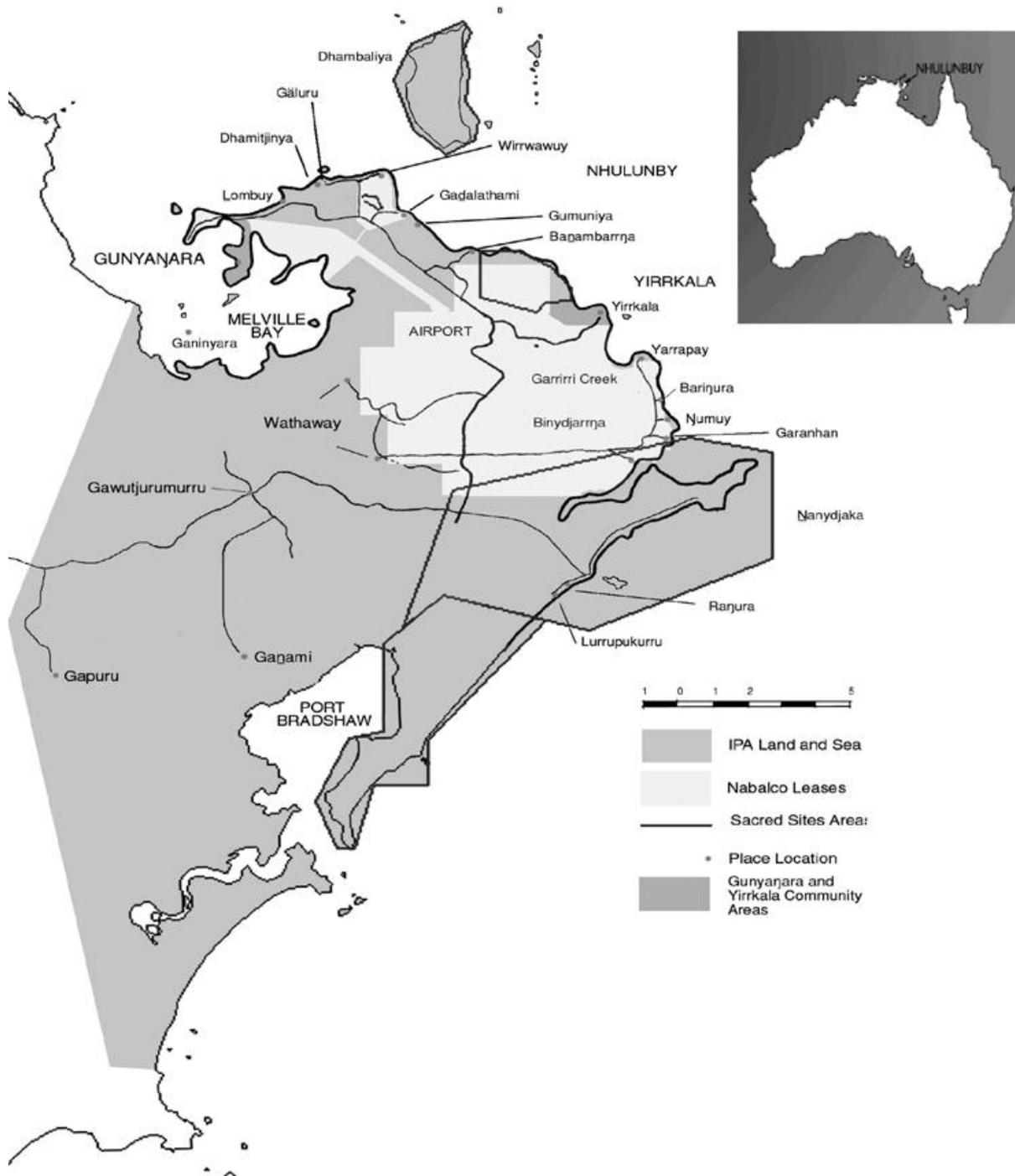


Figure 8: Dhimurru Indigenous Protected Area

Dhimurru is one of more than 50 IPAs voluntarily established Aboriginal and Torres Strait Islander peoples on their traditional Country. The following characteristics of Dhimurru demonstrate the opportunities and challenges of the IPA concept:

- Funding from the Australian Government’s IPA Program enabled the development of a Management Plan for the IPA and provides ongoing funding for management;
- However, Dhimurru has negotiated multiple partnerships with other government, conservation NGO, research and commercial organisations to support ongoing

management of the IPA - IPA Program funding now represents less than 20% of the overall IPA budget;

- Dhimurru IPA includes areas of sea Country that are registered as marine sacred sites under the *Sacred Sites Act (NT)*, providing a degree of management authority over customary marine estates currently not available to other coastal IPAs;
- Dhimurru Aboriginal Corporation is currently exploring opportunities to expand the boundaries of the IPA to include large areas of customary marine estates – an ambition shared by other coastal and island IPAs;
- By invitation of Traditional Owners and an agreement under the Territory Parks and Wildlife Act, the Northern Territory has co-located one of its senior rangers to work day-to-day with staff of Dhimurru IPA.

Dhimurru IPA is managed in line with the following World Conservation Union Category V: Protected Landscape/Seascape: Protected Area managed mainly for landscape/seascape conservation and recreation.

Mandingalbay Yidinji Indigenous Protected Areas

Mandingalbay Yidinji Country lies just east of Cairns across Trinity Inlet in North Queensland and includes a great diversity of environments – marine areas, mangroves, freshwater wetlands, rainforested mountains, coastal plains, beaches, reefs and islands. Much of Mandingalbay Yidinji Country has been divided into several protected areas managed by multiple government agencies:

- Great Barrier Reef Coast Marine Park;
- Grey Peaks National Park;
- East Trinity Environmental Reserve;
- Malbon Thompson Forest Reserve;
- Giangurra Council Reserve; and
- Wet Tropics World Heritage Area.

The Mandingalbay Yidinji IPA joins Country back together by providing a framework for coordinating the management of land and sea protected areas in collaboration between Traditional Owners and government management agencies. The anticipated resolution of additional Native Title claims by the end of 2011 will enable additional land and sea areas to be added to the IPA.

The Djunbunji Land and Sea Program was established in 2010 to actively engage in the management of Country through the employment and training of Traditional Owners as rangers, working in partnership with government rangers, land and sea managers and researchers. The Land and Sea Program is based in premises leased from the Queensland

Department of Environment and Resource Management (DERM) located in Grey Peaks National Park.

The Mandingalbay Yidinji represents a new stage in the development of the IPA concept in Australia. Innovations include:

- The IPA is established over multiple tenures based on traditional Aboriginal estates (Country), rather than being limited to land wholly owned by Indigenous people (as was the case for previous IPAs);
- The IPA incorporates existing government protected areas – the first time a national park, marine park and other government protected areas have been included in an IPA;
- The IPA represents a new pathway to co-management of existing government protected areas, based on recognition of a Traditional Owner group’s cultural connection and responsibility to Country, rather than a legislatively based joint management agreement; and
- Planning and coordination of management of the IPA is led by Traditional Owners, with voluntary collaboration by various government conservation agencies and other stakeholders.



Figure 9: Some of the tenures included in the Mandingalbay Yidinji IPA

The voluntary nature of the Mandingalbay Yidinji IPA framework provides a degree of uncertainty about the long-term viability of this approach to joint management. On the

other hand the absence of legislative constraint has so far resulted in the development of multiple funding and other partnerships that may provide a robust co-management framework that is equal to or better than the joint management arrangements based on legislation.

9. LAW AND POLICY REFORM

Indigenous experts on natural and cultural heritage protection were involved in consultations, workshops and briefings for the *Australian State of the Environment (SoE) 2011 Report* to the Commonwealth Parliament, and various areas requiring reform were identified. Those consultations have informed the recommendations outlined below:

- Indigenous landowners who have custodianship and stewardship responsibilities for areas of land or water in ICCAs are likely to benefit from the provision of adequate resources and training, enabling them to develop and implement appropriate and culturally-sensitive records of traditional knowledge and management practices and 'caring for Country' planning and compliance frameworks. Enhanced enforcement powers and regular monitoring and evaluation would be an expected part of this.
- All ICCAs, whether or not formally dedicated and recognised as protected areas, would benefit from comprehensive reviews of the integrity of and threats to their natural and cultural values, similar to those that are published as regular State of the Parks reports.
- A nationally agreed definition of Indigenous 'heritage' and assessment and reporting frameworks could lead to a greater level of protection for that heritage by national and global corporations, governments and Aboriginal and Torres Strait Islander people.
- A stronger role for the Commonwealth in protecting Indigenous heritage is seen as necessary by many Indigenous leaders and Traditional Owners.
- The ability of culturally-appropriate Indigenous people to manage threats to their heritage, including through 'caring for Country' plans and compliance activities, should be enhanced.
- All protected area, resource extraction, resource management and heritage protection legislation should be reviewed for consistency with international human rights standards, including the United Nations Declaration on the Rights of Indigenous Peoples, including provision for 'free, prior and informed consent' for impacts on heritage including from tourism and resource extraction.
- National heritage protection standards and a rationalisation of the agencies with whom Indigenous people have to deal in relation to the protection and management of their cultural heritage appear to be needed.
- Where Traditional Owners' do not have access to their Country and heritage for cultural practices and protective management, there is a role for governments to facilitate that access by assisting with landowner negotiations and providing transport support. Guidelines for the National Reserve System of Marine Protected Areas should be

reviewed and revised to facilitate recognition and support for IPAs that include marine areas.

- Federal, state and territory governments should further develop their recognition and support for IPAs and other forms of ICCA in acknowledgment of their valuable contribution to conservation outcomes, as well as social, cultural and economic benefits to Indigenous communities.

REFERENCES

- Australia. (SoE 2011). Australian State of the Environment Committee, *State of the Environment 2011 Independent report to the Australian Government Minister for Sustainability, Environment, Water, Population and Communities*, www.environment.gov.au/soe/2011/report
- Australia. National Biodiversity Strategy Review Task Group (2010) *Australia's Biodiversity Conservation Strategy 2010–2030*, Natural Resource Management Ministerial Council Commonwealth of Australia <http://www.environment.gov.au/biodiversity/publications/strategy-2010-30/index.html>
- Australia. National Reserve System Task Group convened under the Natural Resource Policies and Program Committee (2009), *Australia's Strategy for the National Reserve System 2009–2030*, Natural Resource Management Ministerial Council.
- Australia. Dept. of Climate Change (2009), *Climate change risks to Australia's coast : a first pass national assessment* [Canberra]: Australian Dept. of Climate Change [<http://www.climatechange.gov.au/~media/publications/coastline/cc-risks-full-report.ashx>]Australia. Department Sustainability, Environment, Water, Population and Communities (2012), *Australian Heritage Strategy Public Consultation Paper* (April)
- Schnierer E, Ellsmore S and Schnierer S (2011) 'State of Indigenous cultural heritage 2011'. Report prepared for the Australian Government Department of Sustainability, Environment, Water, Population and Communities on behalf of the State of the Environment 2011 Committee. Canberra: DSEWPaC. <http://www.environment.gov.au/soe/2011/report/heritage/pubs/soe2011-supplementary-heritage-state-of-indigenous-cultural-heritage.pdf>
- Sandwith T and Lockwood M 'Linking the landscape' (2006) in M Lockwood, GL Worboys and A Kothari (eds), *Managing Protected Areas: A Global Guide* (Earthscan London) 574–602
- Mackay R (2011), 'DSEWPaC Indigenous Advisory Committee State of the environment 2011 workshop – summary notes'. Report prepared for the Australian Government Department of Sustainability, Environment, Water, Population and Communities on behalf of the State of the Environment 2011 Committee. Canberra: DSEWPaC. <http://www.environment.gov.au/soe/2011/report/heritage/pubs/soe2011-supplementary-heritage-iac-soe2011-workshop-notes.pdf>