MAKING THINGS WORK: ABORIGINAL AND TORRES STRAIT ISLANDER INVOLVEMENT IN BIOREGIONAL PLANNING

CONSULTANT'S REPORT

for the
Biodiversity Unit,
Department of the Environment, Sport and Territories
Canberra.

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The distinct rights of Indigenous peoples are rapidly gaining status in international law. ... What can be confidently anticipated is that in the future, international law will require the recognition of Australian Indigenous claims to lands, seas, wildlife and resources. This can encompass ownership and /or management of lands, seas, wildlife and resources and intellectual and cultural property associated with them.

Michael Dodson,
Aboriginal and Torres Strait Islander Social Justice Commissioner (1995a:3)

There is only one way to deal with indigenous peoples: as equals and as stakeholders.

Peter Jull and Monica Mulrennan
North Australia Research Unit
Australian National University.
(in Whitehouse 1993:163)

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ACRONYMS & ABBREVIATIONS

AAPA - Aboriginal Affairs Planning Authority, Western Australia
ACDO - Australian Cultural Development Office
AHC - Australian Heritage Commission
AIPO - Australian Industrial Property Organisation
AIWGWA - Aboriginal Interests Working Group State Task Force for Museums Policy (W.A.)
ANCA - Australian Nature Conservation Agency (formerly the Australian National Parks and Wildlife Service)
ATSIC - Aboriginal and Torres Strait Islander Commission
ATSILF - Aboriginal and Torres Strait Islander Land Fund (established by the *Land Fund and Indigenous Land Corporation (ATSIC Amendment) Act 1995*)
CCNT - Conservation Commission of the Northern Territory
CEPANCRM - Contract Employment Program for Aboriginals in Natural and Cultural Resource Management (ANCA)
CFAR - Council for Aboriginal Reconciliation
CLC - Central Land Council (in the Northern Territory)
CoA - Commonwealth of Australia
COICA - Coordinating Body for the Indigenous Peoples' Organisations of the Amazon Basin
CRC-TREM - Co-operative Research Centre for Tropical Rainforest Ecology and Management (based at James Cook University, Cairns Campus)
CYLC - Cape York Land Council
CYPLUS - Cape York Peninsula Land Use Study

DEST - (Commonwealth) Department of the Environment, Sport and Territories
DOGIT - Deed of Grant in Trust, the form of title held by Aboriginal and Torres Strait Islander Community Councils on behalf of their communities to the viii former reserves in Queensland
ERIN - Environmental Resources Information Network
FAIRA - Foundation for Aboriginal and Islander Research Action, Brisbane
GBRMPA - Great Barrier Reef Marine Park Authority
HRSCATSIA - House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs
HRSCERA - House of Representatives Standing Committee on Environment, Recreation and the Arts
ICPWCNH - Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage (UNESCO)
ILCB - Indigenous Land Corporation Board (established by the *Land Fund and Indigenous Land Corporation (ATSIC Amendment) Act 1995*)
IUCN - International Union for the Conservation of Nature
KALNRMO - Kowanyama Aboriginal Land & Natural Resource Management Office
KLC - Kimberley Land Council
NSW MTFAHC - New South Wales Ministerial Task Force on Aboriginal Heritage and Culture
NSW NPWS - New South Wales National Parks & Wildlife Service
OIA - Office of Indigenous Affairs (Department of the Prime Minister and Cabinet)
QDEH - Queensland Department of Environment and Heritage
QFMA - Queensland Fisheries Management Authority (established under the *Fisheries Act 1994*)
RAFI - Rural Advancement Foundation International
RCIADIC - Royal Commission into Aboriginal Deaths in Custody
SADENR - South Australian Department of Environment and Natural Resources
WLR-WHP - Willandra Lakes Region World Heritage Property

Terms of Reference

To prepare a report on Aboriginal and Torres Strait Islander involvement in bioregional planning. This report will be provided as a background paper to the national conference on Approaches to Bioregional Planning.

Aims:

to examine how biodiversity conservation could be incorporated into regional agreements;

to identify and assess how Aboriginal and Torres Strait Islander communities might adopt bioregional planning for biodiversity conservation and ecologically sustainable land use;

to assess domestic models of bioregional planning and management appropriate for Aboriginal and Torres Strait Islander communities.

Expected products in addressing the aims :

how to incorporate biodiversity conservation and bioregionalism into regional agreements.

the feasibility of bioregional planning for Aboriginal and Torres Strait Islander communities, including criteria for success.

an outline of specific domestic models for bioregional management by indigenous peoples.

analysis which can be used as a basis for discussion on this issue in the conference.

EXECUTIVE SUMMARY & IDENTIFICATION OF ISSUES

In this Report the various factors leading to the successful involvement of Aboriginal and Torres Strait Islander (collectively referred to as Indigenous) communities in bioregional planning for biodiversity conservation are examined primarily within the context of regional and local agreements involving

Indigenous communities and various government agencies with responsibility for the conservation of biological diversity.

Background - Sections 1 and 2

In order to fulfil its obligations under the *Convention on Biological Diversity*, the Commonwealth Government, in conjunction with the States and Territories, is in the process of implementing a co-ordinated policy to better conserve the continent's biodiversity, primarily through the *National Strategy for the Conservation of Australia's Biological Diversity*
(CoA 1996). Objective 1.2 of the National Strategy is to "manage biological diversity on a regional basis, using natural boundaries to facilitate the integration of conservation and production-oriented management". This should proceed by determining the principles for establishing bioregional planning units which emphasise regional environmental characteristics, are based on environmental parameters, and take account of productive uses and the identity and needs of human communities as appropriate.

Some work has been undertaken towards identification of regions which will assist with the establishment of a national network of bio-representative reserves to ensure that all of Australia's identified ecosystems can be conserved. The *Interim Biogeographic Regionalisation for Australia* (IBRA) (Thackway and Cresswell 1995) has been developed for a reserve system, but does not take into account fauna, or cultural values, among other factors. It is anticipated that bioregions when defined will include these issues, and as such, determination of their boundaries as well as their management will proceed with the involvement of Aboriginal and Torres Strait Islander peoples.

In general Australia's Indigenous communities support the notion of bioregional planning for biodiversity conservation as essential to the maintenance of biodiversity, but see it as essentially traditional practice "dressed up in new words". However, for Indigenous community involvement in bioregional planning and biodiversity conservation to be effective there has to be an acknowledgment by planning bodies of differences between Indigenous and western perspectives regarding nature conservation and land management. The concept of "caring for country" is the embodiment of Indigenous relationships with their land **[1.1].**

Also under the *Convention on Biological Diversity*, Australia has accepted a number of obligations directly and indirectly requiring the involvement of the nation's Indigenous peoples in biodiversity conservation. The National Strategy incorporates and expands on these requirements (CoA 1996). These concern acknowledgment and respect for Indigenous knowledge concerning biodiversity and the contribution such knowledge can make to biodiversity conservation; Indigenous communities being able to equitably benefit from any commercial developments in which Indigenous knowledge has had a part; their involvement in cooperative arrangements to manage areas protected for their biodiversity values; and their right to harvest certain species within the parameters of ecologically sustainable use**.[1.2]**

In terms of bioregional planning and management as detailed in the draft National Strategy **[1.3]**, based on the detailed knowledge of their environment on which their survival depended, Indigenous communities have much to contribute to the identification of bioregions, particularly in regard to their knowledge of rare and endangered species, such as Australia's native rodents. Their knowledge could also assist in identifying ecologically representative areas suitable for inclusion in the national reserve system **[1.4]**.

Concern was expressed about the lack of an holistic approach to Indigenous cultural heritage generally, and that when programs concerning natural heritage are developed, other aspects of culture are overlooked. Therefore Indigenous communities want to see culture become a primary focus of any programs, such as that concerning bioregional planning, which affect their heritage. **[2.2]**

Amongst Indigenous communities world-wide, and Indigenous Australians are no different, there is a strong sense of ownership of the natural resources on which their lives depended and with which their relationships have extended beyond being purely economic **[2.3]**. This relationship, and Indigenous rights to use, manage and enjoy their natural resources, are embedded in a number of international instruments, including the *Convention on Biological Diversity*. There are also a number of other standard-setting instruments which are not legally binding on Australia, but which detail Indigenous

rights to self-determination and further recognise and reinforce Indigenous rights to manage and benefit from the natural resources of their traditional lands. **[2.1.2-3; 2.3]**

Indigenous communities regard self-determination as the cornerstone of their political and cultural survival, and Indigenous people in Australia are very aware of the disparity which exists between international concepts of self-determination as defined in such instruments as the *Draft Declaration on the Rights of Indigenous Peoples*, and what governments in Australia see as fulfilling the concept. Essentially self-determination is seen by governments as empowering local Indigenous communities to manage their own affairs, but there is a failure to articulate the concept in relation to departmental and agency involvement with the Indigenous community. **[2.4]**

Australia's domestic policies regarding reconciliation **[2.5]**, the social justice package of the Commonwealth's response to the High Court's decision in Mabo **[3.1.3],** Recommendation 315 of the Royal Commission into Aboriginal Deaths in Custody, regarding Indigenous involvement in national parks **[3.2]**, Australia's international treaty obligations (binding and non-binding) and the *National Strategy for the Conservation of Australia's Biological Diversity* (CoA1996), together set the framework within which the involvement of Indigenous communities in bioregional planning and biodiversity conservation should be considered. Accordingly, the position is adopted in this Report, and as a matter of equity among Indigenous communities, that all Indigenous communities, whether they have title to land or not, have the right to be involved in bioregional planning **[2.6]**.

Regional Agreements and Indigenous Involvement in Bioregional Planning - Sections 3 and 4

The concept of regional agreements and their application in Australia has arisen out of the desire by Indigenous communities, in a defined geographic area,

> ... to have greater control over the design, operation or funding of services being provided to them. ... Models for regional agreements leading to autonomy and localised self-government such as those advanced for the Torres Strait and discussed by the Kimberley and Cape York Land Councils ... involve ceding by the Commonwealth and the relevant State or Territory Government of powers to an Indigenous structure within the framework of the present Constitution. ...
>
> Regional agreements could be more specific, in more settled or urbanised areas, by focusing on contracts between Aboriginal and Torres Strait Islander communities or organisations with the Commonwealth and the relevant State or Territory government or local authority for the delivery of particular services such as health or education. Such arrangements would permit greater involvement of Aboriginal and Torres Strait Islander peoples in monitoring and influencing the outcomes of mainstream service provision to their communities (CFAR 1995:47-48).

To date, most of the debate about regional agreements has been focused on achieving greater regional autonomy and using them as the basis for better service delivery in such areas as health, housing, education and training, and infrastructure for Indigenous communities. However, there appears to be no reason why such agreements cannot be extended to cover bioregional planning and biodiversity conservation, either within the context of a comprehensive regional agreement of the sort contemplated by the Torres Strait Regional Authority or Cape York Land Council, or in a more localised agreement specifically negotiated around bioregional planning and biodiversity conservation , or some aspect of it.

Given the flexibility of what can constitute a regional agreement and the diversity of circumstances in which Indigenous communities in Australia live, the suitability of their application to bioregional planning and conservation appears obvious. For example, a regional agreement might be concluded which gives the Indigenous communities concerned the responsibility to plan and carry out biodiversity conservation measures throughout a complete bioregion which might be located on their lands, or it may concern the contracting of an Indigenous community ranger service to undertake various conservation and land care tasks on neighbouring lands reserved for forests.

In discussing regional agreements in regard to their application to bioregional planning and biodiversity conservation, **s.21** of the *Native Title Act 1993* (Cwlth) needs to be taken into account **[3.1]**,

although regional agreements are not contingent upon the existence of native title rights. Within the broader context of what might constitute a regional or local agreement, many agreements in the form of management plans involving national parks were negotiated before the existence of the *Native Title Act 1993*. Regional agreements need not entail the surrender of native title, although some communities may wish to do so in exchange for other considerations. However, this Report considers that Indigenous involvement in bioregional planning should be framed within the Commonwealth Government's 3-part response to the High Court's decision in *Mabo*. This 3-part response was necessitated because it was realised that only about 10% of the Indigenous population might have their native title recognised. The creation of the Aboriginal and Torres Strait Islander Land Fund (ATSILF) **[3.1.2]** and the Social Justice Package **[3.1.3**] therefore should be taken into account with regard to the effective involvement of Indigenous communities in bioregional planning. With the operation of the ATSILF, many communities may be able to secure land which might also be useful in terms of biodiversity conservation. It was also considered that, as a matter of social justice, all Indigenous communities in Australia, irrespective of whether they owned land or not, should be able to avail themselves of regional or local agreements which might contain provisions relevant to their involvement in bioregional planning and biodiversity conservation.

Regional or local agreements involving Indigenous communities will generally involve a range of non-Indigenous stake-holders and interest groups with whom planning and management arrangements will have to be negotiated **[3.3].** These include:

Commonwealth Agencies (possibly as brokers): ANCA, Biodiversity Unit, Land care Unit, World Heritage Properties authorities, CSIRO, etc.

State/Territory Agencies (possibly as brokers Departments/instrumentalities concerned with national parks and nature conservation, forest/timber reserves, environment, land-care, soil and water conservation, land generally (Crown and freehold), primary industries and resource management.

Local Government (possibly several), possibly organised into regional planning coalitions to address particular concerns through regional planning advisory groups;

Land-holders (privately owned, lease-hold, mining leases, etc): farmers, pastoralists, miners, etc.

Interest Groups (often acting as advocates or lobbyists for land-holders): Farmers associations, Cattlemen's Union, mining industry councils, conservation groups, tourism organisations, etc.

While it is probably impossible to list all elements which need to be taken into account in terms of the content of a bioregional plan or agreement because local conditions will apply, the following will nevertheless have to be taken into account.**[3.4]**

- **Relevant legislation** (at federal, state and local government levels) regarding land tenure, national parks and other categories of protected areas, timber and water catchment reserves, endangered and vulnerable species, heritage protection, conservation orders, existing management plans (eg., for the sustainable use/harvesting of particular species), etc.;
- **Land and water resources conservation** - with respect to existing and future conservation and rehabilitation requirements;
- **Recognition and accommodation of Indigenous Rights** - self-determination, ownership of cultural property, recognition and protection of Indigenous intellectual property rights in biodiversity, right to hunt, fish and gather, etc.;
- **Particular cultural requirements** - eg., with regard to particular sites or places , particular species;
- **Identification of land to be incorporated into the representative protected area system** - Indigenous communities must be involved and identification should take into account cultural considerations;
- **Existing local management/conservation plans**
- **Pest control** - weeds and vermin
- **Overall status of plans/agreements** - whether they have statutory force or not (some elements of a plan will be guided by statutory requirements, some components might involve voluntary agreements),
- **Membership of planning and management bodies**
- **Status of management bodies** - primarily advisory or having particular administrative powers and functions;
- **Consideration of other regional planning processes and forums** - bio-plans and agreements might have to fit within or be a component of other regional plans;

- **Research and monitoring programs** - eg., the use of pesticides and herbicides, endangered species management plans, ecosystem inventories, base-line studies, impact assessments, etc;
- **Enforcement procedures** - particularly in relation to the powers of Indigenous community ranger services.
- **Day-to-day management** - who will have responsibility for carrying out various on the ground tasks.
- **Resourcing** - how will bioregional plans and/or particular components of them be financed and resourced.
- **Accountability** - to Indigenous communities and the various others who are party to the agreement

With respect to the basis of regional agreements regarding Indigenous community involvement in bioregional planning and management, three models have emerged, namely, joint management, cooperative management and sole management:

Joint management refers to a joint decision making process, based on recognition, respect and commitment to agreed values, between Indigenous peoples particularly concerned with the (managed) area and government, where each party has significant statutory or other mutually agreed powers and obligations.

Cooperative management refers to a decision making process where Indigenous peoples particularly concerned with the (managed) area are involved with government in an advisory or consultative capacity rather than a statutory power-sharing capacity.

Sole management refers to management with minimal involvement of parties other then the manager. The manager may be a government agency, landowner or Indigenous people.

With sole management generally not a current option in relation to protected areas, most Indigenous communities prefer the joint management option over the cooperative arrangement as there is a stronger basis for the protection of their interests. However, sole management arrangements remain a goal for many communities in line with their aspirations for greater autonomy **[3.5]**.

Four models were evaluated in terms of being suitable "precursors" within the context of regional and local agreements.

1) The Cape York Land and Natural Resource Strategy

This model is still in the early phases of development. A bioregional agreement would probably take place within the overall context of a comprehensive multi-lateral, multi-faceted regional agreement negotiated to deliver a (high) degree of autonomy to the Indigenous communities of Cape York Peninsula. Initially involving probably a mixture of joint and cooperative arrangements, the ultimate goal would be to achieve sole management, whereby conservation agencies would assume the role of monitoring statutory and contractual compliance within the terms of the regional agreement **[3.6.1]**.

2) The Kowanyama Aboriginal Land and Natural Resource Management Office (KALNRMO) model.

Essentially based on a cooperative management model, this has evolved out of practical necessity and is highly regarded by Indigenous communities around Australia. It is most applicable in a mixed tenure situation in which an Indigenous community owns substantial areas of land and has access to other areas for traditional purposes **[3.6.2**].

3) Uluru - Kata Tjuta National Park model.

Widely regarded by Indigenous communities with traditional interests in national parks and other protected areas, it is regarded as the "blueprint" for joint management of national parks by the Commonwealth Government **[3.6.3]**.

4) Lake Condah Heritage Management Plan and Strategy

A cooperative management plan involving Aboriginal-owned land, national park and some freehold lands, this model has wide application in the south eastern half of Australia where Indigenous holdings are generally small and fragmented, but nevertheless form a community base from which more extensive projects can be mounted **[3.6.4]**.

In identifying 6 community situations in which regional agreements might involve, wholly or partly, bioregional planning and biodiversity conservation, it was necessary to take into account both planning and management factors. It is recognised that cultural criteria need to be taken into account in

determining bioregional boundaries, and therefore Indigenous communities must necessarily be involved. In determining bioregions, political and land tenure factors are extraneous, however, in terms of management, they are critical. In arriving at 6 community situations, such factors as the amount of land held, neighbouring tenure, legislative conditions, community diversity and possible management arrangements (joint, cooperative, sole) were taken into account.

1) Indigenous domains comprising large areas or regions in which Indigenous people constitute the majority of the population and have title to (or have been granted an interest in land, eg., hunting and gathering rights on pastoral leases, national parks, etc.) over the greater proportion of the land and within which one or more bioregions and parts of others may exist (Examples could well include Cape York Peninsula, Torres Strait, Arnhem Land, the Kimberleys and large areas of central Australia). Suggested precursor model: Cape York Peninsula Land and Natural Resource Strategy, and KALRNMO at sub-regional level **[4.1]**;
2) Bioregions wholly covered by lands to which Indigenous communities have title (inalienable freehold, freehold, pastoral lease, DOGIT, etc). Suggested precursor model: KALNRMO **[4.2]**;
3) One or more bioregions partly covered by substantial areas of lands (ie, more than 10,000 hectares) to which Indigenous communities have title or have been granted an interest. Suggested precursor model: KALNRMO **[4.3]**.
4) Bioregions which include Indigenous lands leased back as national park and national park in which Indigenous communities have been granted an interest (eg., a lease, a role in management, hunting and gathering rights, access to sites). Suggested precursor model: Uluru - Kata Tjuta National Park **[4.4];**
5) Bioregions in which Indigenous communities are land-holders along with other classes of land-holders (governments, farmers, pastoralists, mining companies, etc). Suggested precursor model: Lake Condah Heritage Management Plan and Strategy **[4.5]**;
6) Bioregions in which Indigenous communities currently do not have title to any land but in which they maintain an interest by virtue of traditional association. Suggested precursor model: Lake Condah Heritage Management Plan and Strategy **[4.6]**.

The potential also exists for native title, or some native title rights, to survive in areas of land within all 6 contexts, however in the south eastern half of the continent these areas are likely to be small, restricted to areas of Vacant Crown Land and possibly to some government owned lands such as national park, water and forest reserves.

A wide variety of regional and local agreements is possible with regard to Indigenous community involvement in bioregional planning and biodiversity management. Some of these agreements will incorporate provisions for bioregional planning and management, possibly covering complete bioregions, within the overall context of the agreement, and the formulation and implementation of plans might primarily be the responsibility of the communities concerned. Others might be more local in character and relate only to the involvement of a local community in bioregional planning and management or some particular aspect of it. Indigenous communities in this situation may have to negotiate their involvement with a host of other stake-holder and interest groups and may have a comparatively minor (but significant) role to play in planning and implementation. These agreements might be more contractual in nature whereby community members might undertake specific tasks to aid biodiversity conservation (eg., weed control, species surveys, land care projects). Others might involve contracting Indigenous community ranger services, on a fee for service basis, to manage particular National Parks or other forms of protected area. In this situation, the contracting agency might provide resources (office, vehicles, etc) while the rangers provide their labour and expertise.

In determining criteria for successful involvement of Indigenous communities in bioregional planning for biodiversity conservation the following should be taken into account:

- the degree to which local Indigenous communities are consulted and involved in the determination of bioregional boundaries using their knowledge of biodiversity and culturally relevant criteria;
- the extent of the role of local Indigenous communities in formulating and executing agreements and management plans;
- the cultural relevance of agreements regarding bioregional planning (adherence to culturally relevant criteria, using terms clearly understood by local communities and written and presented in a form which is accessible to them);

- in any regional and local agreements, the degree to which Indigenous involvement is specified or required (eg., as members of relevant management bodies);
- the degree to which bioregional planning documents take into account local Indigenous community aspirations and perspectives regarding land and natural resource management ("caring for country") with respect to traditional management practices, sacred sites, use rights, etc.;
- the relative status of Indigenous communities and their representatives as parties to any agreements (eg., as equal partners in power sharing, respective nature of responsibilities, etc);

Issues which need to be Addressed - Sections 5 to 12

In the necessarily brief consultations with Indigenous land-based community organisations (primarily land councils) a number of issues were identified which could affect the success (or otherwise) of Indigenous community involvement in bioregional planning.

The issue of self-determination through empowerment focused on the lack of legislative empowerment and Indigenous involvement in departmental and agency structures. For self-determination to operate effectively through legislation, the following minimal requirements were considered essential:

1) the definitions and interpretations upon which an Act is based must be culturally appropriate, with Indigenous people themselves being able to exercise powers of definition;
2) required lndigenous membership of statutory bodies, appointees being nominated by the relevant lndigenous bodies;
3) establishment of representative Indigenous advisory/management committees.
4) Indigenous membership of other specialist/technical committees to provide an Indigenous perspective;
5) processes for accountability and input;
6) employment of Indigenous people to carry out culturally relevant duties.

Commonwealth legislation regarding World Heritage Areas **[5.1.5]** and nature conservation **[5.1.2]** was examined as was the relevant State and Territory legislation **[5.2]** It was found there that many Acts gave Indigenous people no role in the management of their interests even though their interests were part of the subject matter of the legislation. In this regard Commonwealth legislation generally fared much better than that of the States and Territories.

Indigenous communities expressed concern about the lack of effective consultative and networking structures through which biodiversity concerns could be addressed from the local level all the way to national and state policy levels. Within this multi-level context attention was given to the role of ATSIC **[6.1.1]**, the desirability of establishing a national statutory Indigenous cultural heritage authority **[6.1.2]** with functions to oversee national policies concerned with the environment, such as Indigenous involvement in bioregional planning, with a third option being the establishment of an Aboriginal and Torres Strait Islander Environmental Advisory Body within the Environment Portfolio of the Department of the Environment, Sport and Territories with the immediate functions of guiding Indigenous policy with regard to ANCA, GBRMPA and the AHC and other environmental agencies **[6.1.3].** At state level, the desirability of using Indigenous cultural heritage committees (where they exist) under state Indigenous cultural heritage protection legislation with their powers expanded to also take into account Indigenous interests in natural heritage, was examined. Such bodies could play a vital role in monitoring the effectiveness of Indigenous involvement in bioregional planning, providing support where appropriate **[6.2].** Land councils were seen as the relevant bodies at the regional level, particularly because a bioregion would usually have several local land owning/affiliated groups within its boundaries **[6.3].** However, it was the local groups as the primary land owning/land affiliated groups, which were considered to be the fundamental units of the consultancy and networking structure because it was they who were responsible for the implementation of bioregional plans in terms of "caring for country" **[6.4].**

Indigenous community ranger services have the major role on a day-to-day basis for carrying out practical management tasks on community lands, and therefore their role is critical in producing the end results of bioregional planning and biodiversity conservation measures. Generally such services are underfunded, unempowered to carry out basic enforcement procedures, and lack the professional status of their mainstream counterparts. **[7]**

Indigenous communities are concerned about conflict between conservation requirements and their own local needs and aspirations, particularly where traditional hunting, fishing and gathering rights are at issue. These conflicts can also involve other natural resource users, such as farmers, pastoralists and professional kangaroo shooters. One way of resolving conflict is by managing it, and the Commonwealth and the States and Territories have management procedures in place under the relevant laws whereby particular species, either because they are endangered or vulnerable, like turtle and dugong **[8.2.1]**, or because they constitute a commercial resource (various species of macropods, for example **[8.3]**) can be managed within ecologically sustainable limits. It is important that such management plans require Indigenous representation on the relevant management bodies and involve them in the management of the species.

While it has been an issue which has been simmering in Australia for some time, the need to establish appropriate measures to protect Indigenous knowledge in biodiversity is now emerging as a major concern among Indigenous communities **[9].** The commercial potential of Australia's biodiversity is largely untapped, but evidence suggests that this is about to change with the development of new biotechnologies and an emerging focus on bush foods and medicines. Because Australia's obligations to protect the interests of the Indigenous population under the *Convention on Biological Diversity* largely depend on the quality of "national legislation", doubt exists as to whether Australia can honour these obligations because such legislation designed to protect intellectual and industrial property (such as the *Copyright Act 1968, Patents Act 1990* and *Plant Breeder's Rights Act 1994*) is inadequate in terms of protecting the interests of Australia's Indigenous communities - a situation acknowledged by the Australian Industrial Property Organisation **[9.1]**. The issue has been the subject of a number of major forums overseas and as Indigenous communities become more aware of the issues concern is growing for the recognition and implementation of an Indigenous intellectual property rights regime. **[9.2]** Where Indigenous knowledge is involved in the development of a product a system of royalty payments should be involved.

As pointed out in relation to Indigenous community ranger services, communities are badly under-resourced to carry out many of the land care and rehabilitation programs necessary not only for the commercial use of their lands but to carry out programs which can benefit the conservation of biodiversity. While there are a number of programs available, most work on a "one-off" short term grant system, and are unsuitable for long term projects. Many of the properties purchased primarily through ATSIC schemes are seriously degraded and therefore are in need of secure funding in order for rehabilitation programs to be effective. **[10]**

Much biodiversity conservation work is reliant on research, and Indigenous communities also have many environmental concerns of their own which they want to have addressed. It is therefore important that their interests are not neglected and that not only can they gain access to research expertise and funds but that they can also be partners in research projects, setting research agendas and priorities, and designing the programs, but also directly benefiting from research outcomes. **[11]**

The Report concludes with a set of conditions necessary to ensure effective Indigenous involvement in bioregional planning and biodiversity conservation. **[12]** These are reproduced in full.

In order for Indigenous involvement to be effective in bioregional planning there must be fundamental recognition by all levels of government that it is the right of all Indigenous communities, whether they have title to land or not, to be involved in biodiversity conservation. This right has been recognised by Australia in regard to its obligations under the *Convention on Biological Diversity* specifically regarding *in situ* conservation, sustainable use of components of biological diversity, and technical and scientific co-operation. The *National Strategy for the Conservation of Australia's Biological Diversity* specifically addresses this issue in Objective 1.8 (Recognise and ensure the continuity of the ethnobiological knowledge of Australia's Indigenous peoples to the conservation of Australia's biological diversity), as well as Action 4.1.8 (Recognise the value of the knowledge and practices of Aboriginal and Torres Strait Islander peoples and incorporate this knowledge and those practices in biological diversity research and conservation programs).

These rights have been further articulated in instruments which are not legally binding on Australia, some of which Australia has been integrally involved in developing (for example, *ILO Convention 169* and the *Draft Declaration on the Rights of Indigenous Peoples*), and which set standards to which

governments should aspire. These standards have also been articulated in terms of social justice and reconciliation. Furthermore, effective Indigenous involvement in bioregional planning and biodiversity conservation would assist in fulfilling some of the recommendations of the Royal Commission into Aboriginal Deaths in Custody, in particular Recommendation 315. Acknowledgment of these rights may be contained in a preamble to any legislation established to protect biodiversity by formalising the bioregional planning process, in the objectives to the plans themselves, or incorporated throughout any strategic plans designed by conservation agencies and other planning groups to carry out biodiversity conservation. These expressions can then act as reference points or criteria by which the effectiveness of Indigenous involvement can be assessed.

For bioregional planning to have any relevance to Indigenous communities they must be involved in the determination of not only what constitutes a bioregion in terms of both cultural and natural criteria, but also in the determination of the boundaries of bioregions.

Indigenous communities must be treated as stake-holders who have an equal right to be involved in bioregional planning and biodiversity conservation and therefore all planning groups associated with a bioregion should involve the local Indigenous communities in all activities incorporating these processes and their implementation.

Planners must respect the fact that in any one bioregion there will be a number of local Indigenous communities involving a number of clans, families and other land affiliated groups. Relationships between these groups are intricate and need to be respected. Some responsibilities in biodiversity conservation will necessarily involve matters internal to the communities and therefore should be left to those communities to manage. An example might be the allocation of quotas between family groups for the harvesting of a particular species, or the taking into account of traditional rights and obligations to particular areas of country, particularly if sacred sites are involved. Respecting the diversity of Indigenous communities necessitates that a “bottom up” or grass roots approach to Indigenous involvement in bioregional planning be taken. Consultation and negotiation must also necessarily reflect this approach.

Bioregional planning and biodiversity conservation must accommodate Indigenous subsistence rights, understanding that the enjoyment of such rights involves far more than just subsistence activities and therefore is fundamental to the maintenance of each Indigenous community’s way of life. Local Indigenous communities must therefore necessarily be involved in determining what constitutes the economically and ecologically sustainable levels of all activities associated with natural resource use which impact on biodiversity conservation within a particular bioregion.

To create the conditions necessary for effective Indigenous involvement in bioregional planning, and as a matter of social justice and to promote reconciliation, reform including structural reform, is necessary in departments and agencies concerned with biodiversity conservation and at all levels of government. The following series of suggestions are made:

Legislation should be the starting point, and at the very least should entail amendment to any Acts which are in some way relevant to biodiversity conservation to require Indigenous representation on any statutory bodies charged with duties under such legislation. As part of the structural reform, the creation of Federal and State statutory Indigenous cultural heritage authorities is advocated, whose basis for existence is to manage Indigenous cultural heritage holistically in order to reintegrate the cultural and natural components of Indigenous heritage which have been historically separated for mainstream administrative convenience. Such authorities should be involved with inter-agency networking in order to facilitate an holistic approach to Indigenous cultural heritage management. Structural reform could also extend to the establishment of Indigenous units within departments and agencies involved with biodiversity conservation; in consultation with Indigenous peoples, incorporation of Indigenous interests in departmental and agency strategic plans; and employment of Indigenous people throughout a range of positions within those departments and agencies (for example, as rangers, researchers, administrators, etc.).

Indigenous communities must be adequately resourced in order to effectively undertake bioregional planning and biodiversity conservation responsibilities. This applies particularly to Indigenous community ranger services in their day-to-day responsibilities of “caring for country”. Such services should be established as full-time professional services (and not reliant on CDEP status) with the same status, employment conditions, etc., as their mainstream counterparts. Biodiversity conservation cannot be

effectively carried out “on the cheap” by the continued application of short term grants to serious land care and environmental problems, through such programs as CEPANCRM and the application of National Estate and ATSIC land management grants, laudable as these programs may be. This also includes having adequate secretariat services/support to enable local, regional and state Indigenous consultation and networking structures to operate.

Agreements at regional and local level must have a statutory basis. In some cases bioregional planning and biodiversity conservation may form just one component of a comprehensive regional agreement negotiated to address a range of needs. In other instances agreements may be negotiated to specifically address biodiversity conservation and may take the form of joint management agreements in which case the Uluru/Kakadu management model deserves respect as the model widely preferred by Indigenous communities.

Indigenous intellectual property rights in biodiversity must be acknowledged, respected and compensated. The western industrial system of protecting knowledge (primarily through patents) is inappropriate and discriminates against Indigenous knowledge systems. Alternative systems of knowledge protection appropriate to the protection of Indigenous intellectual property rights must be investigated and established as a matter of priority.

Indigenous communities must be involved in research. A code of research ethics should be formally established to guide all research in Australia which involves Indigenous interests. Indigenous involvement in research must include participation in such activities as mapping out research agendas, setting research priorities, initiating community based research programs, and being fully informed of the results of research (and if needs be in a form or language understood by the local community).

Conservation agencies must remain cognisant of the fact that their programs where Indigenous communities are involved, while retaining conservation as their primary focus, must also recognise Indigenous culture as an integral part of that focus, and resist formulating nature conservation programs which fail to further the purposes of Indigenous communities as well as those of the conservation agencies.

The wider community must accept that Indigenous ownership and control of lands is not a lesser form of ownership than that enjoyed by other land-owners which therefore can be treated with less respect. Indigenous community land-owners feel under continual assault by governments wanting to encroach on Indigenous lands in ways which they would not do if the land-owners were non-Indigenous. Indigenous communities have their own priorities and particular ways of enjoying and managing their lands and these must be respected. Agendas concerning biodiversity planning and conservation will not always match local community aspirations for their lands and where this occurs negotiations should take place on a basis of respect for Indigenous rights regarding their lands.

INTRODUCTION

In this Report the various factors leading to the successful involvement of Aboriginal and Torres Strait Islander (collectively referred to as Indigenous) communities in bioregional planning for biodiversity conservation are examined primarily within the context of regional and local agreements involving Indigenous communities and various government agencies with responsibility for the conservation of biological diversity.

Methodology

In compiling this report the methodology employed was based on consultation and research. The consultant sub-contracted Associate Professor Stephan Schnierer and Adam Faulkner of the Gungil Jindibah Centre, Southern Cross University, to carry out consultations in NSW, and Bruce White from Cairns to consult with community groups in WA, NT and SA. The consultant participated in a number of conference workshops in Alice Springs, Melbourne, Sydney and Darwin as well as consulting with a number of community groups in Queensland (see Appendix 1 - People and Organisations Consulted).

It must be emphasised that there was insufficient time to carry out more extensive consultations with local community groups as the duration of the consultancy was effectively only three months. However,

an overview of concerns was gained. Common themes, such as issues of empowerment of local communities to address conservation issues, were then subjected to more detailed analysis and research. For example, in terms of the issue of empowerment, frustration was expressed at the lack of Indigenous representation at senior levels within departments, legislative constraints, lack of input into policy-making, lack of knowledge about what various government departments were doing, neglect of Indigenous interests in management regimes and insufficient networking, which all affected the local communities' capacity to be self-determining. Many people felt that legislation inadequately addressed their needs, but few people had enough detailed knowledge of particular laws to identify exactly where the inadequacies occurred. In addressing these different issues related to (dis-) empowerment, various pieces of legislation, which in some way were relevant to both biodiversity conservation and Indigenous interests, were analysed in detail in order to identify what were the disempowering aspects of these laws.

At best this Report can only be considered a preliminary investigation of the ways in which Indigenous communities throughout Australia might be involved in bioregional planning for biodiversity conservation. The Report also attempts to highlight major issues, such as the structural reforms necessary for the empowerment of Indigenous communities, which need to be addressed if such involvement is going to be effective. Another major issue, which has barely been discussed at the community level, concerns the recognition and protection of Indigenous intellectual property rights, particularly that involving Indigenous knowledge of biodiversity. The impact of such treaties as the *Convention on Biological Diversity* on Indigenous communities has yet to be fully investigated by the communities themselves. It is therefore hoped that this Report might act as a catalyst for further discussion and analysis of these and other issues related to the need of Indigenous communities to "care for their country" and benefit from their natural resources.

Structure of Report

This Report is essentially divided into three parts. The first part, comprising Sections 1 and 2, analyses the concept of bioregional planning for biodiversity conservation within the framework of the *National Strategy for the Conservation of Australia's Biodiversity* (CoA 1996) taking into account Indigenous perspectives on the management of natural resources.

Section 2 presents a number of background factors which provide a more comprehensive context within which Indigenous involvement in bioregional planning should be considered.

The second part comprises Sections 3 and 4. These two Sections focus on the concept of regional agreements (Section 3) and how they might relate to Indigenous community involvement in bioregional planning, taking into account six different community contexts which can affect the nature of such agreements (Section 4). Section 4.7 provides a conclusion in terms of how Indigenous community involvement in bioregional planning might be successfully incorporated into regional and local agreements.

The final part, comprising Sections 5 to 12, examines a number of issues identified during consultations with representatives of Indigenous communities and organisations. In order for Indigenous community involvement in bioregional planning and biodiversity conservation to be effective it was considered that these issues had to be addressed, otherwise Indigenous concerns would continue to be marginalised, conservation and Land care programs would remain ineffective, and their natural resources and knowledge of them would remain open to exploitation. The section concludes with the identification of a set of conditions necessary to ensure the successful involvement of Indigenous communities in bioregional planning and biodiversity conservation.

1. INDIGENOUS INVOLVEMENT IN BIOREGIONAL PLANNING — NEW WORDS FOR AN OLD PRACTICE

> The way that traditional Aboriginal Law regulates the use of natural resources acknowledges the significance and value of key zones of what western scientists describe as biodiversity. Such areas usually correspond with water sources and rich habitats for flora and fauna. Other Laws cover particular aspects of hunting and resource distribution and have a significant impact in terms of land

> management. The Laws which control burning practices, for example, have played a significant role in shaping the present form of the arid zone biota. Stories also record and transmit historical information about natural phenomena and the impacts of human action. In their stories, Laws and Beliefs Aboriginal people have a complex and holistic framework for understanding their place in the world and their role in looking after the country.
>
> Bruce Rose
> Central Land Council
> (1995:14)

In order for Australia to carry out its obligations under the *Convention on Biological Diversity* the national policy to conserve the continent's biodiversity by implementing a strategy based, in part, on bioregions necessarily has to involve Australia's Indigenous communities. A further consideration is that Aboriginal and Torres Strait Islander peoples own or lease about 13% of Australia's land, an area in excess of 1 million square kilometres (ATSIC 1994b:5) and which is likely to increase as a result of native title determinations and acquisitions through the Aboriginal and Torres Strait Islander Land Fund . In some instances individual bioregions may be located within Indigenous community-owned land or form substantial parts of other Indigenous holdings. At the other end of the scale there are also many bioregions within which Aboriginal communities, while maintaining their traditional ties, have no title to land. The strategy expands the currently limited opportunities for Indigenous communities to be involved in nature conservation and natural resource management by enabling even landless communities to participate in biodiversity conservation using their traditional knowledge and skills together with opportunities to learn new skills.

In the *National Strategy for the Conservation of Australia's Biological Diversity*, biological diversity, or biodiversity, is defined as:

> The variety of life forms: the different plants, animals and micro-organisms, the genes they contain, and the ecosystems they form. It is usually considered at three levels: genetic diversity, species diversity and ecosystem diversity (CoA 1996:50);

and a bioregion is:

> A territory defined by a combination of biological, social and geographical criteria rather than by geopolitical considerations; generally, a system of related, interconnected ecosystems (p.50)

The criteria for and the identification of bioregions is still in the process of development. The *Interim Biogeographic Regionalisation for Australia* (IBRA) (Thackway and Cresswell 1995) has been developed for a reserve system, but does not take into account fauna, or cultural values (among other factors). It is anticipated that bioregions when defined will include these issues, and as such, determination of their boundaries as well as their management will proceed with the involvement of Aboriginal and Torres Strait Islander peoples. Prior to the development of an Interim Biogeographic Regionalisation for Australia (IBRA), the total number of existing biogeographic regions defined by nature conservation agencies across their respective jurisdictions was 130. This has subsequently been reduced to 80 (Thackway and Cresswell 1995), but since these are still under review, when these biogeographic regions as delineated in the IBRA system are referred to in this Report, it is on the basis that they are considered to be interim only.

An important strategy, which is based on biogeographic regions, is the establishment of a national reserve system to complement the existing protected area systems of the State and Territory nature conservation agencies and collectively establish a comprehensive national reserve system that adequately samples the biodiversity of all ecosystems in Australia. In terms of Indigenous involvement in the setting up of such a reserve system, this is being carried out in another study by Dermot Smyth which investigates the feasibility of the voluntary inclusion of Aboriginal and Torres Strait Islander land and sea country in a national representative protected area system. Based on the concept of Managed Resource Protected Areas (IUCN Category VI protected areas), which are managed mainly for the sustainable use of natural ecosystems, it is believed that this Category may be readily applicable to lands owned and managed by Indigenous communities. This Category recognises that responsibility for management of these areas may be provided through traditional and contemporary land management practices, supported and advised by governmental and non-governmental agencies (Sutherland and Smyth 1995:5). Smyth's

study has primary relevance only to land already owned by Indigenous communities. This report on Indigenous involvement in bioregional planning and management is much wider in its application as it details a direct role for all Indigenous communities, whether they have land or not, in biodiversity conservation.

Central to biodiversity conservation is the concept of ecologically sustainable use, that is: "The use of a species or ecosystem within the capacity of the species, ecosystem and bioregion for renewal or regeneration" (CoA 1996:50). Indigenous communities are renowned for using their natural resources in such a manner and are concerned that this should remain so. However, there are now new opportunities present which will enable Indigenous communities to economically benefit from the biodiversity on their lands while adhering to the principle of ecologically sustainable use. New commercial opportunities are opening up in the bush food industry, an industry still very much in its infancy, and the potential for Australia's biodiversity to provide new pharmaceutical, agricultural, forestry, industrial and cosmetic products is still largely untapped. Indigenous knowledge is frequently the key to the development of new commercial products and there is now an increasing awareness that this contribution must be rewarded. So not only might Indigenous communities farm their natural resources to supply, for example, the bush food and native plant industries, but may also benefit from royalties from the commercial development of products derived from native species which were traditionally used.

Involvement in biodiversity conservation will also provide opportunities for many Indigenous communities to manage the natural as well as cultural aspects of their heritage and thus achieve a more holistic approach to cultural heritage management. While this has been less of a problem for those communities which have retained or regained ownership of their lands, for many communities, particularly in the south eastern half of the continent, access to natural resources has not been possible for a host of reasons: private ownership of land, clearing of the land for agriculture, urbanisation and legislative constraints governing the use and access to remaining areas of natural vegetation in the form of timber reserves and national parks. Bioregional planning for biodiversity conservation could once more provide opportunities to Indigenous communities to become natural resource managers, even without land ownership, and enable them to rekindle their cultural associations with many of the species which have traditional value.

The conservation of biodiversity is a common concern of all Australians, and while this might be primarily a responsibility of Indigenous communities in much of the north western half of the continent because they are major landowners and frequently constitute the majority of the population in many regions, in the southern areas this should be seen more in terms of being a responsibility shared between both Indigenous and non-Indigenous members of the community. It can provide Aboriginal communities with one of the few opportunities to come together with the wider community to be responsible for and manage a common resource. In doing so opportunities emerge for Indigenous people to augment their traditional knowledge with new skills in conservation, land care, research and management leading to employment in these fields.

Indigenous peoples of Australia are holders of a wealth of knowledge and information about Australia's natural systems. It is important to acknowledge and respect that Aboriginal and Torres Strait Islander peoples have intimate relationships with their land and sea "country", and that these relationships involve the proper care, maintenance and respect for the land and waters as set down and defined by Aboriginal Law and Lore. Cultural and religious freedom are cornerstones of contemporary Australian society protected by law. What scientists and planners interpret as 'traditional knowledge' or 'traditional management' is in fact the essence of contemporary Aboriginal society and essential for its survival. That is, 'care for country' in accordance with the Law and Lore. Only when Aboriginal and Torres Strait Islander rights to cultural and religious freedom are fully recognised can scientists, planners and governments share in Aboriginal and Torres Strait Islander land and resource management knowledge (as defined by Aboriginal Law and Lore).

It is also important to note that examples of Indigenous communities working with government agencies in conservation already exist. The Anangu have been involved with scientists researching and cataloguing the fauna and flora of Uluru National Park in the Northern Territory. Anangu have worked successfully with CSIRO scientists, sharing their extraordinarily detailed knowledge of animal habits and

habitats; one result of which is the possible reintroduction of Wayuta (Brushtail Possum), one of the most important species for Anangu (Baker et al. in Birckhead et al., 1992:65-73).

Conventional biological surveys or research programs are often constrained by time and finances, and the management strategies resulting from these are therefore based on limited information. Aboriginal ecological knowledge is not constrained by either of these factors and can significantly expand the information base on which to develop management strategies (Baker et al. in Birckhead et al., 1992:65).

At this point it is important to note that the relationship that Anangu have achieved with ANCA is the direct result of the joint management arrangement between the two. Indeed, at Uluru National Park where Anangu own the land and are in a joint management arrangement the provision of knowledge is seen by both parties as part of that joint management process (Baker et al., 1992). If Indigenous communities are to share their knowledge with planners and scientists for improved management of land and resources, those communities must have a real, tangible and meaningful role in all levels of management and decision making. However, because having land increases community bargaining power, for those Indigenous communities who have no land or only small holdings, as experience shows in States like Victoria and Tasmania, this is likely to be problematic.

For Indigenous communities to increase their involvement in bioregional planning, and before any regional agreements can be implemented Aboriginal and Torres Strait Islander peoples must have their rights and interests formally recognised. At the present time, arguably the most effective way to achieve this in the current political and administrative climate is to address Indigenous calls for control over their lands.

As the Indigenous community strives for self determination, increased awareness is being generated about the assertion and protection of Indigenous rights. In areas where negotiations for joint management or management control of land are underway the possession and control of knowledge is seen as a primary tool in those negotiations. Caring properly for the country involves careful management of information about it , and for Indigenous communities this necessarily involves the assertion and protection of intellectual property rights and setting and controlling their own research agenda.

1.1 Indigenous Perspectives on Nature Conservation and Land Management

For Indigenous community involvement in bioregional planning and biodiversity conservation to be effective, however, there has to be an acknowledgment by planning bodies of differences between Indigenous and western perspectives regarding nature conservation and land management. As Rose (1995:10) points out in relation to Aboriginal communities in central Australia:

> One of the fundamental elements of the traditional Aboriginal view of the world is that individuals are not separate from the environment, they are part of it. This is quite different to the way western society views the land, wherein the environment is “out there” beyond the individual, and therefore can be objectified and controlled through human understanding and intervention.
>
> Western society sees the environment as something that can be acted upon by humans as independent agents. This view is manifested in the way we attempt to know the environment as an “objective” reality, using science as a tool to uncover “reality” and to discover universal truths. This view of the world is a cultural construction, however, it informs all of our decisions and legitimates our actions in the environment. For Aboriginal people who do not share this dichotomy between environment and person, notions such as “management” and “control” of land must have very different dimensions.

Thus, as Rose (1995:ix) points out, Aboriginal attitudes to basic issues of western environmental policy such as land degradation, soil erosion, the use of fire, the protection of endangered species, control of feral animals and even the notion of conservation itself, have a different meaning and value and therefore many of the concerns of non-Aboriginal land managers are not shared by Aboriginal people. These views are little understood by mainstream society, yet the consequences of this on Indigenous communities wishing to carry out their own Land care objectives can be dramatic. As Rose explains:

> The lack of information on Aboriginal attitudes has a number of implications. Firstly, there is little Aboriginal control over the processes of policy formulation or the development of programs to deal with land management issues. As a result the capacity of Aboriginal people to deal with the land

> management that they perceive and face on a daily basis is severely reduced. Secondly, there is not a clear understanding of the implications of Aboriginal land ownership and management in relation to issues such as conservation and the future development of Aboriginal land. ...
>
> Aboriginal people have to operate in a policy environment which is largely alien to their interests. Forces external to Aboriginal society are major factors affecting Aboriginal land use and management. Even the concept of self management is itself the result of external definition. The rules of property law and scientific concepts of land use and resource management provide the western framework in which Aboriginal people must act or their motives and rights can be called into question. The structures set up within organisations dealing with Aboriginal land are largely based on this externally imposed framework as resources are only made available where programs fit in with the dominant (non-Aboriginal) view of what is appropriate. Contemporary Aboriginal land management is therefore a mixture of resource use and management which fits in with the dominant view of what is appropriate thereby achieving some measure of support, and traditionally based resource use and management, the majority of which continues to be marginalised both economically and conceptually (pp. 1-2).

The Central Land Council (1994:12) provides an example of this marginalisation:

> Land degradation for example, defined as a loss of ability to sustain outputs from a particular use, is very dependent on the particular type of land use. Land which remains viable for pastoralism may have already lost its ability to support indigenous economic activities. For Aboriginal people this land has been degraded. However, support is generally unavailable to remedy this problem. Aboriginal needs are not recognised. Considerable effort needs to be made to accept and promote Aboriginal development priorities in line with the basic principle of self-determination.

The essential basis of the Indigenous relationship with the land is spiritual, expressed through the Dreaming and Aboriginal Law. The key element embodying Aboriginal world views is the existence of special places, sacred sites, which are fundamental to the Aboriginal relationship to the land. Caring for sacred sites is tantamount to “caring for country” and is an essential element of Aboriginal land management. The western separation of natural and cultural for administrative convenience is responsible for ripping the Aboriginal world view apart because it has severely restricted the ability of Aboriginal communities to “care for their country”. While they often have access to sacred sites under heritage protection legislation, they are denied access to some through restrictive national park and nature conservation laws. Only by having control and access to traditional land can the two aspects of the Aboriginal world view be united and the country properly cared for. As the Central Land Council (CLC) (1994:13) points out:

> Land and land rights are of pivotal importance to Aboriginal people. The cultural obligation remains with Aboriginal people to “care for country”. This concept of “caring for country” includes the maintenance and protection of sacred and significant sites upon that land. It is fundamental to the existence and development of Aboriginal culture and society that these sites be protected whether on or off legally recognised Aboriginal land. Until national land rights are recognised there must be provision for the protection of those sites which are frequently threatened by resource development proposals.

It is therefore imperative that planning groups take account of Indigenous views on biodiversity planning and conservation, particularly concerning the need to reintegrate the so-called natural and cultural spheres of Aboriginal life.

1.2 The National Strategy for the Conservation of Australia’s Biological Diversity and Indigenous Involvement

Among the conservation-oriented objectives detailed in the Strategy is the recognition of the “contribution of ethnobiological knowledge of Indigenous peoples to the conservation of biological diversity” (CoA 1996:14) It acknowledges that :

> Traditional Aboriginal and Torres Strait Islander management practices have proved important for the maintenance of biological diversity and their integration into current management programs should be pursued where appropriate (p.14).

In order to achieve the objective of “recognis[ing] and ensur[ing] the continuity of the contribution of this knowledge” (p.14), a number of actions are suggested. These include:

1.8.1 Access to information

Provide resources for the conservation of traditional biological knowledge through cooperative ethnobiological programs.
Provide access to accurate information about biological diversity for Aboriginal and Torres Strait Islander peoples, and involve them in research programs relevant to the biological diversity and management of lands and waters in which they have an interest.

1.8.2 Use and benefits of traditional biological knowledge

Ensure that the use of traditional biological knowledge in the scientific, commercial and public domains proceeds only with the cooperation and control of the traditional owners of that knowledge and ensure that the use and collection of such knowledge results in social and economic benefits to the traditional owners. This will include

(a) encouraging and supporting the development and use of collaborative agreements safeguarding the use of traditional knowledge of biodiversity, taking into account existing intellectual property rights;
(b) establishing a royalty payments system from commercial development of products resulting, at least in part, from the use of traditional knowledge.

Such arrangements should take into account relevant work in international forums such as the United Nations Commission on Human Rights; they should also take into account Australian obligations under the Convention on Biological Diversity.

1.8.3 Species recovery plans

Provide resources for the establishment of cooperative species recovery plans for endangered and vulnerable species of particular significance to Aboriginal and Torres Strait Islander communities.

1.8.4 Cooperative arrangements

Recognising that a representative reserve and off-reserve system to conserve biological diversity will extend across the boundaries of Aboriginal and other tenure systems, negotiate cooperative arrangements for conservation management that recognise traditional land tenure and land management regimes.

1.8.5 Sustainable harvesting of wildlife

Recognising the importance of harvesting of Indigenous plant and animal species, both on land and in water, to the well-being, identity, cultural heritage and economy of Aboriginal and Torres Strait Islander peoples, provide assistance for the establishment of management programs for ecologically sustainable harvesting of wildlife by individual communities(p. 15).

1.3 Bioregional Planning and Management

Within the *National Strategy for the Conservation of Australia’s Biodiversity*, with regard to bioregional planning and management, the objective is to:

Manage biological diversity on a regional basis, using natural boundaries to facilitate the integration of conservation and production-oriented management (CoA 1996:8).

In order to achieve this, it is proposed to set up planning units, however, to do this it is necessary to:

Determine principles for establishing bioregional planning units that emphasise regional environmental characteristics, are based on environmental parameters, and take account of productive uses and the identity and needs of human communities as appropriate. This will include

(a) identifying the biological diversity elements of national, regional and local significance, the extent to which they need to be protected, and the extent to which they already occur in protected areas;
(b) identifying the major activities taking place within the region and in adjoining regions and analysing how these may adversely affect the region’s biological diversity, to ensure its use is ecologically sustainable;

(c) identifying any areas that are important for biological diversity conservation and require repair or rehabilitation;
(d) identifying priority areas for biological diversity conservation and for ecologically sustainable use, and their relationship to essential community requirements such as infrastructure and urban and industrial development;
(e) providing mechanisms for genuine, continuing community participation and proper assessment and monitoring processes;
(f) coordinating mechanisms to ensure ecologically sustainable use of biological diversity, with particular reference to agricultural lands, rangelands, water catchments and fisheries;
(g) incorporating flexibility, to allow for changes in land use allocation, including multiple and sequential uses of particular locations, and to accommodate improvements in knowledge and management techniques and changes in institutional arrangements (CoA 1996;8).

In terms of the planning process for the conservation of biological diversity, this will involve:

(a) identifying appropriate intergovernmental and intragovernmental mechanisms to ensure cooperation and coordination in bioregional planning;
(b) promoting the inclusion of biological diversity goals and principles in local government planning schemes and strategy plans;
(c) promoting sympathetic and coordinated management of biological diversity for land and seas adjoining protected areas;
(d) improving protection of and management for biological diversity in closely settled environments and the coastal zone, with particular attention being paid to corridors and remnant areas;
(e) increasing the number and involvement of those in the community who have special knowledge of biological diversity and skills in regional management, making use of existing community networks;
(f) providing suitably trained facilitators to help with community participation, facilitate cooperation, and encourage resource managers to pursue ecological sustainability (CoA 1996:8–9).

1.4 Traditional Ecological Knowledge and the Delineation of Bioregions

> People whose livelihood is derived from hunting and gathering must have an intimate knowledge of native ecosystems. Failure to understand the environment is to die.
>
> Braithwaite et al. 1995:2

The limitations of the IBRA system for delineating bioregions for a national reserve system have already been mentioned. It is also now acknowledged that Indigenous communities must be involved in the determination of bioregions. The detailed fabric of Indigenous knowledge of biodiversity, particularly that relating to faunal species - one of the aspects acknowledged as lacking in informing the IBRA system - could be a crucial element in delineating boundaries. This could be particularly so in relation to Indigenous knowledge of the less known and understood, rare and endangered species, such as Australia's native rodents (Braithwaite et al. 1995).

Many faunal species are of sacred (totemic) significance and are celebrated in Dreamings, a feature of which is the routes travelled by these various species as they crisscrossed each other's paths and interacted with each other at various places (sacred sites or story places). Many of these routes passed through the traditional lands of (often) many different tribal and clan groups. Thus individuals from different land-owning groups are custodians of various sections of the routes (song-lines) travelled by the different animals, reptiles and birds. Individuals could also be identified by their totem as the wati malu (Kangaroo man - *Pitjantjatjara*) or the *wati nyi:nyi* (Zebra-finch man), for example.

This detailed body of culturally based ecological knowledge can assist not only in the planning of bioregions, but with the identification of key ecological zones within them as Rose (1995:14 - quoted at the beginning of Section 1) notes. This knowledge will also be useful in identifying the most appropriate areas to be included in the national reserve system to ensure that ecosystems are adequately represented.

2. SOME BACKGROUND CONSIDERATIONS

2.1 International instruments and standards setting documents recognising the Rights of Indigenous Peoples

Throughout this report reference is made to a number of international and regional conventions, declarations and other standards setting instruments and statements safeguarding or having the potential to safeguard the various rights of Indigenous peoples. These fall into three categories: Instruments to which Australia is party and therefore legally bound to uphold; those which are not legally binding but which contain standards which governments should aspire to meet in regard to the treatment of their Indigenous peoples; and declarations statements and charters generated by Indigenous peoples setting out their rights and expectations as to the manner in which they should be upheld. The *Draft Declaration on the Rights of Indigenous Peoples* was formally adopted by the UN Working Group on Indigenous Populations in July 1994. This is frequently referred to in matters affecting Indigenous rights, however it should be pointed out that it has no binding status until it is at least endorsed by the UN General Assembly - and even then it will need to be transformed into a Convention for it to place binding obligations on member countries. It is currently a long way off achieving even the first step. Some of these instruments, declarations etc., are listed here. The documents generated by Indigenous peoples are provided in Appendix 2.

2.1.1 Instruments binding on Australia

Convention on Biological Diversity
International Covenant on Civil and Political Rights
International Covenant on Economic, Social and Cultural Rights
Convention on the Elimination of All Forms of Racial Discrimination
Convention for the Protection of the World Cultural and Natural Heritage
Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169)
Torres Strait Treaty
International Convention for the Protection of New Varieties of Plants
UN Convention to Combat Desertification and Mitigate the Effects of Drought

2.1.2 Non-binding Declarations and other Instruments

Rio De Janeiro Declaration on Environment and Development
Agenda 21
UN Declaration on the Human Right to Development
UNESCO - WIPO Model Provisions for National Laws on Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions 1985
UNESCO Recommendations on the Safeguarding of Traditional Culture and Folklore 1989
Mexico City Declaration on Cultural Policies 1982
International Undertaking on Plant Genetic Resources
United Nations Law of the Sea Convention
UNCED Statement of Forest Principles
Draft Declaration of Principles on Human Rights and the Environment

2.1.3 Indigenous generated Declarations, Charters and Principles

Draft Declaration on the Rights of Indigenous Peoples 1994
Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples 1993
Kari-Oca Declaration and Indigenous Peoples Earth Charter 1992
Julayinbul Statement on Indigenous Intellectual Property Rights and the Declaration Reaffirming the Self Determination and Intellectual Property Rights of Indigenous Nations and Peoples of the Wet Tropics Rainforest Area 1993
Treaty for a Lifeforms Patent-Free Pacific and Related Protocols 1995
Coordinating Body for the Indigenous Peoples' Organisations of the Amazon Basin (COICA) Statement, September 1994
East Malaysia Statement, February 1995

Fiji Statement, April 1995

2.1.4 The Effect of these International Instruments on Australia

While such instruments as the *Convention on Biological Diversity*, the *International Convention on the Elimination of All Forms of Racial Discrimination* and the *Covenants on Civil and Political Rights and Economic, Social and Cultural Rights* are legally binding, the *Rio Declaration*, *Agenda 21* and the draft *Declaration on the Rights of Indigenous Peoples*, by comparison, "are not in the nature of treaty instruments and, to the extent that they introduce concepts not entrenched at customary international law, cannot be said to impose legally binding obligations on States which are signatories" (Office of the Chief Scientist 1994:31). It is further stated, with particular reference to the *Convention on Biological Diversity*, *ILO Convention 169*, *Agenda 21*, the *Rio Declaration* and the draft *Declaration on the Rights of Indigenous Peoples*, that:

Together these instruments represent important manifestations of current international thinking on the subject of the rights of Indigenous peoples and Australia, as part of the international community, has actively contributed in several international forums to the development of the views, ideas and ideals expressed in these instruments. Moreover, to the extent that certain common themes appear in these instruments, they reinforce each other and inevitably have the effect of exerting a greater pressure upon Governments to implement the obligations contained therein. These common themes include:

- recognition of the close relationship that exists between Indigenous peoples and their land and resources;
- the notion of self-management by Indigenous peoples, including management of resources;
- the right of Indigenous peoples to participate fully in environmental matters, including sustainable development and measures of protection;
- the requirement that Governments consult with Indigenous peoples over issues such as the adoption of a national policy to ensure conservation and sustainable utilisation of resources and strategies for the implementation of that policy;
- the need, where appropriate for the implementation of special measures to restore or protect the Indigenous environment;
- the right to fair compensation for any damage Indigenous people might sustain as a result of activities by Governments or corporations affecting the environment;
- respect, preserve and maintain knowledge, innovations and practices of Indigenous peoples relevant to the conservation and sustainable use of biological diversity;
- promote the wider application of such knowledge, innovations and practices with the approval and involvement of Indigenous peoples; and
- share equitably benefits arising from the use of traditional knowledge, innovations and practices with Indigenous peoples (pp. 31-2)

2.2 Holistic Concept of Indigenous Cultural Heritage

> It is ... inappropriate to try to subdivide the heritage of Indigenous peoples into separate legal categories such as "cultural', "artistic" or "intellectual", or into separate elements such as songs, stories, science or sacred sites. This would imply giving different levels of protection to different elements of heritage. All elements of heritage should be managed and protected as a single, interrelated and integrated whole.
>
> Erica-Irene Daes
>
> Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and Chairperson of the Working Group on Indigenous Populations (1993:9)

One of the problems confronting Indigenous communities in Australia is the protection of their cultural heritage. The dispossession of their lands was also accompanied by the dispossession of their cultural heritage. Indigenous cultural heritage, based on an holistic and integrated world view in which the various aspects of existence were intricately interwoven and interdependent, became fragmented and redefined to suit the administrative convenience of the colonisers. Thus land, sites of significance, cultural objects, biodiversity, languages, cultural knowledge, arts, etc, all became the responsibility of different

government departments at both federal and state levels, each charged with administering various bodies of legislation. One of the major divisions regarding the Western view of heritage is that between natural and cultural and which is embedded in the World Heritage Convention itself. Both the Commonwealth and the States have evolved separate sets of legislation to deal with the natural and cultural. These administrative and legislative arrangements have also marginalised Indigenous peoples, usurping their roles as the rightful custodians and authorities of their heritage. It also meant that the traditional balance between the various components of Indigenous heritage became distorted as some components were emphasised over others. The arts, for example, have enjoyed comparatively lavish patronage, while Indigenous languages have been allowed to languish.

The challenge, therefore, is to pull everything back together and enable Indigenous communities to once more exert their inherent human rights to own, control and enjoy their heritage and to share it with others on their own terms. As Toledo (in Cunningham 1993:1) has pointed out in relation to Indigenous communities in Mexico:

In a country that is characterised by the cultural diversity of its rural inhabitants, it is difficult to design a conservation policy without taking into account the cultural dimension; the profound relationship that has existed since time immemorial between nature and culture.... Each species of plant, group of animals, type of soil and landscape nearly always has a corresponding linguistic expression, a category of knowledge, a practical use, a religious meaning, a role in ritual, an individual or collective vitality. To safeguard the natural heritage of the country without safeguarding the cultures which give it feeling is to reduce Nature to something beyond recognition; static, distant, nearly dead.

Because so much of Indigenous heritage has been redefined in Eurocentric terms it is therefore necessary to once again reformulate Indigenous definitions of their cultural heritage and promote policies and structural reforms which will re-integrate the various components at the same time recognising the impact and input that the colonisers have had. In Western Australia, for example, the Aboriginal Interests Working Group (AIWG WA), in proposing the establishment of an Aboriginal Cultural Heritage Commission, recommended that one of the fundamental principles guiding the necessary legislation must be the "recognition of the Aboriginal world view that natural and cultural heritage are integrated and one" (AIWG WA 1991:192).

As part of this attempt "to pull everything back together" and to give this report some context in relation to an holistic notion of Indigenous cultural heritage management the following definitions based on those formulated by FAIRA (1989:34-36) for the terms cultural heritage, cultural property, and cultural resources will be employed:

Cultural Heritage

In general terms, the "cultural heritage of a people" refers to the totality of cultural practices and expressions belonging, as of birthright, to a particular group of people who recognise themselves as culturally distinct, and over which they hold primary rights and responsibilities as inherent sovereign rights. Culture is, by nature,

(i) continuously evolving, and

(ii) comprised of both intangible and tangible aspects

Cultural Property

Cultural property refers to those elements of Indigenous cultural heritage over which Indigenous communities assert ownership and wish to have this ownership recognised in Australian law.

Cultural Resources

Cultural resources refer to those elements of Indigenous cultural heritage which are a product of interaction between Indigenous and non-Indigenous peoples and over which equitable rights of access, enjoyment and control are required.

The relationship between Indigenous cultural heritage, cultural property and cultural resources is expressed in Diagram 1. For a more complete description of these terms see Appendix 3.

2.3 Biodiversity as Indigenous Cultural Property

Article 26

> Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent interference with, alienation of or encroachment upon these rights.
>
> *Draft Declaration on the Rights of Indigenous Peoples*

Indigenous people world-wide have long asserted their ownership, or more appropriately, custodianship over the natural species upon which their very existence has depended and over the millennia have developed a deep understanding of the ecosystems in which they live and indeed form part. This deep understanding extends way beyond economic relationships with the various plants, animals and minerals which sustain them to spiritual relationships involving totemic identification and an understanding of the interconnectedness of all life-forms to an understanding of the Earth as the Mother of all Creation (see, for example, the *Kari-Oca Declaration and Indigenous Peoples Earth Charter 1992* - Appendix 2.4.1). This relationship, under assault from resource hungry industrial societies on the territories, resources and lifestyles of Indigenous peoples, has necessitated an Indigenous response in order to mount a defence in international forums such as the United Nations General Assembly and its many sub-agencies. Thus Indigenous peoples are asserting their rights through such declarations as the *Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples 1993* and the *Julayinbul Statement on Indigenous Intellectual Property Rights 1993* (Appendices 2.4.2 and 2.4.3). In the last two years these responses have become very focused on what Indigenous peoples regard as the failure of the *Convention on Biological Diversity* to firstly acknowledge Indigenous ownership rights in the biodiversity on their lands and seas; secondly, to provide adequate legal protection for those rights; and thirdly, the use of the Convention by developed counties to extend an intellectual property rights regime based on the granting of exclusive monopoly patenting rights to individual corporations at the expense of Indigenous knowledge rights systems (Peteru, 1995; Nijar, 1994; and also Sutherland and Smyth 1995:77-8; Craig, 1995:20-5). This is very evident in statements and resolutions issued from a number of regional meetings in Bolivia (COICA, 1994), Sabah (Asian Consultation Workshop, 1995) and Fiji (Pacific Concerns Resource Centre, 1995a)(see Appendix 2.5) and which has culminated most recently in the demand that the Pacific be declared a life-forms patent-free zone with a symbolic treaty being drawn up to give effect (Pacific Concerns Resource Centre, 1995b). While the *Convention on Biological Diversity* may offer Indigenous peoples in Australia some very definite gains in terms of the acknowledgment of Indigenous knowledge and their important contribution to the management of the environment, the implications of this Convention are still being debated by Indigenous communities - this issue will be further explored in Section 9.1 of this Report.

In Australia, the continent's biodiversity and Indigenous use of it have been under scientific scrutiny since the time of Captain Cook's first voyage here, however, the issue of Indigenous intellectual property rights in biodiversity has scarcely been examined by the Indigenous and non-Indigenous communities alike.

While an enormous quantity of information has been gathered by scientists concerning Indigenous biodiversity (see, for example, Webb, 1969:137), so far, little of it seems to have resulted in significant large scale commercial exploitation - or certainly in a way which might capture the public's imagination and thus possibly draw attention to the issues regarding the (mis)appropriation of Indigenous knowledge. Apart from discontent being voiced by Aboriginal people about the use of Indigenous knowledge in such television programs as *The Bush-Tucker Man*, there has been little serious examination of the issues, and certainly no where near the extent to which they have been examined by Indigenous communities overseas. Even the recent examination by the Attorney-General's Legal Practice of the effectiveness of the *Copyright Act 1968* with regard to protecting Indigenous intellectual property has largely confined itself to the realm of the arts (see *Stopping The Rip-Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples,* CoA, *1994*). Thus, apart from the efforts to raise the issue of Indigenous intellectual property rights in biodiversity by land councils, such as the NLC with respect to a

bio-prospecting contract with AMRAD, and in the course of this consultancy, there seems to have been little other systematic examination of the issues taking place.

2.4 Bioregional Planning, Biodiversity Conservation and Management and Indigenous Self-Determination

Article 3

> Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 30

> Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilisation or exploitation of mineral, water or other resources. Pursuant to agreement with the Indigenous peoples concerned, just and fair compensation shall be provided for any such activities and measures taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Draft Declaration on the Rights of Indigenous Peoples

The House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (HRSCATSIA) in a report, *A Chance for the Future*, considered the essence of self-determination to be the devolution of political and economic power to Aboriginal and Torres Strait Islander communities. [It] defined self-determination in terms of Aboriginal control over the decision making process as well as control over the ultimate decisions about a wide range of matters including political status, and economic, social and cultural development. It means Aboriginal people having the resources and capacity to control the future of their own communities within the legal structure common to all Australians (quoted in HRSCATSIA 1990: 12).

The essential problem with this definition is that self-determination is seen as applying within the closed context of an Indigenous community and does not include how Indigenous self-determination might be articulated and achieved in relation to mainstream Australian society and its many government departments, institutions and agencies which impact on Indigenous interests. A very good example of the failure of mainstream institutions to apply the principles of Indigenous self-determination, even when Indigenous interests are the focus of concern, is provided by the body of State/Territory legislation purporting to protect Indigenous cultural heritage. Much of the legislation concerned with biodiversity conservation, particularly at State level, is subject to this same criticism and is dealt with in detail in Section 5: Empowerment.

Within the context of Indigenous involvement in bioregional planning and in addition to the necessary structural reforms which will entail legislative amendments, the following points must be taken into account for Indigenous self-determination to be effective:

- **Consultation** - This entails the provision of information (in a form which is accessible to the local community) - the terminology involved with biodiversity conservation in many ways involves new words and concepts for what is in reality an age-old practice for Indigenous communities; holding workshops (particularly within local communities) and conferences; incorporating feedback into plans and other documents and subjecting them to further community scrutiny; etc. Consultation must be an on-going process and adequate time must be allowed for the different phases.
- **Community involvement in the determination of bioregional boundaries and protected areas** - The process of selecting bio-regions for planning purposes must have Indigenous input and influence to better sensitise bio-regional planners to some of the human and cultural factors involved. The whole process of selecting protected area priorities within bio-regions must include some measure of Indigenous control and be made clearly accountable to the Indigenous communities effected. Indigenous understanding and influence over processes of selecting protected area priorities within bio-regions would seem to be essential if Indigenous groups are going to ensure that they attract long term conservation funding for self-declared areas. It may also be important for them if they are to

ensure that their lands are not simply chosen for protected areas simply because their lands are considered by government agencies to be easy targets. Scepticism about the fairness of the processes involved in establishing the national reserve system is based on past experiences with groups such as Marine Parks in Queensland, and the Commonwealth Government's past actions leading to the inclusion of parts of Yarrabah in the Wet Tropics World Heritage area, despite the protests of Aboriginal people affected.

- **Creation of appropriate Indigenous Units within Government Departmental and Agency Structures** - These (should) act as focal points for the mutual articulation of department/agency and Indigenous community interests. Indigenous units should have responsibility for explaining and administering department/agency policy and practice with Indigenous communities, while at the same time advising on and monitoring performance, ensuring that community protocols are observed, obtaining community feedback and ensuring that it is acted upon, etc.
- **Respect for community diversity -** Indigenous communities are very diverse, with respect to kin, social and tribal groupings; political dynamics and aspirations; whether they own land or not; and the overall environment in which they live (urban, rural, remote area). Respect for these factors is essential for community participation.

2.5 Indigenous involvement in bioregional planning and management - another path to reconciliation

> Although all levels of government have clear responsibility, the cooperation of conservation groups, resource users, Indigenous peoples, and the community in general is critical to the conservation of biological diversity.
>
> *National Strategy for the Conservation of Australia's Biological Diversity* (CoA 1995:b).

In terms of community involvement in bioregional planning and conservation, a likely scenario is that the planning activities associated with each bioregion will necessitate the establishment of at least one committee for each region. These committees will also, no doubt, reflect the diversity of interests held by the people who live within each bioregion and therefore it can be anticipated that there will be Indigenous representation on these local committees. Such forums enable views to be exchanged and the various concerns of the different stakeholders to be negotiated and reconciled in order to meet the objectives of managing a shared resource.

This has certainly been the experience of those participating in the Regional Marine Resource Advisory Committees (RMRAC), ten of which have been established with the support of the Great Barrier Reef Marine Park Authority (GBRMPA) and the Queensland Department of Environment and Heritage (QDEH) at places like Cooktown, Port Douglas, Cairns and Townsville, to help those agencies manage the multiple uses of the Great Barrier Reef Marine Park (GBRMP). The Cairns RMRAC has members from 16 organisations representing both private and government interests and includes local Indigenous representation. Many of these organisations represent industries which share limited and intensively used resources, namely particular reefs in the GBRMP off-shore from Cairns. The competing interests of, for example, commercial fishers and tourism operators can lead to animosity, but the establishment of the RMRACs has provided an opportunity for these mutual interests to be accommodated. The RMRACS have been so effective in terms of providing management input to GBRMPA and QDEH that GBRMPA recently announced a $40,000 allocation for the employment of a part-time co-ordinator and secretary to provide support for the RMRACs in the Cairns, Port Douglas and Cooktown regions. The funding was "recognition of the contributions the committees made to the management of the reef through its broad-based community representation" (*The Cairns Post* 1995:20). Such bodies might not only serve to promote reconciliation between Indigenous and non-Indigenous groups, but also among other groups who are in competition over a resource.

It might be argued that activities which can bring together diverse and often disparate interests, if entered into in the right spirit, will promote mutual understanding and tolerance. The inclusion of Indigenous interests in bioregional planning and management should not be an exception and should provide an ideal forum to promote reconciliation. With the inclusion of Indigenous representatives in the

various planning groups, other members could, for example come to appreciate much more about (local) Indigenous communities' cultural, spiritual, historical and traditional associations to the land and the traditional management of its resources. This can add new dimensions to the understanding of the area.

Indigenous communities should, therefore, be involved throughout the bioregional planning exercise, by not only being involved in the determination of actual bioregions, but also in their management by being party to management plans, regional and local agreements and by being involved in the day to day management , for example, as rangers and traditional owners/custodians.

2.6 Equity in Indigenous Involvement in Bioregional Planning

In terms of conservation policies generally, concern was expressed by representatives of Indigenous communities in south eastern Australia that such policies were directed towards the communities to the north which owned land and that communities which had no land were ignored, marginalised or reduced to tokenism. In Queensland, for example, of the 12 national parks gazetted as claimable under the *Aboriginal Land Act 1991*, 11 are on Cape York Peninsula, thus potentially considerably extending the amount of land already under Aboriginal control in the DOGIT areas (Department of Lands statistics in Bergin 1993:69).

It is the intention of this Report to detail a role for the involvement of all Indigenous communities in Australia in bioregional planning and biodiversity conservation and management, as of right. Indigenous communities' rights to be involved in the management of natural resources with which they are traditionally associated are articulated in a number of instruments binding, and non-binding, on Australia, and which have been identified or discussed in preceding sections of this Report.

3. REGIONAL AGREEMENTS AND INDIGENOUS INVOLVEMENT IN BIOREGIONAL PLANNING

> The term regional agreement is being used increasingly in Australia, although seemingly with much confusion and controversy. Basically, it involves the concept of equitable and direct negotiations between Indigenous peoples, governments and other stakeholders in a region to recognise the rights of Indigenous peoples and to protect them in a contemporary legal system. There is no pre-ordained form which a regional agreement should take. Rather, it is a means for Indigenous peoples to define our own solutions and obtain legal, administrative, and political recognition for such definitions. A working definition might be:
>
> > A regional agreement is a way to organise policies, politics, administration, and/or public services for or by an Indigenous people in a defined territory of land (or of land and sea).
>
> The only firm requirement is that there is a region. What one chooses to organise within that region, and the way in which one chooses to organise it, is up to the Indigenous people alone, or the Indigenous people together with others who have power and resources for or in the region.
>
> (Dodson 1995a:19)

Within this flexible concept of regional agreement there are now many examples of such agreements existing both overseas and within Australia at, what might be termed, mega, macro and micro geo-political levels. Two examples of 'mega' regional agreements involve the Home Rule plan negotiated between the Inuit peoples of Greenland and the government of Denmark and the Nunavut Agreement in Canada (Tungavik and Siddon 1993; Richardson et al. 1994 - see Dodson 1995a:21-3 for a brief commentary on both; and Craig 1995: 39-51,54-61) . It is conceivable that any document or "instrument of reconciliation" formulated by the CFAR might be regarded as a 'mega agreement'. In terms of macro agreements, the efforts of such organisations as the KLC, CYLC and the Torres Strait Regional Authority to establish regional agreements in their respective areas are examples with which the term regional agreement in Australia is most frequently associated. However, at the micro or local level, the establishment of joint management agreements between Indigenous traditional owners and Federal, State or Territory agencies over such national parks as Uluru - Kata Tjuta, Kakadu and Nitmiluk and the various agreements entered into with Queensland authorities by the KALNRMO can be understood in

terms of being regional agreements. Agreements regarding such diverse concerns as mining, hunting and gathering, access to sites, bio-prospecting and community justice can also be interpreted as constituting some form of regional agreement (see Dodson 1995b:1-11 for a summary of some of these agreements as they are currently operating in Australia). Dodson (1995a:20) explains the particular benefits that regional agreements can afford to Indigenous communities in Australia:

> Contemporary regional agreements offer an approach whereby Indigenous peoples are regrouping, or grouping together in new units, in order to solve their own problems in the context of [their] cultural identity. They are an old concept for solving new problems. A regional agreement creates or renews a social and cultural context in which Indigenous society can live, build, and flourish. Sometimes these are traditional historical associations of peoples, such as the Torres Strait or the Kimberley, even if they are now looking to new forms of organisation and new functions to help them deal with new realities and especially with other public authorities. Sometimes they are dispersed and dispossessed people living in a large city who are finding in each other a society for the exchange and enrichment of cultural values while working together to solve particular social ills. Or they may be something between the two, like the Tangentyere Council which provides local government services and a wide range of culturally important functions to the town camps of several peoples grouped around Alice Springs. In each case they are evolving or negotiating new forms of organisation to deal with contemporary challenges of self-determination, social well-being, environmental protection, economic development, and cultural survival.
>
> Approached from a 'rights based' perspective, regional agreements offer a vehicle to transform vague rights into a clear form of organisation and law so that Indigenous peoples achieve some real benefit from them .

The regional agreement approach to Indigenous affairs is the antithesis of most current government approaches which are based on central statutory agencies imposing policies and 'solutions' on Indigenous communities with little real consultation and involvement of the peoples concerned in the formulation of such policies and the structures and processes they generate. Such approaches are not only counterproductive but anathema to Indigenous communities (Pearson in Horstman and Downey 1995).

The concept of regional agreements being applied in Australia has arisen out of the desire by Indigenous communities, in a defined geographic area,

> "to have greater control over the design, operation or funding of services being provided to them. ... Models for regional agreements leading to autonomy and localised self-government such as those advanced for the Torres Strait and discussed by the Kimberley and Cape York Land Councils ... involve ceding by the Commonwealth and the relevant State or Territory Government of powers to an Indigenous structure within the framework of the present Constitution. ...
>
> Regional agreements could be more specific, in more settled or urbanised areas, by focusing on contracts between Aboriginal and Torres Strait Islander communities or organisations with the Commonwealth and the relevant State or Territory government or local authority for the delivery of particular services such as health or education. Such arrangements would permit greater involvement of Aboriginal and Torres Strait Islander peoples in monitoring and influencing the outcomes of mainstream service provision to their communities (CFAR 1995: 47-48).

The Council for Aboriginal Reconciliation (p.48) further points out that:

> Specific provision was made in the Native Title Act, 1993 for a statutory basis for regional agreements. Similarly, the establishment of the Torres Strait Regional Authority was provided for by amendment to the Aboriginal and Torres Strait Islander Commission Act, 1989. At the other end of the spectrum, it would seem likely that any tripartite arrangements involving the Commonwealth, a State or Territory government and a structure representative of Indigenous peoples would be able to be drafted in such a fashion as to be enforceable under the general law of contract. In addition, if a regional agreement of such significance so warranted it, a statutory protection could be provided to its framework by amending the Aboriginal and Torres Strait Islander Commission Act, 1989.

To date, most of the debate about regional agreements has been focused on using them as the basis for better service delivery in such areas as health, housing, education and training, and infrastructure. There

appears to be no reason why such agreements cannot be extended to cover bioregional planning and biodiversity conservation, either within the context of a comprehensive regional agreement of the sort contemplated by the Torres Strait Regional Authority or Cape York Land Council, or in a more localised agreement specifically negotiated around bioregional planning and biodiversity conservation , or some aspect of it. With respect to legal status, again there appears to be no reason why the relevant Commonwealth, State or Territory legislation cannot be amended to provide statutory force to such regional agreements - perhaps framed in terms of management arrangements. A recent example of such legislative amendment concerns the *Great Barrier Reef Marine Park Act 1975* (see section 5.1.1.2).

Given the flexibility of what can constitute a regional agreement and the diversity of circumstances in which Indigenous communities in Australia live, the suitability of their application to bioregional planning and conservation appears obvious. For example, a regional agreement might be concluded which gives the Indigenous communities concerned the responsibility to carry out biodiversity conservation measures throughout a complete bioregion which might be located on their lands, or it may concern the contracting of an Indigenous community ranger service to carry out various conservation and land care tasks on neighbouring lands reserved for forests. The application of regional and local agreements to bioregional planning and biodiversity conservation will be explored in detail in Part 4 below.

The following sections deal with regional and local agreements within the context of the Commonwealth Government's response to the Mabo decision taking into account that, even where native title has been extinguished, land acquisitions and land management strategies funded by the Indigenous Land Corporation together with various measures mooted for the Social Justice Package have implications regarding Indigenous involvement in bioregional planning throughout Australia.

3.1 Regional Agreements in the context of the Commonwealth Government's response to the Mabo Decision

The Commonwealth Government's response to the High Court's decision in Mabo comprises three parts: a legislative response in the form of the *Native Title Act 1993*; the creation of the Aboriginal and Torres Strait Islander Land Fund (ATSILF) under the *Land Fund and Indigenous Land Corporation (ATSIC Amendment) Act 1995*; and the Social Justice Package. All three components have direct implications for Indigenous involvement in bioregional planning.

3.1.1 **The Native Title Act 1993** and regional and local agreements

Regional agreements are referred to in the Preamble, and **s.21** of the Act. The Preamble states that:

> Governments should, where appropriate, facilitate negotiation on a regional basis between the parties concerned in relation to:
> (a) claims to land, or aspirations in relation to land, by Aboriginal peoples and Torres Strait Islanders; and
> (b) proposals for the use of such land for economic purposes.

Section 21 of the NTA states that:

> **21.**(1) Native title holders may, under an agreement with the Commonwealth, a State or Territory:
> (a) by surrendering their native title rights and interests in relation to land or waters of the Commonwealth, a State or Territory (as the case may be) extinguish those rights and interests; or
> (b) authorise any future act that will affect their native title.
> (2) The agreement may be given for any consideration, and subject to any conditions, agreed by the parties (other than consideration of conditions that contravene law).
> (3) Without limiting subsection (2), the consideration may be the grant of a freehold estate in any land or any other interest in relation to land, whether statutory or otherwise, that the native title holders may choose to accept.
> (4) Subsection (1) does not prevent agreements mentioned in that subsection being made by native title holders on a regional or local basis.

In summarising the importance of the regional agreements provision in the *Native Title Act 1993*, Dodson (1995c:144) states:

> The NTA provides a mechanism for Indigenous people, governments and industry to reduce uncertainty themselves through negotiation and agreement instead of costly and time-consuming litigation. In particular, **s.21** of the NTA allows any future act to proceed with the agreement of native title holders. This provision provides scope for the development of regional or local agreements, which can incorporate arrangements for environmental and resource management although it is not the only way in which regional agreements can be reached. As the Prime Minister said in his Second Reading speech for the Native Title Bill:
>
> > The Bill recognises further that there may be cases where regional negotiation is the most efficient way to avoid or resolve conflicts over land use for large areas.
>
> Regional agreements, whether they are within the structure of the NTA or not, have the advantage of allowing future development projects and land and resource management to operate with certainty, even where the full extent of the common law recognition of our native title rights is yet to be defined. It also creates an environment where Indigenous concerns are not neglected and future developments proceed with our consent. Development approval procedures that require consultation with, and consent from, Indigenous peoples will create a framework for real Indigenous participation in regional projects. Such a framework is a practical expression of reconciliation and to bring it into existence should be the ambition of all governments, whether local, state or commonwealth.

To these comments can also be added those of ATSIC (1995:55), which in citing the success of regional agreements in Canada, notes that:

> 4.49 In Australia there is growing interest similarly in settling a range of social justice issues on a regional basis. There is particular interest in strengthening localised responsibility, commitment and accountability both within Indigenous communities and in relations with various levels of Government, their agencies and institutions. The negotiated framework and process provided by a formal regional agreement is seen as the most appropriate way of securing this outcome.

While a regional or local agreement need not necessarily entail the surrender of native title rights [**s.21.**(1)(b)], the concept of surrendering or voluntarily extinguishing native title in exchange for a regional agreement may be a controversial issue for some Aboriginal and Torres Strait Islander communities as, unlike in Canada, there are no constitutional guarantees protecting Indigenous rights in Australia. However, as is pointed out in an information paper from the Department of Prime Minister and Cabinet:

> It should be noted that while native title extinguishment is possible in such an agreement, it is not always necessary. However, if the land in question was to be leased, for example, the Government may need to convert the title from native title to freehold or some form of statutory title (s21(3)) in order to allow a third party to then lease rights in the land along the lines of the agreement.
>
> Such agreements may be between the native title holders and another party (for example a mining company, a tourist operator or a Shire Council) and given endorsement by the Government party responsible for managing the title and land use elements of any transaction. There is no statutory restriction on the ambit of negotiation and any lawful land use may be included in such an agreement (s21(2)).
>
> It is for example, possible for a regional or local agreement to agree to:
>
> - allocate areas of native title land as a recreation reserve or national park (without necessarily extinguishing native title);
> - exchange areas of native title land for pastoral leasehold (probably extinguishing native title);
> - enable the use of native title land as a mining lease (suspending native title for the duration of the lease);
>
> as well as other uses (in Craig 1996).

In any case, regional or local agreements under the *Native Title Act 1993* (Cwlth) will be limited by the scope of the Act and the resources of the Native Title Tribunal (Craig 1996).

> In terms of Indigenous involvement in bioregional planning, as Dodson (1995a:20) suggests:
>
> ... regional agreements can provide a legal framework and procedures for involving Indigenous interests in a region with ... environmental protection by establishing an on-going policy framework whereby Indigenous and non-Indigenous interests can co-operate and co-exist through bicultural institutions for management and planning.

The most likely scenario regarding regional agreements is that they will be more local in character as local communities, particularly in the south eastern half of the continent where regional agreements in the form being contemplated by such bodies as the KLC and CYLC will not be possible, seek to take advantage of the ATSILF and the various measures of the Social Justice Package. Also, whereas Indigenous involvement in bioregional planning in terms of these larger regional agreements might be negotiated as only one item within a package, in terms of the local agreements they might well be focused on bioregional plans.

3.1.2 The Aboriginal and Torres Strait Islander Land Fund

The ATSILF was set up to address the land needs of the estimated 90-95% of the Indigenous population for whom their native title has been extinguished. The amounts of land to which Aboriginal and Torres Strait Islander peoples have title under existing Commonwealth, State and Territory land rights legislation (see Table 1: Aboriginal Land Tenure - Population, Type of Tenure, 30 June 1989) or have been granted certain rights and responsibilities (eg., in relation to national parks and other protected areas and pastoral leases in some states and the NT) varies from state to state. While Aboriginal communities have title to considerable areas of land in the northern and central regions of the continent, some of which may encompass complete bioregions and substantial parts of others, Aboriginal land tenure in the south-eastern half of the continent (south of a line from Cairns to Perth), with the exception of the Pitjantjatjara lands in SA, is characterised by small, scattered parcels of land varying in size from a few hectares to a few rarely exceeding 10,000 hectares (see Map 1: Aboriginal Land 1988). Apart from a few pastoral properties purchased under various ATSIC, former Aboriginal Development Commission and NSW Aboriginal Land Council grants, the majority of these Aboriginal holdings enabled under various State and Commonwealth Acts are comparatively small. For example, in Queensland, apart from Deed of Grant in Trust (DOGIT) lands, the majority of lands now being transferred under the *Aboriginal Land Act 1991* comprise former Aboriginal town reserves (the “town” or “fringe” camps) which, for the most part, involve only a few hectares of limited economic value which communities want to use to establish housing and cultural and training facilities.

Table 1. Aboriginal Land Tenure - Population, Type of Tenure, 30 June 1989.

	Aboriginal population (a)	As % Aboriginal population	Total land (sq. km.)	Aboriginal freehold area (sq. km.)	As % total	Aboriginal leasehold (b) land (sq. km.)	As % total	Aboriginal Mission land (sq. km.)	As % total	Reserve/ Land (sq. km.)
NSW & ACT	60 229	1.04	804 000	492	0.06	842	0.1	-	-	1 334
Vic	12 610	0.3	227 600	31	0.01	-	-	-	-	31
Qld	61 267	2.3	1 727 200	5	0	31 990	1.85	95	0.01	32 070
SA	14 292	0.97	984 000	183 146	18.61	507	0.05	-	-	183 653
WA	37 788	2.6	2 525 000	35	0	103 227	4.09	202 223	8.01	305 485
NT	34 740	23.2	1 346 200	451 219	33.52	26 424	1.96	0.45	0	477 688
Tas	6 712	1.5	67 800	2	0	-	-	-	-	2
Australia	227 638	1.42	7 681 800	634 930	8.27	162 990	2.12	202 363	2.63	1 00 263

(a) 1986 Census

(b) includes pastooral, special purposes and local shire council leases

Source: Heritage Division, Department of Aboriginal Affairs

Apart from the small remaining parcels of Vacant Crown Land and the possibility of some native title rights surviving in relation to national parks and timber/forest reserves, native title has been extinguished virtually throughout this south eastern half of the continent. This half of the continent also contains about two-thirds of the Indigenous population, of which a sizeable proportion live in the capital cities, for example, 47.5% and 42.8% of their respective state populations live in Melbourne and Adelaide (Castles 1993:3).

The ATSILF has only recently been established and the Indigenous Land Corporation Board has yet to release its national Indigenous land strategy or any of its regional Indigenous land strategies. Under **s.191N:**

(2) The national Indigenous land strategy must cover, but is not limited to, the following matters:

(a) the acquisition of interests in land for the purpose of making grants of those interests to Aboriginal and Torres Strait Islander corporations;

(b) land management issues relating to Indigenous-held land;

(c) environmental issues relating to Indigenous-held land.

And with regard to consultation, in addition to consulting with ATSIC, the ILCB "may consult with such other persons and bodies as the Board considers appropriate" [**s.191N.**(3)(b)]. With regard to the regional Indigenous land strategies, **s.191P** is similarly worded but to give effect to a regional context.

While the *Land Fund and Indigenous Land Corporation (ATSIC Amendment) Act 1995* has clear implications and potentials with regard to Indigenous involvement in bioregional planning (for example, by the purchase of strategically important areas necessary to biodiversity conservation or for the conservation of particular species), it is highly unlikely that this will constitute a major guiding principle in terms of the land acquisition policies of the ILCB (see also Sutherland and Smyth 1995:24-25). However, this is not to rule out the possibility of conservation agencies, such as ANCA or any of the State/Territory departments, negotiating with the relevant Indigenous bodies (eg., ATSIC regional councils, representative land councils, or local communities) about prospective land purchases and indeed setting up conservation management agreements between parties. Such negotiations can, of course, work both ways, with Indigenous communities also lobbying conservation agencies for support of particular areas of land which may also have significant conservation value.

3.1.3 The Social Justice Package

The Social Justice Package involves a "package of measures directed towards structural reform and encompassing a broad range of social, economic and cultural factors" (Dodson 1995a:1).

Structural Reform

In terms of structural reform and Indigenous peoples' involvement in bioregional planning, it is assumed that while the Commonwealth (in conjunction with the States and Territories) has articulated the broad policy framework and objectives to govern and implement bioregional planning (see CoA 1996), it will be largely the responsibility of the States and Territories to implement the policy "on the ground". Within this context it will be the responsibility of a number of State/Territory departments (concerned with environment, nature conservation, national parks, land use and development, primary industries and local government) under their enabling legislation to oversee the bioregional planning process and execution. It also goes without saying that bioregional planning is very much a local planning exercise involving (probably several) local government authorities, land owners, community interest groups together with the various State/Territory and Commonwealth authorities. While bioregional planning will ultimately devolve into a number of responsibilities being undertaken at the local level, nevertheless the whole exercise has to be co-ordinated at the State/Territory level, presumably through inter-departmental/agency arrangements.

Within this scenario it is argued that, for effective Indigenous involvement in bioregional planning, and from the point of view of structural reform, Indigenous people must be involved throughout the whole structure associated with bioregional planning and any of its processes. This structural reform, from an Indigenous perspective, must entail empowerment through the relevant legislation and involvement at all levels of departmental policy making, administration, implementation, monitoring and review through membership on the relevant bodies (statutory or not) at state regional and local levels.

This issue of structural reform is dealt with in detail in terms of empowerment in Part 5 of this report.

3.2 Regional Agreements and the RCIADIC Recommendation 315.

The Royal Commission into Aboriginal Deaths in Custody, in relation to Indigenous involvement in national parks and protected areas, recommended:

315. That the recommendations submitted to the Conservation and Land Management meeting (held at Millstream on 6-8 August 1990) by representatives of Aboriginal communities and organisations be implemented in Western Australia upon terms to be negotiated between Aboriginal people and appropriate Aboriginal organisations and communities on the one hand and National Park authorities on the other so as to protect and preserve the rights and interests of Aboriginal people with cultural, historical and traditional association with National Parks. The recommendations proposed at the Millstream meeting were:

a. The encouragement of joint management between identified and acknowledged representatives of Aboriginal people and the relevant State agency;
b. The involvement of Aboriginal people in the development of management plans for National Parks;
c. The excision of areas of land within National Parks for use by Aboriginal people as living areas;
d. The granting of access by Aboriginal people to National Parks and Nature Reserves for subsistence hunting, fishing and the collection of material for cultural purposes (and the amendment of legislation to enable this, where necessary);
e. Facilitating control of cultural heritage information by Aboriginal people;
f. Affirmative action policies which give preference to Aboriginal people in employment as administrators, rangers, and in other positions within National Parks;
g. The negotiation of lease-back arrangements which enable title to land on which National parks are situated to be transferred to Aboriginal owners, subject to the lease of the area to the relevant State or Commonwealth authority on payment of rent to the Aboriginal owners;
h. The charging of admission fees for entrance to National Parks by tourists;
i. The reservation of areas of land within National Parks to which Aboriginal people have access for ceremonial purposes; and
j. The establishment of mechanisms which enable relevant Aboriginal custodians to be in control of protection of and access to sites of significance to them (Johnston 1991:100-1).

These recommendations might well act as a check-list for the content of a regional agreement in the form of a management plan involving a joint management arrangement between an Indigenous community and a conservation authority in relation to a national park. Agreement so-constructed would then fulfil government obligations to honour Recommendation 315 in respect of the Indigenous communities involved.

3.3 Possible Parties to Regional and Local Bio-agreements

Any regional or local agreements involving Indigenous communities will also involve a range of non-Indigenous stake-holders and interest groups with whom planning and management arrangements will have to be negotiated. These include:

Commonwealth Agencies (possibly as brokers): Department of the Environment, Department of Primary Industry and Energy, CSIRO, etc.

State/Territory Agencies (possibly as brokers): Departments/instrumentalities concerned with national parks and nature conservation, forests/timber reserves, environment, land-care, soil and water conservation, land generally (Crown and freehold), primary industries and resource management.

Local Government (possibly several), possibly organised into regional planning coalitions to address particular concerns through regional planning advisory groups;

Land-holders (privately owned, lease-hold, mining leases, etc): farmers, pastoralists, miners, etc.

Interest Groups (often acting as advocates or lobbyists for land-holders): Farmers associations, Cattlemen's Union, mining industry councils, conservation groups, tourism organisations, etc.

It is also possible (if not probable) that if major conservation initiatives are involved then party politics (federal and state) may also overlay planning negotiations as is currently the case with the Queensland Government's pre-election announcement to declare the eastern portion of Cape York Peninsula a conservation zone. It is probable that any formal declaration by government to enter into a regional agreement with Indigenous communities in Indigenous domains, such as Cape York Peninsula or the Kimberley, will likewise be politically controversial.

On the assumption that the more parties involved, the more complex the negotiations, in terms of Indigenous involvement in bioregional planning the simplest situation is likely to be where a bioregion falls within lands owned by an Indigenous community [situation 2) outlined in section 4.2 below]. The most complex are likely to be where complex regional agreements are being negotiated over Indigenous domains [situation 1) as described in 4.1 below] and where Indigenous communities do not have title to any of their traditional lands [section 7 below].

3.4 Possible Content of Regional and Local Bio-agreements

While it is probably impossible to list all factors which need to be taken into account in terms of the content of a bioregional plan or agreement because a huge variety of local conditions will apply, the following factors will nevertheless have to be taken into account.

- **Relevant legislation** (at federal, state and local government levels) regarding land tenure, national parks and other categories of protected areas, timber and water catchment reserves, endangered and vulnerable species, heritage protection, conservation orders, existing management plans (eg., for the sustainable use/harvesting of particular species), etc.;
- **Land and water resources conservation** - with respect to existing and future conservation and rehabilitation requirements;
- **Recognition and accommodation of Indigenous Rights** — self-determination, ownership of cultural property, recognition and protection of Indigenous intellectual property rights in biodiversity, right to hunt, fish and gather, etc.;
- **Particular cultural requirements** — eg., with regard to particular sites or places , particular species;
- **Identification of land to be incorporated into the representative protected area system** — Indigenous communities must be involved and identification should take into account cultural considerations;
- **Existing local management/conservation plans**
- **Pest control** — weeds and vermin
- **Overall status of plans/agreements** — whether they have statutory force or not (some elements of a plan will be guided by statutory requirements, some components might involve voluntary agreements),
- **Membership of planning and management bodies**
- **Status of management bodies —** primarily advisory or having particular administrative powers and functions;
- **Consideration of other regional planning processes and forums —** bio-plans and agreements might have to fit within or be a component of other regional plans;
- **Research and monitoring programs —** eg., the use of pesticides and herbicides, endangered species management plans, ecosystem inventories, base-line studies, impact assessments, etc;
- **Enforcement procedures;**
- **Day-to-day management —** who will have responsibility for carrying out the above tasks.
- **Resourcing** — how will bioregional plans and/or particular components of them be financed and resourced.
- **Accountability**

It is within this context that Indigenous involvement will take place. With respect to some bioregions, for example, those which fall within Indigenous community owned land, the formulation and implementation of plans will primarily be the responsibility of the communities concerned. In other circumstances Indigenous communities will have to negotiate their involvement with a host of other stake-holder and interest groups and may have a comparatively minor (but significant) role to play in planning and implementation (see sections 4.1–4.7 of this report)

3.5 Joint Management, Cooperative Management and Sole Management

It is noted that the Commonwealth government refers to ”cooperative arrangements” in the *National Strategy for the Conservation of Australia’s Biological Diversity* (CoA 1996:15) recognising that a ”representative reserve and off-reserve system to conserve biological diversity will extend across the boundaries of Aboriginal and other tenure systems”, while expressing a commitment to joint

management in relation to "conservation areas and key species under Commonwealth control" in the policy document, *Living on the Coast* (DEST 1995:29). Indigenous communities do not regard these two concepts synonymously: joint management is what they generally aspire to - with or without a lease-back arrangement - with the Uluru/Kakadu "blue print" in mind; cooperative management is what some governments offer and is best symbolised by the phrase "meaningful management input" (see Woenne-Green et al. 1994:211) without legislative endorsement.

There has been much debate about what constitutes joint management and cooperative management, the two seemingly being used interchangeably to the confusion of everyone, but Indigenous communities in particular. The following definitions of both and their relationship to each other were decided upon at a workshop, "Working Together": A Workshop Towards a More Coordinated Approach to Aboriginal Issues Amongst Government Departments, convened by the Wet Tropics Management Agency in Cairns in May 1995, and are adhered to in this Report. Another option, sole management, is also included. The definitions and commentary from the workshop follow:

> **Joint management** refers to a joint decision making process, based on recognition, respect and commitment to agreed values, between Indigenous peoples particularly concerned with the (managed) area and government, where each party has significant statutory or other mutually agreed powers and obligations.
>
> For some decisions, this will involve equality of decision making. In some cases, Indigenous people will have a major say, while in others Government will want to retain a major or final say about certain issues.
>
> Government and the managing agency must be required to implement the decisions made under this joint management process, and be prepared to provide adequate and timely funding.
>
> The roles and responsibilities of each party will be determined by negotiation and will be defined through a combination of legislation and mutual agreement, as appropriate.
>
> **Cooperative management** refers to a decision making process where Indigenous peoples particularly concerned with the (managed) area are involved with government in an advisory or consultative capacity rather than a statutory power-sharing capacity.
>
> Cooperative management may include formal management agreements between Indigenous people, the managing agency and/or the landholder and could be used in some circumstances as a stepping stone toward joint management or sole management.
>
> **Sole management** refers to management with minimal involvement of parties other then the manager. The manager may be a government agency, landowner or Indigenous people.

The additional comment was made that "[s]ole management might apply to Indigenous communities where native title rights have been determined by a Native Title Tribunal".

3.6 "Precursor" Regional Agreements

> There is concern that in the current Australian political climate there is a tendency to promote models and pilot projects. Management strategies are the result of a social learning process which can take a long time to develop. There is much to be learned in the old adage, "what is one man's food is another's poison". What is good for Western Australia might not suit Arnhem Land or Queensland, given the complexities of political, social, economic and cultural circumstances. Kowanyama is not blindly following some Native American fisheries management "model", but is sharing a hell of a lot of different people's experiences in the development of its own unique management regime.
>
> Viv Sinnamon
> Director, Kowanyama Aboriginal Land and Natural Resources Management Office,
> Alice Springs, 1995.

The term "precursor", was used by Lambert et al. (1996) to identify various planning activities that have been carried out at state, regional and local levels which might contribute to the formulation of models for bioregional planning for biodiversity conservation. In their words:

> …those activities which have the potential to develop into bioregional planning for biodiversity conservation are called precursor activities. Precursor activities have some of the essential elements of

bioregional planning, and at least consider how to protect the environment in their strategies and activities (Lambert et al. 1996).

Their three case studies involved the SEQ2001 Project, the Mallee Region Review and the Great Barrier Reef Marine Park Strategic Plan. In their summary they noted that:

> Public consultation and review formed an important part of each of the regional planning processes reviewed in the Case Studies. However, the extent of involvement of Aboriginal people varied widely. As the Great Barrier Reef Marine Park example demonstrates, differences between Aboriginal and European culture require that specific communication strategies are required to properly involve Aboriginal and Torres Strait Islander peoples and to benefit from their knowledge of each region (p.64).

Within the definition of what constitutes a regional agreement given by Dodson (1995a:19) (see epigraph at beginning of Part 3), there are already many examples of agreements in place which might act as precursors or models for future agreements which involve Indigenous communities in bioregional plans. These agreements usually take the form of management plans which involve Indigenous communities in Australia in some way or other. Because the majority have been established before the High Court's decision in Mabo in June 1992 they demonstrate that bioregional agreements, including biodiversity conservation can be successfully negotiated even in the absence of native title. All the national park agreements were concluded prior to the commencement of the *Native Title Act 1993* (Cwlth), and many involve land where native title had previously been extinguished.

Local agreements, often in the form of heritage agreements, are provided for in all states and territories between government instrumentalities and local land-holders (owners and lessees) (see Sutherland and Smyth 1995:34-63). For example, under **Part 4** of the *Native Vegetation Act 1991* (SA) and **Part 8** of the *Conservation, Forests and Lands Act 1987* (Vic) such agreements are possible. While practically all such agreements registered to date involve non-Indigenous land-holders, it is quite within the law for such agreements to also be struck with Indigenous land-holders but in culturally appropriate ways and in ways which do not jeopardise traditional hunting, fishing and gathering and other cultural activities unless with the consent or co-operation of the communities involved. The important point is that, whatever the nature of the agreement, it should not be inferior to those being established in similar circumstances between non-Indigenous land-holders and government agencies.

In their review of various land use models for consideration in the CYPLUS study, Stanley and Campbell (Focus et al. 1995:31) note in regard to various Indigenous Participation Models that:

> Indigenous participation in land management has emerged as making a powerful contribution in three distinct ways. First, it is critical in the appropriate management of traditional lands, so that a management framework is introduced which has cultural relevance and respect. Second, the wisdom of many traditional practices is such that Indigenous participation can make an important contribution to mainstream planning and resource management. Thirdly, the development of new approaches to land management by Indigenous peoples may see the emergence of totally new initiatives, arising out of the fusion of the old and the new. Such initiatives may have a broader influence on land management practices in Australia, in the long term.
>
> The Indigenous management model is based upon the application of traditional ecological knowledge in the wider context of development and social change, It involves using traditional knowledge and understanding of environmental structures and processes, networks of cause and effect, and people's perceptions of their own roles within environmental systems. Implicit in this is an acceptance of cultural and religious significance and the traditional economy and lifestyle of Indigenous people (p.31).
>
> The structure and content of Indigenous participation models vary, but most rely on the co-operative development of a management plan between the traditional owners of an area and the government agency responsible for resource management (p.32).
>
> The major strength of the Indigenous participation model is the benefit of obtaining an holistic ecological understanding of a region which has a greater value than scientific knowledge alone. On the other hand, traditional ecological knowledge is enhanced through the application of scientific knowledge for management purposes and the role of conservation areas is broadened to include social

and cultural dimensions. The model is well suited to less developed areas where traditional lifestyles and associations with land have been maintained (p.37).

A weakness of the Indigenous participation model has been its limited application in Australia other than in conservation areas. Applied on a regional scale across varying public and private land tenures, the model may have considerable potential, as has been demonstrated in Canada (p.37).

These models are driven by demands from Indigenous people to have control over the natural resources on which they depend for their well-being. Reinforcement of traditional cultural values is an additional aspiration. A further benefit of the various models is application of traditional techniques of land and resource management, which are often well based on sustainability, and which can inform mainstream resource management techniques (p63).

3.6.1 Cape York Peninsula Land and Natural Resource Strategy

The following section is compiled from information provided by Noel Pearson, Executive Director of the Cape York Land Council (CYLC).

Cape York Peninsula is currently undergoing a period of great change, where both at the local and regional level the return of traditional lands, primarily as national parks and the strategic purchase of others with high traditional as well as conservation values (Starcke and Silver Plains) to augment the DOGIT lands, necessarily means that there must be organisational changes at all levels — with governments, Federal, State and Local, and within the Indigenous Cape community. In order to achieve an holistic approach to the future of the region there needs to be an integrated and unified coalition of all the Indigenous organisations in the area involving the Peninsula ATSIC Regional Council, Cape York Health Council, Cape York Land Council and the Cape York Legal Service (Tharpuntoo) and the Aboriginal Coordinating Council.

The planning structure is based on 3 levels of organisation: regional (ie, Cape York Peninsula, the southern boundary being the Nassau River through to just south of Cedar Bay National Park); sub-regional (14 sub-regions primarily focussed on the existing communities); and local (the outstation communities, which could ultimately number as many as 100). At this stage the primary concern is to get people back on their land, that is, establish the outstations, for which *Planning a Future at Cape York Outstations* (Cooke 1994) provides the agenda in terms of the necessary evolving support structures, infrastructure needs (water and sanitation, cyclone shelters and storage, airstrips and air services, regional radio network, housing, vehicles, heavy machinery, etc), economic development and education and health needs. The next phase concerns land and natural resource management, however, occupation of lands through the establishment of outstations is integral to land management. Land and natural resource management, including fisheries, are now under consideration.

The Kowanyama Aboriginal Land and Natural Resource Management Office (KALNRMO) considered at the sub-regional level, and with which all the Cape communities are familiar, is considered the best model, but needs to be adapted to suit particular sub-regional needs and conditions. The Uluru model is not seen as suitable, primarily because it is confined to a single tenure situation as National Park and involves the “central agency” approach to management which is the antithesis of the CYLC model based on local community self-governance. The Kowanyama model takes into account multiple tenure arrangements and an integrated approach to the ecology of the area by being based on a water catchment area (see below). And most importantly, it has “struck the optimum relationship between traditional ownership and communal management”.

On a regional basis, land and natural resource management is to be supported through the soon to be established Cape York Community Development Centre. This Centre will be jointly run by the ATSIC Regional Council, the CYLC, Cape York Health Council and the Cape York Legal Service. Its functions will be: outstation development and support; land management support to sub-regional and local groups; economic development support; planning services and support; and training and employment services and support (facility to access DEET and State programs). This arrangement will leave the CYLC to ”concentrate on land and resource ownership and acquisition issues, and mining and heritage questions”.

At the sub-regional level, it is the intention to establish a network of 14 Land Management Offices. This recognises the view that land management cannot take place on a regional basis in Cape York. This

is because land management involves (i) decision-making about the land and (ii) day to day implementation. This can only happen on the ground. It cannot take place from Cairns where both QDEH's Regional Office and the CYLC are situated. However, neither can land management take place at an exclusively local group level. This is because of the wide impacts of land management problems and issues, that involve more than one local group. Limited resources and the need to rationalise organisational arrangements, mean that purely local group land management is impossible. It is at the sub-regional level that the delicate relationship between recognising and respecting the right of traditional owners to have ownership, control and "the say" over their own country, and the imperative for sub-regional co-operation and co-ordination in relation to management can be achieved successfully — the strength of the KALNRMO model. The people at the outstations, ie, the local level, will have the on ground responsibility of caring for their country, drawing needed resources and support from the Cape York Development Centre.

In terms of both bioregional planning and biodiversity conservation and regional (including sub-regional and local) aspirations for self-governance, the nature of future relations with Government agencies is vital. It is anticipated that the Queensland Department of Environment and Heritage (QDEH) "will have a presence in Cape York for some years to come with its facilities and employees (Rangers)". However, in time QDEH as a government conservation agency will be able to "retreat to Cairns" and no longer have a permanent presence in the Cape and will no longer exercise day to day management functions. Instead their role would be "reduced to monitoring and checking on contractual and statutory compliance". Aboriginal Land Management Agencies (patterned on KALNRMO and operating at the sub-regional level) will instead be contracted by QDEH to manage the National Parks on a day to day basis, within the statutory regime set by the State and the Management Board's policy guidelines. However, this transition will not take place until:

- Aboriginal Land Management Agencies have developed the requisite capacity to do the job; and
- a contract has been negotiated between the State and the Aboriginal Management Agency to do the job.

In the interim, QDEH will have their rangers in place who will also take on the role of Training Officers "to train our people and develop our capacity to manage". A further consideration is that, wherever possible, the Land Management Offices should be co-located with major QDEH Ranger bases, for example, at Bizant and Wakooka. In this way, advantage can be taken of the State Government investment in infrastructure (airstrips, communications, transport, equipment, etc.), and, with the appropriate statutory and contractual arrangements in place, "we anticipate the day when we take over the QDEH facilities down the track".

While the Cape York Regional ATSIC Council will be a major provider of funds to establish these operations on Cape York, the Cape York Indigenous Environment Foundation has also recently been established to provide funding assistance to a range of activities which include: the acquisition of culturally and naturally important land; the management of land; research into the cultural and natural values; and the promotion of the cultural and natural values where appropriate (see also Horstman and Downey 1995). The Foundation has a Board comprised of traditional owners from the Cape and non-voting representatives from The Wilderness Society and the Australian Conservation Foundation.

It is anticipated that where regional agreements over Indigenous domains are being contemplated each will evolve to meet its own unique requirements and in accordance with the terms and conditions that individual State and Territory governments will allow. Its main value is in the sub-regionalisation of its structure with its favoured application of the KALRNMO management model at that level, and as a predictor of the future in terms of what regional autonomy implies for the management of the regional biodiversity.

3.6.2 Kowanyama Aboriginal Land and Natural Resource Management Office (KALNRMO)

KALRNMO, established in 1990, has been extensively involved in the management of land and natural resources in the Mitchell River watershed which involves Kowanyama DOGIT land, national park (Alice/Mitchell National Park), non-Aboriginal pastoral leasehold lands and the coastal waters in the south-eastern region of the Gulf of Carpentaria. The well documented activities of KALNRMO (see, for

example, KALRNMO nd, 1994a and 1994b; Sinnamon nd, 1994a, 1994b and 1994c), which draw much of their inspiration from the land and resource management achievements of such North American Indian organisations as The Treaty Indian Tribes of Western Washington and the Northwest Indian Fisheries Commission, are widely respected by Indigenous communities in Australia and may well serve as a model for Indigenous involvement in bioregional planning at regional and local levels, particularly where other land tenures are involved.

The following information is taken from KALNRMO's *Strategic Directions* document (KALNRMO 1994b).

Kowanyama is an Aboriginal community of over 1000 people situated near the mouth of the Mitchell River, one of Australia's largest and least disturbed watersheds. The community is administered by the Kowanyama Aboriginal Council which receives advice and help from a Council of Elders, particularly in regard to land. The community has the title deeds to the Kowanyama DOGIT lands (252,000 ha) and management responsibilities for the Oriners Pastoral Holding. The opportunity also exists for the community to claim the Alice Mitchell Rivers National Park (37,100 ha).

Cultural and economic activity at Kowanyama revolves around the Mitchell and its natural resources. The land is a complex of story places and sites of local historical importance. In the mid 1980s, considerable tension existed between a number of competing groups with an interest in the use of the Mitchell River's resources (ie., commercial and recreational fishermen, graziers, miners, tourists and conservationists). The Kowanyama community considered that these conflicts were affecting the long term health of the resource base at Kowanyama, and consequently, were reducing the options available to future generations. To address this concern the KALNRMO was established.

Since then, the office has been involved in a range of activities aimed at assisting the community to manage land and natural resources. It has negotiated joint-fisheries management arrangements with the commercial fishing industry; prepared community responses to external development proposals; established a tourism management system for the Trust lands; encouraged integrated management of the Mitchell River watershed through representation on the Mitchell River Watershed Management Group and Integrated Catchment Management Process and established a detailed community awareness program. These activities have been conducted on behalf of the Kowanyama Council and wishes of the Council of Elders.

In consultation with the Council of Elders, the Kowanyama Aboriginal Council and the community a set of goals and accompanying strategies were formulated to give strategic direction for the KALNRMO. The six goals are:

1. To promote recognition of the community's self-governance aims within the broader community;
2. To secure appropriate land and natural resource rights for all community members:
3. To assist people in the community to return to country and to meet their land aspirations;
4. To manage the community's land and natural resources to ensure their health for future generations;
5. To provide young people in the community with the skills to become responsible land and natural resource managers for the future; and
6 To develop the Office to enable it to facilitate the community's land and natural resource management needs.

The KALNRMO management model comprises joint, cooperative and sole management arrangements. A joint arrangement exists with the Queensland Fisheries Management Authority with regard to the management of the fisheries of the Mitchell River, cooperative arrangements exist in relation to the Alice-Mitchell Rivers National Park, and sole management occurs, subject to the Kowanyama Aboriginal Council's by-laws, on the community's DOGIT lands. The model can be applied to extensive areas, is ecologically based in the sense that it is applied to a whole catchment area, can be applied to multi land tenure conditions and is community driven. As a well respected model it could be widely applied within the remote areas of Australia.

3.6.3 The Uluṟu - Kata Tjuṯa National Park Model

> There are two rules: one rule is Aṉanguku [Aboriginal] Law; the other one, number jumper-angka [the symbol of the rangers' sleeve patches], is government rule. Running properly kutjara [two] rules.

> Our Law is in the front, Ananguku [Aboriginal's]. Ka palimpa [and theirs] national park, on the jumper, is second. National park and our Law. In the front, Ananguku Law.
>
> Tony Tjamiwa
> Uluru Board of Management
> (in Birckhead et al. 1992:9)

The initial joint-management arrangements, conditional that on the grant of freehold title to the Uluru National Park, the Mutitjulu community would then lease it back to the Commonwealth government as national park, were negotiated with the ANPWS - now ANCA - in a political climate of intense opposition from the Northern Territory Government. Necessary amendments to both the *Aboriginal Land Rights Act (Northern Territory) 1976* (Cwlth) and the *National Parks and Wildlife Conservation Act 1975* (Cwlth) to include Uluru National Park and also to provide for Boards of Management for Aboriginal land wholly or partly within a park or reserve and for plans of management prepared for such Aboriginal land. In particular **s.14C.**(5) states:

> Where a Board is established for a park or reserve that consists wholly of Aboriginal land, a majority of the members of the Board shall be Aboriginals nominated by the traditional Aboriginal owners of that Aboriginal land.

The 1985 amendments, under **s.14D.**(1), define the functions of the Board as:

> (a) to prepare, in conjunction with the Director, plans of management in respect of that park or reserve;
> (b) to make decisions, binding decisions that are consistent with the plan of management in respect of that park or reserve, in relation to the management of that park or reserve;
> (c) to monitor, in conjunction with the Director, the management of that park or reserve; and
> (d) to give advice, in conjunction with the Director, to the Minister on all aspects of the future development of that park or reserve.

The Uluru Board consists of 10 people, 6 of whom are nominees of the traditional owners, four of whom live at Mutitjulu. The other 4 members are: a nominee of the Federal Minister for Tourism, a nominee of the Federal Minister for the Environment, a person with acknowledged expertise in arid zone ecology, and the Director of ANCA who is the only Park Service person on the Board. Anangu "have always considered it important that the Management Board not consist only of Aboriginal people and Park staff" (Woenne-Green et al. 1994:285).

As Woenne-Green et al. (p.285) report:

> The 1985 amendments to the *National Parks and Wildlife Conservation Act 1975* (Cwlth) provided the key to the evolution of a genuine power sharing relationship between Anangu and ANWPS in all the aspects of policy generation, planning and day-to-day management. By means of a majority on the Board with which the Director is to work **in conjunction** to, amongst other things, prepare the plan of management and monitor its implementation, the traditional owners can ensure that their rights specified in the Lease are reflected in the Plan as management objectives and management strategies.

The Uluru Lease, in summary, requires the Director of ANPWS (ANCA) to promote Aboriginal interests in the Park by:

- encouraging the maintenance of Aboriginal tradition within the Park through the protection of areas, sites and matters of significance to the traditional owners;
- taking all practicable steps to promote Aboriginal administration, management and control of the Park, and to urgently implement a program for training Aboriginal people in skills needed to do so;
- involving as many Aboriginal people as possible in the operations of the Park and adjusting working hours and conditions to the needs and culture of Aboriginal people employed in the Park to facilitate this;
- maximising the use of traditional skills in the management of the Park;
- promoting among non-Aboriginal employees in the Park (and where possible among the visitors to the Park and residents at Yulara) a knowledge and understanding of the traditions, language, culture and skills of Aborigines, and to arrange for proper instruction by Aborigines engaged for that purpose;

- regularly consulting with the traditional owners and their organisations about the administration, management and control of the Park;
- encouraging Aboriginal business and commercial initiatives and enterprises within the Park.

As Woenne-Green et al. (p286) point out:

> Participating in or initiating policy decisions which give effect to these Lease covenants and translating them into management objectives and strategies for a plan of management constitutes a large part of what joint management is all about.

In conclusion they state:

> The formal aspects of Aboriginal title, Leaseback and the particular Board of Management Structure have been essential in providing Anangu with the negotiating collateral necessary to continue the process of "Aboriginalising" Uluru. There is more than that, however. One of the most important effects of refining the Uluru model since handback of title has been the intensity of commitment by all parties that joint management of the Park not only works well but is seen to be working well (p.189)

In reflecting on the success of the Uluru National Park joint management arrangement and on Aboriginal involvement in national parks generally, foundation Board Member, Tony Tjamiwa commented:

> Aboriginal land that is just a national park is like a table with one leg or like a bird. It's not very stable. Shove it and it will fall over. Just one leg is not enough for Aboriginal land. It has to have the other legs there: the leg that Aboriginal Law and ownership provides; that Aboriginal involvement in running the park provides; that an Aboriginal majority on the board of management provides. I went to the Millstream Conference in the Pilbara last year, and saw how the Western Australian Government was insisting, even at that conference, which was about Aboriginal involvement in national parks, on a one-legged type of national park. They were insisting that national park rules alone were sufficient (in Birckhead et al. 1992:9).

Despite the success of the Uluru - Kata Tjuta National Park joint model , and three others like it in the Northern Territory, namely Kakadu, Nitmiluk and Gurig (minus the Leaseback arrangement) National Parks, as their State-by-State analysis testifies, State governments, to the continued frustration of the Aboriginal communities concerned, insist on constructing their management arrangements with Aboriginal communities in relation to national parks as "tables" with anything less than four legs (Woenne-Green et al. 1994).

3.6.4 Lake Condah Heritage Management Strategy and Plan

The particular merit of this plan is that it involves the management of both natural and cultural heritage under a co-operative arrangement involving the Kerrup Jmarra Elders Aboriginal Corporation (KJEAC) and the Victorian Department of Conservation and Natural Resource (DCNR) to manage the Lake Condah Wildlife Reserve and Aboriginal community landholdings in the Lake Condah area (AAV and KJEAC 1993:3).

The Lake Condah area considered in the plan comprises 5 "properties", each held under different land tenure arrangements: inalienable title (Lake Condah Mission Station held by the KJEAC); property acquired by the Victorian Government and transferred to the KJEAC; wildlife reserve and national park (Lake Condah Wildlife Reserve and Mt Eccles National Park); freehold title vested in the KJEAC; and other freehold land (p.9). The heritage significance of the area is assessed against National Estate Register criteria. The Aboriginal cultural significance of the area is both traditional and historical. Sites of traditional significance include fish trap systems and stone "house" sites, while the Lake Condah Mission and associated buildings are of great historical significance. The natural significance includes landscape feature associated with volcanic activity, wetlands and flora and fauna.

The management objectives achieved after consultation with the Kerrup Jmara Aboriginal community are to:

1. conserve significant features and areas;
2. provide an ongoing focus for the practice of contemporary Aboriginal cultural activities;
3. offer educational opportunities for the Aboriginal community and visitors;
4. research Aboriginal land-use practices before and after the arrival of Europeans;

5. secure long-term social and economic development for the Aboriginal community and employment for its members (p.1).

The management guidelines should provide for:

1. consistent management values and policies, as set out in the Lake Condah Heritage Management Plan;
2. well-defined areas of responsibilities with a decision-making process directed from or, at the very minimum, agreed to by the Kerrup Jkara Elders Aboriginal Corporation;
3. a co-ordinated approach to the area's management which provides for effective and regular communication between all parties with an interest in the area;
4. broadly-based participation in the management process which recognises the value of voluntary input;
5. long-term commitment by all parties involved to appropriately managing the significant heritage resources found in the area;
6. provision of the required financial and administrative resources(p.2).

In order to assist the KJEAC and DCNR to manage the Lake Condah area a Community Liaison Committee is to be established. This will have representatives from the KJEAC, Aboriginal Affairs Victoria, DCNR. Country Fire Authority, ATSIC, the Heywood and Minhamite Shire Councils, the regional Land Protection Advisory Committee, local landowners, community interest groups and regional tourism authorities. One of its responsibilities is to:

> liaise with the KerrupJmara Elders Aboriginal Corporation and assist this body in co-ordinating its land management activities with government organisations which have interests and responsibilities in the Lake Condah area (p3).

Details of the actual management structure are not specified at this stage, however, it is stated that:

> ... the diverse responsibilities for the care of the fabric of the place be clearly defined in a management structure (contained in the final Heritage Management Plan) and that these responsibilities be set up clearly so that all persons involved are aware of their own role and all other complementary roles. In any subsequent changes to the management structure, this practice should continue (p.192).

Thus the key questions concerning the structure and composition of the management body, particularly the relative numbers representing the KJEAC and DCNR respectively, who selects/elects the Chairperson, etc. are not addressed.

> The Innovative character of the *Lake Condah Heritage Management Plan and Strategy* is noted: Management arrangements that co-ordinate the use and development of both public and private land and the responsibilities of several agencies are unusual. Moreover, most formal management plans are only prepared for areas of public land vested in a single management authority. Innovative arrangements are therefore required at present for the Lake Condah area (p.2).

This plan, as an example of a co-operative management arrangement, could have wide application in south eastern Australia. It is complex in detail, involves both cultural and natural heritage enabling Indigenous communities to manage their heritage more holistically, and involves a range of land tenures and community and government interests. In terms of bioregional planning, the plan specifies in great detail how the biodiversity of the area should be managed. In terms of the Indigenous community contexts identified in Part 4 below, it could suit those in contexts 5 and 6.

3.7 The Application of Overseas Regional Agreement Models in Australia

In recent years, and particularly with the advent of the Commonwealth *Native Title Act 1993*, there has been considerable attention paid to various overseas regional agreements struck between Indigenous peoples and governments of the nation states within whose boundaries they live (see, for example, Richardson et al. 1994; Craig 1995; Harris 1995). Most of these regional agreements can be seen in terms of being mega and macro agreements and therefore have a limited, but nevertheless, important application in Australia, namely in those Indigenous domains in which Indigenous people form the majority of the population and own a significant proportion of the land. These regional agreement models are less readily applicable to the micro or local context, which is the context in which much of the Indigenous community involvement in bioregional planning will take place, particularly in the south-

eastern half of the continent. Here Aboriginal communities constitute small minorities (frequently less than 1% of the population) and may possibly be landless although they, nevertheless, have traditional ties to their areas. In this context it is perhaps more appropriate to draw upon those models which have emphasised usufructuary rights of Indigenous peoples whereby the people do not have title to their traditional lands and waters, but can exercise certain rights to hunt, fish and gather on these lands and have access to them for ceremonial and spiritual purposes (see, for example, Great Lakes Indian Fish & Wildlife Commission nd; Northwest Indian Fisheries Commission 1995a, 1995b).

4. DIFFERING INDIGENOUS COMMUNITY CONTEXTS FOR BIOREGIONAL PLANNING

While there were originally between 300 and 700 language groups inhabiting the continent at the time of European invasion (see Map 2: Aboriginal Language Territories circa 1788) the number of bioregions is likely to be considerably less. For example, the number of interim biogeographic regions agreed for delineation of a reserve system is 80 (Thackway and Cresswell 1995) (see Map 3: Boundaries of Interim Biogeographic Regions for Australia March 1995).

In contrast to the IBRA system, it is anticipated that bioregional planning will take account of broad factors, including cultural values, and will therefore necessitate Indigenous peoples' involvement in delineating boundaries.

There is some correspondence between the traditional boundaries of language groups and the regions of the IBRA system. An ecological basis for tribal boundaries has been discussed by anthropologists such as Tindale (1976). However, bioregions will also be subject to many other historical and political considerations, not least of which is the division of the continent into a number of states, territories and local government areas having no relationship to either bioregions or traditional Indigenous boundaries. Under this federal system, the variation in state and territory laws and policies has resulted in different impacts and opportunities for the Indigenous communities under their respective jurisdictions. However, as Map 4 (Distribution of the Aboriginal and Torres Strait Islander Population: Urban Centres/Localities Within ATSIC Regions) illustrates, the Indigenous population is distributed throughout the continent such that virtually all bioregions will have Aboriginal communities within their boundaries. Victoria, for example, with a small Indigenous population, nearly half of which is concentrated in Melbourne, is divided into 26 community areas each with its local community organisation [refer Schedule of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cwlth)] and New South Wales has 117 Local Aboriginal Land Councils established under the *Aboriginal Land Rights Act 1983* (NSW).

In terms of the actual involvement of Indigenous communities in bioregional planning and its execution, ownership of land is an important consideration because planning bodies must seek the cooperation and involvement of land-owners, Indigenous or not (CoA 1995b:9). Most lands to which Indigenous communities have title are vested in trusts or land councils which are statutory bodies under various Commonwealth, State and Territory laws. Such laws stipulate the kind of activities permitted on Indigenous lands and invariably the permission of traditional owners, or of those whom they choose to represent them, is a requirement (see Sutherland and Smyth 1995 for specific details of the separate Indigenous land Acts). The following six situations are primarily based on a scale of 1-to-6 according to the amount of land held under title and includes other lands in which an interest has been granted (eg., national parks leased to local communities, rights to hunt, fish and gather or access granted for religious purposes). 1 represents the situation having the largest areas of land under Indigenous community title - 6 represents situations in which local Indigenous communities have no title to land or title to a very small area of no more than a few hectares. Each of these situations has different implications for the involvement of Indigenous communities in bioregional planning - a matter which will be taken up in some detail in the sections which follow.

1) Indigenous domains comprising large areas or regions in which Indigenous people constitute the majority of the population and have title to (or have been granted an interest in land, eg., hunting and gathering rights on pastoral leases, national parks, etc.) over the greater proportion of the land and within which one or more bioregions and parts of others exist (eg., Cape York Peninsula, Torres Strait, Arnhem Land, the Kimberleys and large areas of central Australia);

2) Bioregions wholly covered by lands to which Indigenous communities have title (inalienable freehold, freehold, pastoral lease, DOGIT, etc);
3) One or more bioregions partly covered by substantial areas of lands (ie, more than 10,000 hectares) to which Indigenous communities have title or have been granted an interest.
4) Bioregions which include Indigenous lands leased back as national park and national park in which Indigenous communities have been granted an interest (eg., a lease, a role in management, hunting and gathering rights, access to sites);
5) Bioregions in which Indigenous communities are land-holders along with other classes of land-holders (governments, farmers, pastoralists, mining companies, etc);
6) Bioregions in which Indigenous communities currently do not have title to any land but in which they maintain an interest by virtue of traditional association.

The potential also exists for native title, or some native title rights, to survive in areas of land within all 6 contexts, however in the south eastern half of the continent these areas are likely to be small, restricted to areas of Vacant Crown Land and possibly to some government owned lands such as national park (see, for example, Wootten in Woenne-Green et al. 1994), water and forest reserves. However, the existence of native title in such areas awaits a determination under the *Native Title Act 1993* (Cwlth).

The overall situation of involving Indigenous people in bioregional planning and biodiversity conservation and management also includes two other scenarios:

1) Any one bioregion is more than likely to have a number of tribal, clan or family groups associated with it and any of those land-holding or land-affiliated groups may also have lands which extend into one or more other bioregions. Indigenous aspirations operate within a complex and very diverse web of political, cultural, economic and geographic circumstances. In this context there will be a number of issues concerning planning and management which are internal to the groups involved. This scenario will potentially apply in all 6 situations outlined above.
2) While all bioregional planning exercises will involve government agencies at all three levels, they will also involve to greater or lesser extents Indigenous and other non-Indigenous stakeholders. Where Indigenous communities are major land-holders in the context of bioregionalism (situations 1-3 above) it would be expected that they would also have a commensurate role within any planning and management arrangements for that region. However, where they own comparatively small areas of land or none at all (situations 5 and 6 above), despite any traditional associations with the land within such bioregions, it might well be up to the goodwill of all the other parties concerned as to whether there will be Indigenous participation, and the nature and extent to which it will occur.

In terms of arriving at the six situations described below, it is necessary to treat planning and management as two separate exercises. Bioregional planning in terms of the current national exercise of delineating the boundaries of bioregions taking into account cultural and full biotic characteristics, may not necessarily take into account such factors as State and local government boundaries and land tenure. However, from a management point of view, and particularly for Indigenous community involvement to be effective, these considerations are critical. The six situations described below take into account, not only the relative size of the areas of land under Indigenous community control, but tenure conditions (Government and privately owned lands), political and economic aspirations (particularly in terms of the mega regional agreements in relation to Indigenous domains, and in relation to land ownership generally) and local community situations in relation to the wider community.

The following sections examine in more detail each of the 6 situations outlined above and in terms of the preceding two scenarios.

4.1 Indigenous Domains

An Indigenous domain refers to a situation whereby a relatively large area of land (or land and sea) contains a majority Indigenous population who have title and rights to a substantial part if not the majority of the area and over which the Indigenous inhabitants have been substantially free to go about their traditional activities (ceremonies, hunting, fishing and gathering, etc.) and thus maintain their traditional lifestyles and associations throughout the area as a whole.

Given these majority circumstances (ie, in terms of population and proportion of land held), it is within these domains or regions that Indigenous communities are investigating the possibilities of negotiating regional agreements, whether under **s.21** of the *Native Title Act 1993* (Cwlth) or not (refer, for example, Harris 1995; KLC 1994; ATSIC 1994), in order to establish regional autonomy as "an essential first step towards real self-determination" (KLC 1994:12). While a major impetus for regional autonomy is better service delivery by reducing the number of government agencies (federal and state) into a more efficient service structure (see, for example, Cooke 1994 with regard to the Cape York Peninsula outstation strategy), with the establishment of the Torres Strait Regional Authority providing something of a model, it is also clear within their planning framework that care for the environment rates highly. However, as Pearson (in Horstman and Downey 1995) points out :

> Land management capacity needs to be organised and developed on a subregional basis. The Gulf community of Kowanyama, with its Aboriginal Land and Natural Resource Management Office (KALNRMO), is an excellent example of sub-regional management. KALNRMO covers a variety of tenures - trust lands, national park and pastoral leases - over lands owned by Kowanyama or with which the people of that community have traditional affiliations.
>
> Subregions need to be geographically, culturally, and politically coherent, based on both catchments and traditional estates. They need to emerge from a viable collective of landowning groups which reflect community, historical and traditional alliances and imperatives. They need to be ecologically, administratively and organisationally rational. We have identified up to 15 subregions that could form the basis of Aboriginal management of Cape York Peninsula. Collectively, this subregional approach will provide direction and vision for the management of the Peninsula estate.

In the case of Cape York Peninsula, the draft region CYP of the IBRA virtually coincides with the area administered by the CYLC, but it does show that not only can bioregions be broken down into sub-regions, but also the imperative of constructing planning frameworks around the needs and aspirations of the local community.

Precursor model: Cape York Land and Natural Resource Strategy.

4.2 Bioregions within Indigenous Lands

There are a few instances in which complete bioregions may fall within lands owned by Indigenous communities, for example, with reference to the IBRA system, regions CA (Central Arnhem) and CR (Central Ranges). The latter straddles the WA, NT and SA borders and involves two forms of title: inalienable freehold in SA and NT, and Crown Reserve in WA. A situation, as represented by region CA (IBRA system), in terms of Indigenous involvement, represents the simplest scenario whereby a single government planning agency negotiates with only one class of landowners (although this will involve a number of local land owning - land affiliated groups) and which should see maximum involvement and total responsibility of those local communities in the planning and execution of conservation strategies for that bioregion.

Precursor model: KALNRMO

4.3 One or more Bioregions partly covered by substantial areas of Indigenous Lands

This will be a relatively common situation, particularly in the northwestern half of the continent. By substantial is meant land areas of more than 10,000 hectares. The situation is similar to 1), the essential difference being that the areas likely to be involved are not primarily seen as being Indigenous domains and regional agreements of the scope and scale now being formulated for areas like Cape York Peninsula are not being contemplated at this stage, although they might well be in the future. Possible examples include, the Aboriginal community at Yalata (456,000 ha) (currently in the IBRA region NUL; the Nepabunna community, owners of Mount Serle station (51,000 ha) within the IBRA boundaries of STP and FOR; a cluster of communities with very substantial land holdings in the Pilbara; and the Aboriginal community at Doomadgee (146,000 ha) in the Gulf Plains. The intersection of 3 biogeograhic regions (IBRA regions MUR, COO and GVD) occurs on land owned by the community at Cundeelee (113,000 ha, plus the adjoining Coonana property, 246,000 ha).

All these examples occur within the context of a single State and each of these biogeographic regions has predominantly only one other class of landowners, namely pastoralists. While owning substantial areas of land, Aboriginal communities will also frequently have access rights to surrounding properties for traditional purposes. Again, taking into account local Indigenous community needs and aspirations, this situation also offers the potential for considerable involvement in their surrounding bioregion(s), possibly through regional and local agreements more specifically tailored to biodiversity conservation.

Precursor model: KALNRMO

4.4 Bioregions which include Protected Areas in which Indigenous Communities have an Interest

In this situation the protected areas in which Indigenous communities have an interest include lands owned by Indigenous communities and leased back to the government as National Park (Kakadu, Uluru), national parks and other forms of protected area (wilderness park, nature reserve, conservation park, forest reserve, wildlife refuge, etc - the terminology differs from state to state) in which Indigenous communities have been granted an interest (eg., hunting, fishing and gathering rights; habitation rights; access rights to sites; a role in management, etc) and protected areas in which Indigenous communities are seeking to have their interests recognised and therefore have a role in management.

A "protected area" is defined in the *Convention on Biological Diversity* as "a geographically defined area which is designated or regulated and managed to achieve specific conservation objectives" (in CoA 1996). As Map 5 (Australian Heritage Commission Registered Areas 1992) shows, there is now a quite extensive network of protected areas of size greater than 100,000 hectares. Some areas, such as the Wet Tropics World Heritage Area (900,000 ha) are not registered as part of the National Estate , and there are many more protected areas less than 100,000 ha. Central to the conservation of Australia's biodiversity

> ... is the establishment of a comprehensive, representative and adequate system of ecologically viable protected areas integrated with the sympathetic management of all other areas, including agricultural and other resource production systems (CoA 1996).

The HRSCERA (1993:68), throughout its inquiry, was told of the "success of the joint management arrangements at Kakadu and Uluru National Parks and the desirability of using them as models of collaboration in protected area management elsewhere". Given that the Commonwealth Government is "committed to the concept of joint management, with Indigenous peoples, of conservation areas and key species under Commonwealth control" (DEST 1995:29), should the states emulate this commitment, then there is considerable potential for Indigenous involvement nationally in biodiversity conservation through the national reserve system. The HRSCERA (1993:68) noted that " [m]ore than 30 Aboriginal-owned and jointly managed national parks are expected to be in existence within a few years". The review by Woenne-Green et al. (1994) provides detailed state-by-state analysis and commentary on the implementation of management arrangements with Indigenous communities in relation to some national parks, most of which fall far short of the Uluru/Kakadu model.

The joint management arrangements at Kakadu and Uluru National Parks (both leased back to the Commonwealth and jointly managed by their traditional owners and ANCA) are well regarded by Indigenous and non-Indigenous people alike and are the standard setters for Indigenous communities in the other states in their negotiations to establish similar arrangements over protected areas. Such negotiations are taking place in all states but, because some individual state legislative provisions and policies governing national parks and nature conservation fall short of the Commonwealth model, many Indigenous communities remain disappointed (Woenne-Green et al. 1994).

Joint management, as in the case of Uluru and Kakadu National Parks, is based on formal agreements in the form of management plans as required by legislation, and therefore having statutory force, and which are administered by management boards. They may be considered in the context of Indigenous involvement in bioregional planning as "precursors" and may provide one form of legal framework within which Indigenous involvement in bioregional planning can take place (see section 3.5 of this Report). Since they already involve national parks, conservation of biodiversity will already be a paramount consideration and the relevant parts of the joint agreements can be renegotiated in accordance with changing requirements of policy.

Precursor model: the Uluru - Kata Tjuta National Park model.

Although this model is widely regarded by Indigenous communities as the best, State governments, and the Northern Territory Government in relation to all of its national parks other than Nitmiluk and Gurig, are reluctant to adopt it, instead developing their own models within their own Indigenous affairs and protected area policies. These models are applied to a limited number of national parks and in regions where there are significant numbers of Indigenous people. For a detailed State-by-State critique of these models see Woenne-Green et al. (1994).

4.5 Bioregions in which Indigenous Communities are land holders in common with others

In the south eastern half of the continent Indigenous communities now have title to former reserve lands which in most instances are (relatively) small - usually less than 10,000 hectares. In Victoria, the Lake Tyers, Framlingham and Lake Condah holdings all involve comparatively small areas, as do the Pt McLeay (Rauukkon), Point Pearce and Gerard lands in South Australia. Such DOGIT lands as Cherbourg, Palm Island, Woorabinda and Yarrabah, in Queensland also fall into this category. In the last decade or so these lands have been added to by lands purchased or granted under the *Aboriginal Land Rights Act 1983* in New South Wales and through the purchasing and development activities of the former Aboriginal Development Commission, now the Aboriginal and Torres Strait Islander Commercial Development Corporation (ATSICDC). Established under the *Aboriginal and Torres Strait Islander Commission Act 1989* as a separate statutory authority, ATSICDC "operates on a strictly commercial basis, not making grants or concessional loans" (ATSIC 1994a:10). Land can also be purchased through the Regional Land Fund and the newly established Aboriginal and Torres Strait Islander Land Fund (see section 3.1.2 this report).

In terms of Indigenous involvement in bioregional planning, this situation is significant for two reasons: firstly, many of these properties are located in agricultural regions and the lands are used commercially or acquired with commercial intentions uppermost; and secondly, Indigenous landholders will comprise just one group amongst many other landholders and resource users.

With regard to the first point, principles and policies of ecologically sustainable use may have to be negotiated and applied, and where degraded land is acquired various land care strategies may have to be implemented within the context of an overall plan applied to a bioregion. Funds are available for land management through ATSIC Regional Councils and can be used for such things as:

> ... herd improvement, fencing, pasture improvement, or to prevent weed infestation, damage from feral animals or land degradation in areas where it is not possible to obtain funds from State/Territory departments of agriculture. Land management studies and other broad land matters may also be supported (ATSIC 1994a:46)

The report, *Caring for Country: Aborigines and Land Management* (Young et al. 1991), details the land management problems confronting Indigenous community lands, the programs and the sources of funds available.

With regard to the second point above, as landholders in common with others, but also with traditional affiliations to the area as a whole in which they live, they will have to negotiate their interests along with other stake-holders and interest groups in whatever forums are set up to plan for the management of a bioregion. The principal point is that they have the right to be represented in such forums as land owners and as people with a traditional interest in the area generally, and their interests should form an integral part of the bioregional plan as should their management of those interests.

Precursor model: *Lake Condah Heritage Management Plan & Strategy* (AAV and Kerrup Jmara Elders 1993).

4.6 Bioregions in which Indigenous Communities have no title to land

Throughout Victoria, Tasmania and much of southern Queensland and southern South Australia Aboriginal communities either have no title to land or title to very small parcels to which they have an historical or cultural attachment. In Victoria, for example, the local communities have title to the

Coranderrk, Ebenezer and Ramhyuck Mission Cemeteries, and lands granted under such legislation as the *Aboriginal Land (Manatunga Land) Act 1992* (Vic) and the *Aboriginal Land (Northcote Land) Act 1989* (Vic) involve only small parcels.

On the basis that having land also means having power as a stake-holder at the negotiating table, these Indigenous communities, which constitute a significant proportion of the nation's Indigenous population, are the most disadvantaged in terms of negotiating an effective role for themselves in bioregional planning. For most of the local communities in these areas it will be a matter of negotiating with local shire councils, state instrumentalities and local land-owners for their interests to be included in bioregional planning and to be included on any of the planning committees set up to formulate and implement the plans. In the absence of amendments to legislation relevant to biodiversity conservation, particularly in relation to management plans and requirements for Aboriginal representation on the management bodies responsible for the plans, in such circumstances local communities might have to rely on federal and state policy directives regarding Indigenous involvement in bioregional planning, their rights as Indigenous peoples and as articulated in various instruments, social justice and reconciliation arguments and the various recommendations contained in the report of the RCIADIC (Johnston 1991). In Victoria, the provision in the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cwlth) regarding heritage agreements, might possibly be used to negotiate local community involvement in specific instances.

Precursor model: *Lake Condah Heritage Management Plan and Strategy*

4.7 Regional Agreements and Bioregional Planning for Biodiversity Conservation — Conclusions

This section summarises the information relevant to regional agreements and bioregional planning contained in section 3 and the above sections of 4.

It was noted that much of the debate in Australia about regional agreements involving Indigenous communities is focused on **s.21** of the *Native Title Act 1993* (Cwlth) (3.1.1) and that regional agreements can also apply in a local context and need not entail the surrender of native title, although some communities may wish to do so in exchange for other considerations. It was also considered that, as a matter of social justice, all Indigenous communities in Australia, irrespective of whether they owned land or not, should be able to avail themselves of regional or local agreements which might contain provisions relevant to their involvement in bioregional planning and biodiversity conservation (3.1.3). With the operation of the ATSILF, many communities may be able to secure land which might also be useful in terms of biodiversity conservation (3.1.2).

It was also pointed out that regional agreements, whether they entail a bioregional planning/biodiversity conservation component or not, are likely to be complex, involving a number of parties (3.3) and a range of conditions, requirements and obligations (3.4). For Indigenous communities, based on their experiences to date, it is of considerable importance whether regional agreements concerning bioregional planning are going to be based on joint, co-operative or sole management arrangements (3.5).

Four "precursor" models on which regional and local agreements might be based were analysed in terms of their suitability to meet any of the six Indigenous community situations which were outlined above. These "precursors" involved the Cape York Land and Resource Management Strategy, which, with regard to the protected areas within the region, is based on the concept of joint management with the ultimate goal being sole management (3.6.1); the model developed by the Kowanyama Aboriginal Land and Natural Resource Management Office (KALNRMO), which is essentially co-operative in character (3.6.2); the Northern Territory (Uluru, Kakadu, Nitmiluk and Gurig) National Parks model - regarded as the "blue print" for successful joint management (3.6.3); and the Lake Condah Heritage Plan and Strategy, a cooperative model (3.6.4), as models which have received endorsement from Indigenous communities. The Cape York Land and Natural Resource Management Strategy is still evolving, while the KALNRMO and Northern Territory models have been in operation for some time. The Lake Condah model exists as a comprehensive plan and is awaiting implementation.

In identifying 6 community situations in which regional agreements might involve, wholly or partly, bioregional planning and biodiversity conservation, it was necessary to take into account both planning and management factors. It is recognised that cultural criteria need to be taken into account in determining bioregional boundaries, and therefore Indigenous communities must necessarily be involved. In determining bioregions, political and land tenure factors may be of secondary importance, however, in terms of management, they are critical. In arriving at 6 community situations, such factors as the amount of land held, neighbouring tenure, legislative conditions, community diversity and possible management arrangements (joint, cooperative, sole) were taken into account (4.1 - 4.6).

In terms of bioregions, Indigenous domains, in which the Indigenous communities are looking to regional agreements as a way of establishing regional autonomy and better service delivery, could potentially encompass whole bioregions and/or significant parts of others. Regional agreements of this scope will probably only apply in a few areas, namely, the Torres Strait, Cape York Peninsula, the Kimberley, Arnhem Land, and Central Australia and will be multi-lateral, not only in terms of co-ordinating the various Indigenous service providers, but also in terms of involving federal, state and perhaps even local governments. There is likely to be a time factor involved as communities move through a *de facto* regional agreement situation, operating through the Land Councils, and as they develop the capacity (ie, acquire the resources, expertise and proof of ability) to be self-governing, deliver services, etc., these agreements might be formalised. In terms of their involvement with bioregional planning and biodiversity conservation, land management responsibilities and capabilities are likely to be a major part of their regional agreements and will probably involve a number of sub-regional agreements which take into account local community circumstances and varying nature of land tenure. These could comprise a mix of joint, cooperative and sole management arrangements with the ultimate goal, in line with their aspirations for autonomy, being sole management with full rights and responsibilities within the limits of what is permissible under Australian law. Conservation agencies will largely be expected to relinquish on the ground management responsibilities and confine their role to that of monitoring compliance with legislative and contractual requirements provided in the terms of the regional agreement. It is expected that the Indigenous communities within each Indigenous domain will develop their own distinctive regional agreements, and as such the Cape York Land and Natural Resource Strategy might be used as a predictor of things to come in terms of relationships with mainstream conservation agencies.

Situation 2 (4.2) is postulated as the simplest situation regarding Indigenous community involvement in bioregional planning and biodiversity conservation, whereby a complete bioregion is located within the boundaries of Indigenous community-owned land. Its simplicity is argued on the basis that only one class of owners (taking into account that several Indigenous land-owner groups are likely to be involved) and primarily only one form of land tenure will be involved, and therefore the agreement is likely to be negotiated on the basis of a sole management arrangement.

Situation 3 (4.3) is likely to be a common occurrence whereby one or more bioregions will be partially located on Indigenous community owned land of considerable size. The management situations will become more complex as more parties (other land users), varying tenure types, and more government agencies are involved. Management could involve both sole management (over Indigenous community lands) and co-operative management (possibly in conjunction with other land users) in terms of Indigenous involvement in bioregional planning and management. The KALNRMO model, adapted to local circumstances, could have wide application here.

With regard to situation 4 (4.4) involving national parks and other forms of protected area (eg., forest reserves) within a bioregion and in which Indigenous communities have an interest (potentially all such areas), joint management arrangements, based on the Uluru/Kakadu model, are what Indigenous communities generally want. In some situations, particularly in the south eastern half of the continent, national parks not only provide a cultural sanctuary for local Indigenous communities (with regard to protected sites and contact with traditionally significant species), but the only opportunity for local Indigenous communities to become effectively involved with biodiversity conservation with “on the ground” management responsibilities. While the Northern Territory (Uluru, Kakadu, Nitmiluk and Gurig) National Parks model is regarded as the “blueprint” by many Indigenous communities, respective State Indigenous affairs and protected areas policies usually mean that co-operative management arrangements are considered appropriate. Many such examples of these arrangements exist,

and because they frequently cause the communities concerned much frustration because they fail to adequately take account of local community needs and aspirations are not discussed here (see Woenne-Green et al. 1994 for a review of some of these models within the context of State policies).

With regard to situation 5 (4.5), in this context Indigenous communities are primarily small land-holders, with much of their lands being used for commercial purposes. As land-holders with an interest in the biodiversity of their region they will be negotiating their interests together with other land-holders and interest groups in (local) planning forums concerned with the management of biodiversity. If their land is of particular biodiversity conservation value (eg., a corridor or wildlife refuge) then particular plans might be negotiated with regard to those lands. Such agreements might be negotiated on a sole management basis. With regard to other lands in the area with which the communities are traditionally affiliated, and which have conservation value, agreements might be negotiated whereby Indigenous communities are contracted to manage the biodiversity on these lands. The Lake Condah model could have some relevance in this situation.

In situation 6 (4.6) Indigenous communities are not land-owners, however, they have traditional affiliations with the area/region generally, particularly in relation to cultural sites. Indigenous communities, particularly in Victoria where provision exists under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cwlth) for heritage agreements, may be able to negotiate agreements which can be extended to include areas of conservation value. Again, the Lake Condah model is relevant.

It can be seen from the above that a wide variety of regional and local agreements is possible with regard to Indigenous community involvement in bioregional planning and biodiversity management. Some of these agreements will incorporate provisions for bioregional planning and management, possibly covering complete bioregions, within the overall context of the agreement. Others might be more local in character and relate only to the involvement of a local community in bioregional planning and management or some particular aspect of it. These agreements might be more contractual in nature whereby community members might undertake specific tasks to aid biodiversity conservation (eg., weed control, species surveys, Landcare projects). Others might involve contracting Indigenous community ranger services, on a fee for service basis, to manage particular National Parks or other forms of protected area. In this situation, the contracting agency might provide resources (office, vehicles, etc) while the rangers provide their labour and expertise.

In determining criteria for successful involvement of Indigenous communities in bioregional planning for biodiversity conservation the following should be taken into account:

- the degree to which local Indigenous communities are consulted and involved in the determination of bioregional boundaries using their knowledge of biodiversity and culturally relevant criteria;
- the extent of the role of local Indigenous communities in formulating and executing agreements and management plans;
- the cultural relevance of agreements regarding bioregional planning (adherence to culturally relevant criteria, using terms clearly understood by local communities and written and presented in a form which is accessible to them);
- in any regional and local agreements, the degree to which Indigenous involvement is specified or required (eg., as members of relevant management bodies);
- the degree to which bioregional planning documents take into account local Indigenous community aspirations and perspectives regarding land and natural resource management (“caring for country”) with respect to traditional management practices, sacred sites, use rights, etc.;
- the relative status of Indigenous communities and their representatives as parties to any agreements (eg., as equal partners in power sharing, respective nature of responsibilities, etc);

5. EMPOWERMENT — REVIEW OF LEGISLATION IN TERMS OF RECOGNITION OF INDIGENOUS RIGHTS IN BIODIVERSITY

The purpose of this section is to review some Commonwealth, State and Territory legislation which in some way or other impacts on biodiversity conservation in order to assess the degree to which it

empowers Indigenous communities to look after their interests in biodiversity (ie, applies the principles of self-determination). Those interests concern their traditional rights in biodiversity and can be, by nature, spiritual, economic, social and intellectual.

Legislation can be a significant gauge of the commitment that governments have in putting into practice the fundamental human right to self-determination, which is the cornerstone of the struggle of Indigenous peoples. As has been pointed out elsewhere (Fourmile 1989a: 58):

> Assessed against Aboriginal criteria of what we require in any legislation set up to protect our heritage, the principles of realising our cultural rights and implementing self-determination, and as a matter of having equity in legislation, Aboriginal heritage legislation around Australia is a dismal failure. This body of legislation provides us with a contemporary version of paternalistic protectionism for Aborigines. We are given special but inferior legislation and it is the view of many Aboriginal people that we are better off without it. It is the long and bitter experience of Aboriginal people who have lived under the various Aboriginal protection Acts that protection is synonymous with control. By bestowing such wide-ranging discretionary powers in Ministers of the Crown, while failing to provide safe-guards against the abuse of their powers, governments are continuing to demonstrate their ingenuine commitment to the achievement of self-determination for Aboriginal people.

Failing the formal acknowledgment of the rights of Indigenous peoples as the original owners of this continent in a treaty or in the Australian Constitution, then the exercise of their rights to self-determination is largely dependent on governments empowering them to do so through legislation which affects their interests. While Indigenous peoples are no longer formally excluded from participating in various statutory boards and management and advisory committees, they are often overlooked, even though their interests are affected, simply because there is no statutory requirement for Indigenous membership on such bodies. Another common flaw in legislation is that their involvement is frequently reduced to advisory status while ultimate decision making responsibilities rests with non-Indigenous.

Consistent with Articles 19 and 20 of the *Draft Declaration on the Rights of Indigenous Peoples* (see Appendix 1.2), and in order for self-determination to be effective, statutory requirements for Indigenous involvement are essential, however, these must also be consistent with Aboriginal processes of decision making, consultation and accountability. For self-determination to operate effectively through legislation, the following minimal requirements must be met:

1) the definitions and interpretations upon which an Act is based must be culturally appropriate, with Indigenous people themselves being able to exercise powers of definition;
2) required lndigenous membership of statutory bodies, appointees being nominated by the relevant lndigenous bodies;
3) establishment of representative Indigenous advisory/management committees.
4) Indigenous membership of other specialist/technical committees to provide an Indigenous perspective;
5) processes for accountability and input;
6) employment of Indigenous people to carry out culturally relevant duties.

Legislation which impacts on biodiversity conservation extends beyond the body of legislation which has traditionally been the focus of nature conservation, ie, the various flora and fauna, and national parks and protected areas Acts, to legislation which governs such matters as land management (most notably pastoral land), state forests and soil and water conservation, for example. Indigenous involvement in national parks and other protected areas has already been examined in detail, for example, by Birckhead et al. (1992) and

Woenne-Green et al. (1994), the latter in particular providing recommendations regarding various matters concerning Indigenous involvement on a state by state basis using the Royal Commission into Aboriginal Deaths in Custody's (RCIADIC) Recommendation 315 as its primary focus. It was noted in this review that :

> The majority of our Recommendations derive from situations in which government assertion of policy is considerably divorced from practice, thus making many government responses to the Royal Commission Recommendations regarding progress with respect to Recommendation 315 appear far more substantial and active than is, in fact, the case as reported by Aboriginal people "on the ground."(Woenne-Green et al. 1994:11).

While it is by no means “a cut and dried” issue, much legislation through general provisions which do not explicitly refer to Indigenous people or their interests nevertheless enables Indigenous communities to enter into various management arrangements with national parks and conservation authorities (see Sutherland and Smyth 1995). However, the legislation itself does not explicitly empower Indigenous people and therefore, it is contended, reality falls short of policy and expectation. In most instances Indigenous involvement falls far short of the “Uluru model” widely seen by Indigenous communities as being the best available model in terms of effective Indigenous involvement in the management of protected areas. It is argued that this is so because the *National Parks and Wildlife Conservation Act 1975* (Cwlth) effectively empowers the traditional owners in terms of the management agreement (for example, by requiring that management boards must have “a majority of the members...Aboriginals nominated by the traditional Aboriginal owners...” [**s.14C.**(5)]) and the responsibilities and decision making powers they have. Most other legislation regarding national parks (whether explicitly referencing Indigenous involvement or not) does not effectively empower Indigenous communities and so their involvement is less than satisfactory. In Victoria, for example, Woenne-Green et al. (1994:17) report that:

a) There has been no action taken by the Victorian Government to implement joint management arrangements in national parks, although there is Aboriginal representation on the management committees of several national parks.
b) Involvement of Aboriginal people in the development of management plans for national parks in Victoria has been an adjunct to overall management, and there have been no instances of Government and the relevant Aboriginal organisation jointly preparing a plan for a national park.

As is noted below, Victoria’s National Parks Advisory Council, established under the *National Parks Act 1975,* has a membership of 9 with no requirement that at least one should be Aboriginal. It is fundamentally necessary that peak statutory bodies which have some role or input into bioregional planning and biodiversity conservation have Indigenous membership if Indigenous involvement in these activities is to be effective. Indigenous interests in these fora have to be negotiated by Indigenous representatives and their presence should ensure that Indigenous interests are not overlooked and that Indigenous input into policies and procedures takes place at the highest levels. Indigenous representatives on such statutory bodies can also oversee and monitor the performance of the Department or Agency responsible for administering the legislation and government policy and advise accordingly. Issues can be taken up directly with the relevant Minister, be addressed as business of the statutory body, or sorted out through consultation with the relevant Departmental/agency personnel.

An investigation of the legislative options and constraints on Indigenous people regarding conservation partnerships with Indigenous land holders has been undertaken by Sutherland and Smyth (1995) and while this study focuses on the role Indigenous communities might have in biodiversity conservation in protected areas, much of this report is also directly relevant to the role of Indigenous peoples in bioregional planning and conservation. Craig’s (1995) report similarly outlines the requirements and opportunities under international and national law and policy but in the context of Indigenous involvement in bioregional planning. Much of the domestic laws (Commonwealth, territory and state) examined enable Indigenous communities to participate in both contexts while not explicitly referencing them. Thus it is largely up to the discretion of the respective governments as to whether they involve Indigenous communities in biodiversity conservation or even impose unwanted biodiversity conservation regimes on Indigenous communities. The focus of this section is on whether the various laws which impact on biodiversity conservation explicitly empower Indigenous communities with regards to biodiversity conservation and the degree to which they are empowered. Essentially the argument is this: if a law, while not making any reference to Indigenous people still enables Indigenous communities to have a role as general members of the community, then most probably their participation will not be invited, as will be seen from examples later in this section. However, if the same law requires, for example, Indigenous representation on any statutory body established under that law, then Indigenous involvement will most probably take place. Ideally, of course, more than just Indigenous representation on statutory bodies will be required. Statutory provisions can extend to such matters as involving Indigenous communities in management plans (for particular areas or species), establishing Indigenous advisory committees, employing Indigenous people in various statutory capacities (as rangers, or inspectors, for example), and respecting the traditional rights of Indigenous people to hunt, fish and gather traditional

foods and collect raw materials for ceremonies and art and craft production. The thrust of this section then is about the degree to which legislation empowers Indigenous people to have “a voice in all places” - to use the title of a report by Dermot Smyth (1993).

5.1 Commonwealth Legislation

5.1.1 World Heritage Areas

Indigenous people in the past have expressed scepticism about the concept of World Heritage seeing it as another form of colonialism. This view is best expressed by Tasmanian Aboriginal, Jim Everett (1985:11), who, reflecting on the experience of the Tasmanian Aboriginal community in relation to events leading up to the listing of the Western Tasmanian Wilderness in 1982, points out that “the doctrine of world human heritage places Indigenous people at the lowest level of socio-political power”.

The concept of the culture of one group of people belonging to the heritage of all humankind, although giving belated recognition and status to Indigenous cultures, was also seen as another strategy for usurping the cultural rights of Indigenous peoples, whereby different components of their cultures would be entrusted under state laws to the care of suitably qualified scholars — archaeologists, ethnoscientists, anthropologists, historians and the like — who would then assume the mantle of “expert” and interpret Indigenous cultural heritage to the rest of the world. The institutional climate of universities, museums, heritage departments, and research agencies encouraged academic colonialism (see, for example, Fourmile, 1987, 1989b). The title of a paper by Tasmanian Aboriginal, Ros Langford (1983), “Our heritage - your playground”, summed up the feeling prevalent among many Indigenous people.

Thus, for Indigenous people emerging from a colonial regime in which ownership and control of their property and lives were giving way to policies of (limited) land rights and self-determination, the indicators of change for Indigenous communities were judged according to such criteria as

1) land rights — the degree to which the Commonwealth and the respective states restored ownership of land to Indigenous communities;
2) self-determination — the degree to which legislation empowered Indigenous communities to manage their own affairs;
3) empowerment — the degree of involvement in the key decision making processes which affected their lives and interests;
4) ownership (and control) — of cultural and economic assets which would enable Indigenous communities to achieve cultural security and financial independence; and
5) access — to other areas of land not under Indigenous control in order to carry out traditional activities regarding the care and maintenance of significant sites, hunting, fishing and gathering, and so on.

In applying these criteria to Indigenous involvement in the various World Heritage Listed areas in Australia it will be seen that there is a great deal of inconsistency. The Aboriginal owned, but leased back, World Heritage areas of the Kakadu and Uluru - Kata Tjuta National Parks have emerged as the “blueprints” for joint management between the traditional owners and the Commonwealth agency, ANCA (Woenne-Green et al. 1994:272-305) (see Section 3.6.3). Yet the GBRMPA, responsible for the Great Barrier Reef World Heritage area, listed in 1981, the same year as Kakadu National Park was first listed, did not seriously begin to involve Indigenous people in its administrative structure until 1990 (Whitehouse 1993:161) (see Section 5.1.1.2). GBRMPA, aided by recent amendments to its Act, and with principles for Indigenous involvement in the GBRMP embedded in its corporate and strategic plans (GBRMPA 1994a; 1994b) is quickly addressing its past neglect of Indigenous interests. The Wet Tropics World Heritage Area, listed in 1988, and which includes areas of Aboriginal community-owned land within its boundaries (namely, Yarrabah, Wujul Wujul, and Mossman Gorge) is primarily administered under a State Act (see Sections 5.1.1.3 and 5.2.3). Protracted negotiations between Aboriginal communities and the Wet Tropics Management Authority and its Agency have yet to see management plans in place, even in those areas under Aboriginal community-ownership (see Fourmile *et al* 1995a).

A general inconsistency in the management of World Heritage Listed properties was noted by the Prime Minister in December 1992 when he presented the Australian Government’s Statement on the Environment in which he announced that the Commonwealth would “develop and implement a more

consistent system of management for Australia's World Heritage Areas". The statement also referred to the Government's "commitment to conservation and the meaningful involvement of Aboriginal people in protected area management" (CFAR 1994:35). As the Council for Aboriginal Reconciliation points out:

> The Federal Government's recent commitment to establish a policy for the consistent management of Australia's World Heritage areas provides the opportunity to promote increased involvement of Aboriginal and Torres Strait Islander peoples in the management of Australia's World Heritage areas.

According to CFAR (1994:36-37), the inclusion of places on the World Heritage List for their cultural values, or for their cultural and natural values, in addition to promoting reconciliation, could provide the following advantages:

- The cultural, spiritual, historical and traditional associations that express the relationship that Aboriginal and Torres Strait Islander peoples have with the land and the sea, and with the resources of the land and the sea, may be identified, protected and communicated within the listed World Heritage areas;
- As the Royal Commission into Aboriginal Deaths in Custody noted: Australia as a nation has a great deal to gain from being seen as one which values and preserves the past and respects the ancient culture which grew up on the land;
- World Heritage listing is an excellent forum for educating non-Indigenous Australians about the past and living cultures of Australia's Indigenous peoples. It provides opportunities to communicate the rich cultural history of Aboriginal and Torres Strait Islander peoples and to communicate the history of the colonisation, subjugation and dislocation of Aboriginal and Torres Strait Islander peoples in Australia;
- World Heritage listing has the potential to ensure the identification, recognition and communication of the traditional use of resources by Aboriginal and Torres Strait Islander peoples;
- The nomination, listing, conservation and management of places as World Heritage areas provides opportunities for the high profile involvement of Aboriginal and Torres Strait Islander peoples as an important part of heritage protection in Australia. New partnership based on the sharing of information, traditional knowledge and wisdom between Aboriginal and Torres Strait Islander peoples and non-Aboriginal land managers may also result; and
- The inclusion of places in Australia on the World Heritage List may create new economic growth. As foci for national and international ecotourism and cultural tourism, World Heritage areas foster economic growth through increased tourism. If Aboriginal and Torres Strait Islander peoples' ownership was recognised, or if they were to be recognised as custodians of World Heritage areas, these economic benefits may contribute to their financial independence as well as to the conservation and interpretation of their cultural heritage.

In December 1992 the Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage adopted a new category which recognised a kind of cultural site under the category of "combined works of nature and of man" — the cultural landscape (ICPWCNH 1994:13). This category is intended to "recognise the complex interrelationships between man and nature in the construction, formation and evolution of landscapes" (Craig 1996). Cultural Landscapes fall into three main categories, namely:

- Clearly defined landscapes designed and created intentionally by man, such as for example, gardens and parks;
- Organically evolved landscapes resulting from successive social and economic imperatives and in response to the natural environment.

There are two sub-categories:

  - the relict landscape; and
  - the continuing landscape "which retains an active social role in contemporary society closely associated with the traditional way of life".

- Associative cultural landscapes which have "powerful religious, artistic or cultural associations of the natural element rather than material cultural evidence, which may be insignificant or even absent (as summarised by Craig 1996).

In assessing the usefulness of this new category Craig (1996) writes:

It would appear from the above that the Convention may be useful in protecting the cultural heritage of some Indigenous peoples although recognition of their concerns and values, through criteria, has been slow. A factor will be the willingness of the IUCN to pay heed to the interests of Indigenous peoples when considering the inclusion of new nominations and already listed properties under the new criteria. However, ultimately, the extent to which the religious and cultural importance of places and objects for ethnic minorities and Indigenous peoples is taken into account in the World Heritage List depends upon:

a) whether governments are willing to consult Indigenous peoples: (b) whether national legislation to implement the Convention allows for a flexible or broad interpretation of "cultural and national heritage" and (c) whether the Committee is prepared to take the view that cultural and natural properties important to an Indigenous people constitute part of the heritage of humankind of sufficient importance to justify the expense of their protection.

Recently, the Uluru - Kata Tjuta World Heritage area was renominated on the basis of its cultural landscape values.

In an assessment of the potential for Aboriginal cultural survival in the Wet Tropics World Heritage Area, it was argued that such survival depended upon the renomination of the area for its cultural as well as natural values (Fourmile 1995a:15):

> The WTWHA is a living rainforest Aboriginal domain, and until it is recognised as such by its formal inclusion on the World Heritage List for its cultural values then the cultural survival of the Aboriginal peoples in the area is in jeopardy as legislation, management policies and strategies will always primarily be based on the needs to preserve its natural values. Aboriginal cultural needs will remain subservient to the needs of those most concerned with natural values, the scientific and commercial communities. Aboriginal cultural needs will be given, at best, only token recognition. Thus renomination becomes a test of government, federal and state, commitment to Indigenous cultural survival and to the process of reconciliation. ... Equal recognition of cultural with natural values will mean that administrative and management apparatus will also have to duly take account of Aboriginal interests. Aboriginal co-management of the WTWHA will only successfully be achieved if Aboriginal cultural values are properly recognised by inclusion in the World Heritage List thereby imposing an obligation on governments and their agencies to recognise Aboriginal rights to manage, occupy and use the WTWHA in such a way as to ensure our cultural survival.

It must be pointed out that the Uluru - Kata Tjuta National Park was originally given World Heritage status on the basis of its natural values until re-listed as a cultural landscape. This did not interfere with the cultural concerns of the traditional owners. However the conditions of the leaseback were contingent upon the traditional owners having a powerful say in the management of the National Park to ensure that their cultural concerns were not jeopardised (Woenne-Green et al. 1994:272-305).

5.1.1.1 **World Heritage Properties Conservation Act 1983** (Cwlth)

This Act applies to Australian properties that are on the World Heritage List under the *World Heritage Convention 1972* or subject to a nomination. It controls activities which threaten to damage or destroy them, with specific protection being given to Aboriginal sites and relics (**s.11**). No statutory body is established by this Act to advise on or administer its functions.

5.1.1.2 **Great Barrier Reef Marine Park Act 1975** (Cwlth)

Established in 1975 the GBRMPA had a poor record with regard to the direct involvement of Aboriginal people in the management of the GBRMP and it was not until 15 years after its establishment that the first Aboriginal representative was appointed to the GBR Consultative Committee (Whitehouse, 1993:161). This Committee consists of a member of the GBRMPA and at least 12 others appointed by the Federal Minister of whom not less than one-third must be Queensland Government nominees (**s.22**). It is not a requirement of the Act that these other members be representatives of any particular interest groups although the Minister should ensure that Commonwealth agencies with an interest in the GBRMP should be represented on the GBRCC [**s.22**.(6)]. The GBRCC as at August 1993 was comprised of 17 members drawn from both the public and private sectors, including tourism, fishing, science, conservation, local government and the Aboriginal communities (GBRMPA, 1994a:67-8).

While Aboriginal communities along the Reef lobbied for statutory representation on the GBRCC (see for example Bergin 1993:56), arguably recent amendments to the *Great Barrier Reef Marine Park Act* have gone one better by increasing the Authority's membership from 3 to 4 and now must include "a member appointed to represent the interests of the Aboriginal communities adjacent to the Marine Park" [**s.10.**(1)(b)]. While most Aboriginal people so far consulted on the matter have stated that this amendment should have stated clearly that this representative must be Aboriginal, it was also pointed out that any appointee to this position , in order to be effective, should have a high level of understanding of scientific, legal an administrative matters as well as having high level political skills. It was felt that there are few Aboriginal people around with that combination of experience. What was important, however, was that the Aboriginal communities along the reef have a decisive say in who, whether Aboriginal or not, is appointed by the Minister to represent them. One might presume that the Authority member there to represent Aboriginal interests would also ensure that the GBRCC also has Aboriginal membership.

Partially fulfilling recommendations made by Whitehouse (1993:163-4), the *Great Barrier Reef Marine Park Act* has now been amended to enable "**a community group having a special interest** in an area of the Marine Park"[**s.39V.**(1)] to enter into arrangements or agreements with the Authority to jointly manage an area in the GBRMP or to manage a species or ecological community within the area concerned (**39ZA**). While this amendment clearly applies to Aboriginal communities or groups, it also enables other groups having a special interest to enter into management arrangements or agreements. However, in drawing up plans of management, the amendments do not specify the administrative arrangements in terms of, for example, the composition of membership of the, presumably necessary, management boards or advisory committees. While Whitehouse recommended that each "Aboriginal Marine Management Area" should be supervised by a "'Management Board' comprising representatives of the Aboriginal community and the GBRMPA but with a majority of Aboriginal representatives", no such guarantee exists in the Act. Because Queensland interests are most likely to be involved as well under the *Marine Parks Act 1982*, and the *Nature Conservation Act 1992* (if island National Parks are also involved) then QDEH will also want to be represented on any such bodies.

Aboriginal interests are also provided for in the *Cairns Section Zoning Plan* (GBRMPA 1992). The Zoning Plan divides this section of the GBRMP into six zones, each of which allows for a range of activities to occur while separating conflicting uses. These zones are named: General Use; Habitat Protection; Conservation Park; Buffer; National Park; and Preservation Zone. Under current zoning and permit arrangements Aboriginal and Torres Strait Islander people may hunt, fish, and gather in all zones of the GBRMP except in the Preservation Zone. To further refine management, designated areas within zones may also be used to apply specific management conditions. Examples of such designated areas are: Fisheries Experimental Area, Seasonal Closure Area, Defence Area and Shipping Area. The *Zoning Plan* also provides for management plans which are more detailed than the *Zoning Plan* and are prepared for the management of particular activities and for the use of particular areas (for example, for mariculture). In preparing management plans GBRMPA will take into account, amongst other things, "the cultural and heritage values of traditional inhabitants", and therefore among the matters to be addressed by a management plan are any requirements for the protection of those values.

The permit system is also used to enable certain activities to take place within the GBRMP subject to specific conditions. Reef users, such as commercial tourism operators, require permits which regulate their activities, the reefs they can visit and at what frequency. Permits are also required for major installations, such as pontoons, helipads and mariculture activities. Indigenous people are required to have permits to hunt turtle and dugong.

Currently permits are issued on a community basis to the Chairperson of each of the coastal Deed of Grant in Trust (DOGIT) communities for allocation to community residents, or on an individual basis to non-DOGIT Indigenous residents but with the condition that they must be accompanied on their hunting trips by a DOGIT community resident. This situation is not without its problems as many DOGIT residents resent having to obtain a permit to do, what for them, is a traditional right, while non-DOGIT hunters generally do not like the requirement that they must be accompanied by someone from a DOGIT community. To resolve these problems negotiations have taken place concerning the issuing of permits to members of non-DOGIT Indigenous communities, and out of this has evolved, what is referred to as, the "Mackay Model". The Indigenous community in Mackay is comprised of both Aboriginal people

traditionally affiliated with the area as well as Torres Strait Islander and other Aboriginal people who have become historically associated with the region. A representative group has formed to become a Council of Elders representing the community as a whole. In this capacity the Council of Elders not only assists the GBRMPA in assessing the cultural and heritage values held, and any threat to them, in relation to any proposed use by another group within the GBRMP as required by Regulations 13AC(4)(b) and 13AC(5) of the *Great Barrier Marine Park Act 1975*, but handles individual applications for traditional hunting of dugong and turtle within a community-based system of issuing permits.

The GBRMPA also has the power, under **s.43**, to appoint inspectors to carry out various duties under the Act. Six Aboriginal inspectors representing the Yarrabah, Hope Vale, Lockhart River and Injinoo communities have recently been appointed as part of the Authority's push for a "significant investigative presence on the reef and on the mainland" (*The Cairns Post*, 1995).

While the *Great Barrier Reef Marine Park Act 1975* contains no special acknowledgment of Aboriginal interests by way of a preamble, as does the *Wet Tropics of Queensland World Heritage Area Conservation Act 1994*, it does now have extensive power to recognise Aboriginal interests in the GBRMP.

5.1.1.3 **Wet Tropics of Queensland World Heritage Area Conservation Act 1994** (Qld)

The Preamble to this Act

> ...sets out considerations taken into account by the Parliament of Australia in enacting the law that follows.
>
> Aboriginal people have occupied, used, and enjoyed land in the Area since time immemorial.
>
> The Area is part of the cultural landscape of Rainforest Aboriginal peoples and is important spiritually, socially, historically and culturally to Aboriginal people particularly concerned with the land.
>
> It is, therefore, the intention of the Parliament to recognise a role for Aboriginal peoples particularly concerned with land and waters in the Area, and give Aboriginal peoples a role to play in its management.

Accordingly, and to overcome what Rainforest Aboriginal peoples considered to be shortcomings in the *Wet Tropics World Heritage Protection and Management Act 1993* (Queensland) (refer 5.2.3 this report), the Minister may, on behalf of the Commonwealth, make nominations of members of the board of the Wet Tropics Management Authority (**s.5**), such nominees to include "one or more Aboriginal representatives who have appropriate knowledge of, and experience in, the protection of cultural and natural heritage." (**s.6).** Under **s.14.**(b) of the *Wet Tropics World Heritage Protection and Management Act 1993* (Qld), and in accordance with the management scheme detailed in Schedule 1, the Commonwealth Government appoints 2 of the WTMA Board's 6 directors. It is now guaranteed that at least one of the directors will be an Aboriginal representative.

With regard to Aboriginal representation on advisory committees, **s.8** states:

> The Minister must use his or her best endeavours, through consultation with the Authority, to ensure that any advisory committee established by the Authority under the Queensland Act includes among its members Aboriginal representatives who have appropriate knowledge of, and experience in, the protection of cultural and natural heritage.

Thus, apart from the Minister using "best endeavours", there is no guarantee that any of the WTMA's advisory committees established under **s.40**. (1) of the State Act will include Aboriginal membership. The only exception is the Community Consultative Committee which is required to have at least one of its (up to) 13 members represent the Aboriginal communities.

5.1.2 Nature Conservation

5.1.2.1 **Endangered Species Protection Act 1992** (Cwlth)

This Act establishes the Endangered Species Advisory Committee (**s.137)** with its functions being, *inter alia*, "to advise the Minister on any measures that the Commonwealth should take in order to comply with its obligations under this Act;" [**s.138.**(a)]**.** The Committee must consist of at least 10 members, appointed by the Minister [**s.139.**(1)], who are to represent the Australian and New Zealand Environment and Conservation Council; conservation organisations that are not authorities of the Commonwealth or any State or Territory; the scientific community (with concerns for both marine and terrestrial species);

the rural community; the business community; and the Commonwealth [**s.140**.(2)(a-f)]. In addition, at least 5 members must possess scientific qualifications and they are appointed specifically to represent the scientific community [**s.140**(3)].

Given the vital role that Indigenous people should have in ensuring the survival of various species listed as endangered or vulnerable it is therefore appropriate that the Committee also be required under **s.140.**(2) to have at least one member appointed to represent the Indigenous community. It is noted that recent amendments to the *Great Barrier Reef Marine Park Act 1975* (Cwlth) now enable Indigenous communities to enter into agreements or arrangements with the Authority to jointly manage a species or ecological community within an area of the Marine Park in which they have a special interest (**s.39ZA**). Indigenous communities are particularly concerned to manage the green turtle (listed as vulnerable under the *Endangered Species Protection Act)* and dugong populations within their traditional areas.

5.1.2.2 **National Parks and Wildlife Act 1975** (Cwth)

This Act is responsible for giving rise to the "blue print" model in Australia for joint management arrangements involving Indigenous communities and national park authorities, in this case ANCA. Its consequences in terms of empowering local Indigenous communities and achieving equitable arrangements are dealt with in detail by
Woenne-Green et al. (1994:272-301) and are summarised in section 3.5 of this report.

5.1.2.3 **Australian Heritage Commission Act 1975** (Cwlth)

The AHC under this Act is extensively involved with aspects of Indigenous cultural heritage, however the term "heritage" is not defined, nor is there any definition relating to what might constitute Aboriginal or Torres Strait Islander heritage. It is clear from the Act that the kind of heritage to which it relates is that associated with places (**s.3**):

> "place" includes -
> (a) a site, area or region;
> (b) a building or other structure (which may include equipment furniture, fittings and articles associated with or connected with such group of buildings or other structures); and
> (c) a group of buildings or other structures (which may include equipment, furniture, fittings and articles associated with or connected with such group of buildings or other structures), and, in relation to the conservation or improvement of a place, includes the immediate surroundings of the place;

and that the national estate

> consists of those places, being components of the natural environment of Australia or the cultural environment of Australia, that have aesthetic, historic, scientific or social significance or other special value for future generations as well as for the present community [**s4.**(1)].

From an Indigenous peoples' perspective, it would be appropriate that the legislation which governs the nation's peak heritage body should give explicit recognition to Aboriginal and Torres Strait Islander significance as it relates to places and the national estate.

The commission itself is established under **s.11**, and **s.12.**(1) provides for the appointment of a part-time Chairman and up to 6 part-time commissioners. The Act does not specify that the commissioners should be representative of different interests of the community, but they must, however, have "qualifications relevant to, or special experience or interest in, a field related to the functions of the Commission" [**s.12.**(4)]. While the Commission has a long-established practice of consultation and communication with Indigenous peoples, up until recently, Indigenous interests have been generally "spoken for" by eminent archaeologists appointed to be commissioners. While currently the AHC has an Aboriginal representative (AHC, 1993:12), as in the past, there is no guarantee that the Commission will have Indigenous membership in the future.

5.2 State and Territory Legislation

Within this section, the various State/Territory Acts which impact on both bioregional planning and biodiversity conservation and Indigenous interests in some way or other are listed. This list is by no

means complete. State and Territory national parks legislation has been analysed in detail in relation to Indigenous involvement in national parks and conservation reserves by Woenne-Green et al. (1994) and by Sutherland and Smyth (1995), and therefore further analysis of this body of legislation is not attempted here. The emphasis in the latter report is on the potential for Indigenous involvement in conservation partnerships under existing legislation for the voluntary inclusion of Indigenous land into a national protected are a system — a strategy designed to assist in biodiversity conservation (CoA 1995b:14-16). Rather than repeat their analysis, the focus in this report is on the degree to which the various Acts empower Indigenous people to look after their interests within the terms of the legislation. In the sections that follow, while a number of Acts have been listed as being relevant in some way to biodiversity conservation and Indigenous interests (primarily because they deal with land and natural resources) only a sample has been analysed.

Legislation which has been examined by Sutherland and Smyth is indicated thus (*).

5.2.1 New South Wales

*Native Title Act 1994 (Cwlth) **

*Aboriginal Land Rights Act 1983 **

This Act establishes a network of Aboriginal Land Councils organised into a hierarchy involving local and regional councils and a State Council. The regional councils are comprised of members elected to represent each local council within their respective regions [**s.15.**(3)], and the State Council comprises a member elected to represent each regional council (**s.22**). This structure ensures that an effective consultative and networking structure is in place and which can be used to facilitate Aboriginal involvement in bioregional planning and conservation. Aboriginal representatives of both local and regional councils can participate directly in any body set up to implement bioregional planning to ensure that Aboriginal interests are taken into account and that Aboriginal people themselves have a role in management. The State Council could provide membership to peak bodies and lead agencies responsible for implementing bioregional planning initiatives within the framework of the state, for example, to the National Parks and Wildlife Advisory Council or any of the advisory committees concerning national parks or nature reserves set up under the *National Parks and Wildlife Act 1974* (see below), the Nature Conservation Council of NSW, etc.

*National Parks and Wildlife Act 1974 **

This Act establishes an Aboriginal Cultural Heritage (Interim) Advisory Committee (**s.27**) consisting of 8 members appointed by the Minister. Of these, 5 are Aboriginal people nominated by the New South Wales Aboriginal Land Council, one nominated by the Nature Conservation Council of NSW, another is to be an officer of the NSW National Parks and Wildlife Service and the eighth, an appointee of the Minister. Such an arrangement at least guarantees an Aboriginal majority on the Committee with the possibility of the remaining 3 members being non-Aboriginal. It is therefore relevant to note the composition of the National Parks and Wildlife Advisory Council, also established under this Act (**s.22**). Consisting of the Director-General and 13 other members (refer Schedule 7 of the Act), none is required to be a representative of the NSW Aboriginal Land Council, yet other interest/stake-holder groups are required to be represented on the Council. At least 4 should have “special knowledge of botany or zoology or other special knowledge concerning the conservation or management of wildlife”; 2 shall be members of an advisory committee for a national park; 1 shall be a member of an advisory committee for a historic site; 1 shall be a nominee of the Nature Conservation Council of NSW (or similar organisation); 1 shall be a nominee of Australia ICOMOS (or similar organisation); 1 shall be an officer of a NSW Government Department or instrumentality concerned with the management of natural resources; 1 a nominee of the National Parks Association of NSW; 2 from universities in NSW; 1 an officer of the Australian Museum; 1 from the CSIRO; 1 a nominee of a grazing or agricultural association in NSW; and 1 a nominee selected by the minister from organisations which have an interest in national parks or other lands dedicated under the Act. While an Aboriginal appointment could be made under a number of these requirements, particularly the last, Indigenous peoples could expect, given the spread of interests, that an Aboriginal appointment would also be a requirement of the Act.

In terms of the purposes of the Act, the functions of the Aboriginal Cultural Heritage (Interim) Advisory Committee are quite limited being to report to and to advise the minister or the Director-General "...on any matter relating to the preservation, control of excavation, removal and custody of relics or Aboriginal places" (**s.28**).

5.2.2 Northern Territory

*Aboriginal Land Rights (Northern Territory) Act 1976 (Cwlth) **
*National Parks and Wildlife Conservation Act 1975 (Cwlth) **
*Nitmiluk (Katherine Gorge) National Park Act 1989 **
*Coburg Peninsula Aboriginal Land and Sanctuary Act 1981 **
*Crown Land Act 1982 **
*Validation of Titles and Actions Act 1994 **
*Aboriginal Land Act 1978 **
*Soil Conservation and Land Utilisation Act **

*Territory Parks and Wildlife Conservation Act **
This Act establishes both the Territory Parks and Wildlife Commission (Part VI) and the Territory Parks and Wildlife Advisory Council (**s.79**). While the membership of the Commission is not prescribed, the Advisory Council is to consist of the Director and 8 other members "chosen for their expertise in scientific or technical fields that are relevant to the operation of this Act, for their expert local knowledge or because they have special knowledge or skills relevant to the functions of the Council" [**s.80.**(3)]. Clearly there is considerable latitude to enable Aboriginal appointments, however, of the members listed in the CCNT's *1993-1994 Annual Report* (p.69), none is Aboriginal. It is understood that the Advisory Council is now defunct and the legislation under review.

Pastoral Land Act
This Act establishes the Pastoral Land Board (**s.11**) of 5 members (**s.12**), 2 of whom shall have experience as pastoralists [**s.13**.(a)] with the members collectively, and as far as is practicable, "having experience that,... is relevant to their role as members" [**s.13.**(b)]. The objects of the Act, *inter alia*, are "to recognise the right of Aborigines to follow traditional pursuits on pastoral land" [**s.4.**(c)] and "to provide a procedure to establish Aboriginal community living areas on pastoral land" [**s.4.**(e)], however the Act does not require an Aboriginal member to represent the extensive Aboriginal interests in pastoral lands.

Conservation Commission Act 1980
The Conservation Commission of the Northern Territory is established under this Act (**s.9**), with at least 2 of its 9 members required to be Aboriginal [**s.10.**(3)]. Furthermore, under **s.11**.(2), these members are appointed by the Minister from 2 nominees from each of the Land Councils established under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cwlth). Besides the functions of promoting the conservation and protection of the natural environment of the Territory and the establishment and management of parks, reserves and sanctuaries, the Commission also has the function to "co-operate with and assist any person, (including the owners of Aboriginal land) organisation or government authority in matters relating to the environment" [**s.19.**(g)].

5.2.3 Queensland

*Nature Conservation Act 1992 **
*Aboriginal Land Act 1991 **
*Torres Strait Islander Land Act 1991 **
*Native Title (Queensland) Act 1993 **
*Queensland Heritage Act 1992 **
Recreation Areas Management Act 1988
Forestry Act 1959
Rural Lands Protection Act 1985

Wet Tropics World Heritage Protection and Management Act 1993 *

The Wet Tropics of Queensland World Heritage Area is the only one of Australia's eleven World Heritage areas to be protected by specific State legislation. Queensland has 3 other World Heritage property listings (the Great Barrier Reef Marine Park, Fraser Island and the fossil sites at Riversleigh).

The preamble to the Act (WTWHPMA) states that:

> (8) It is also the intention of the Parliament to acknowledge the significant contribution that Aboriginal people can make to the future management of cultural and natural heritage within the Area, particularly through joint management agreements.

It also acknowledges Aboriginal people's particular concern with land (**s.5**). The paramountcy of conservation needs over Rainforest Aboriginal cultural needs is established in **s.10** and sets the tone for the whole Act:

> (4) The Authority must perform its functions in a way that is consistent with the protection of the natural heritage values of the Wet Tropics Area.
>
> (5) Subject to subsection (4), in performing its functions, the Authority must, as far as practicable—
>
> a) have regard to the Aboriginal tradition of Aboriginal people particularly concerned with land in the Wet Tropics Area; and
>
> b) liaise, and co-operate with, Aboriginal people particularly concerned with land in the Wet Tropics Area.

The issue then is: who is to decide what is/is not practicable? The Authority must establish a scientific advisory committee and a community consultative committee [**s.40** (1)]. In accordance with Schedule 1 to the Act, the Scientific Advisory Committee will comprise "five core members with powers to co-opt specialist advice" (p.65). There is no requirement for Aboriginal membership, although conceivably — but highly unlikely because of the dearth of Aboriginal science graduates — there could be. The Community Consultative Committee, however, is required to have at least one of its up to 13 members representing the Aboriginal community. But the questions of, who selects (the Ministerial Council appoints the Chairperson with the Commonwealth and Queensland each nominating up to 6 members), on whose advice, and according to what criteria arise. Without those issues being adequately addressed by the Rainforest Aboriginal communities (assuming that they are empowered to address them) then the potential for official appointment of Aboriginal persons who are not true representatives of the communities concerned is obvious. The Authority, under **s.40** (1) (b), also has the power to establish "as many other advisory committees as it considers appropriate." It is conceivable that, in time, a fully rainforest Aboriginal advisory committee may be established. Then, maybe not as the Act does not specifically require it.

Comparisons with the Willandra Lakes Region World Heritage Property (WLR-WHP) management and advisory structure concerning the memberships of their respective committees is instructive. The functions of the WLR-WHP Community Management Council are:

> To advise the [New South Wales World Heritage Properties] Ministerial Council on matters relating to the protection, conservation, presentation and management of the [WLR-WHP] from the view point of the landholders and the community. To advise on and facilitate the preparation of a plan of management for the WLR-WHP and individual plans for each pastoral holding within the WLR-WHP. Ensure appropriate consideration is given to the views of the local Aboriginal community in relation to management of the WLR-WHP and in any cultural heritage research (CoA 1995a:203).

The Council currently has a membership of 15, 5 of whom each represent a local Aboriginal land council and are equal in number to those representing pastoral interests. The WLR-WHP Technical and Scientific Advisory Committee has the function:

> To provide expert advice to the Ministerial Council and Community Management Council on matters relating to the protection and conservation of the Willandra Lakes Region (WLR). In particular, the Committee will advise on technical and scientific research priorities, relevant new technologies and scientific information, the scientific bases of management principles and practices, the appropriateness of research, and the maintenance of the world heritage values and integrity of the WLR (p.203).

Of the current 14 members 3 represent Aboriginal communities, and again there is the same number to represent pastoral interests (CoA 1995a:203)

In contrast, the Wet Tropics Management Agency is responsible for the day to day management of the WTWHA. Its principal functions are:

> ...to develop, co-ordinate, implement and monitor subject to Management Authority and Ministerial Council approval policies, plans and programs to meet the primary goal (Schedule 1, p.60).

The "primary goal" is defined in Schedule 1 of the WTWHMPA thus:

> To provide for the implementation of Australia's international duty for the protection, conservation, presentation, rehabilitation and transmission to future generations of the Wet Tropics of Queensland World Heritage Area, within the meaning of the World Heritage Convention.

In order to carry out its functions:

> The Management Agency will have sufficient staff with appropriate specialist expertise to ensure implementation of Australia's international obligations under the World Heritage Convention. The staff shall include people with expertise in management planning, conservation policy, public information and environment management (Schedule 1, p.63).

Up until the end of 1994 there was no permanent full-time employment of Aboriginal people in the Agency.

Rainforest Aboriginal interests are primarily to be catered for through the setting up of joint management agreements and their involvement in management plans [**s.42**.(2) (c) and **s.44** (2) (d)]. The only protection of their rights is provided in the case of any inconsistency between a plan made under the WTWHPMA and a conservation plan under the *Nature Conservation Act 1992* whereby, under **s.51**.(4), "any rights that Aboriginal people have in relation to native wildlife under another Act" will not be affected. A similarly worded guarantee in relation to prohibited acts concerning "forest products" (ie. native plants) exists in **s.56**(2).

To what extent can the Rainforest Aboriginal communities expect their cultural rights and right of self-determination to be respected in joint management agreements and management plans when they may well have

- no member on the Scientific Advisory Committee;
- only one member (who is not guaranteed to be properly elected) on the Community Consultative Committee (during 1993-94 there was no Aboriginal member on this Committee, WTMA, 1994:4);
- no Aboriginal Advisory Committee should the Wet Tropics Management Authority fail to appoint one;
- no permanent, full-time Aboriginal employee(s) in the Agency; and
- lack of concern for the protection of cultural values in association with natural values of the WTWHA in accordance with the reason for its inclusion on the World Heritage List under the World Heritage Convention?

While Aboriginal representation is now required on the WTMA Board, it was pointed out in section 5.1.1.3 regarding the *Wet Tropics of Queensland World Heritage Area Conservation Act 1994* (Cwlth) that, apart from the Federal Minister using his or her "best endeavours" to influence appointments, there is no guarantee that any of the WTMA's advisory committees established under the Queensland Act, with the exception of the Community Consultative Committee, will include Aboriginal membership. Thus there are a number of "loopholes" in the Queensland Act which could be used to diminish the input of the Rainforest Aboriginal communities in the management of their interests in the WTWHA. It will be largely up to the Aboriginal member of the WTMA Board to see that this does not happen (thus highlighting the importance of having Indigenous membership on statutory bodies where Indigenous interests are of concern). Given that this could be seen as a critical responsibility, it is crucial then that the Rainforest Aboriginal communities should have a say in who is appointed to represent them. There is no provision in either the Commonwealth or Queensland Acts detailing how this should occur. One of the primary responsibilities of an Aboriginal advisory committee [appointed under **s.40.**(1)(b) of the Queensland Act] might be to advise the Commonwealth Minister on the Aboriginal nominees for appointment to the WTMA Board.

The Queensland *Wet Tropics World Heritage Protection and Management Act 1993* provides an example of how good intentions (as indicated in the Preamble to the Act) may not necessarily translate into the effective empowerment of the rainforest Aboriginal peoples.

Marine Parks Act 1982

This Act does not require the establishment of some form of statutory body to administer or advise on the State's marine parks. Under **s.11**, the Director of the National Parks and Wildlife Service is primarily responsible for preparing proposals for the nomination of marine parks and a zoning plan for each area apart and declared as marine park [**s.11b**(1)(d)]. Under **s.17**, regrading zoning plans, it is not a requirement that Indigenous interests must be taken into account, although they may well be. For example, the zoning plan for the Cairns Marine Park provides for Aboriginal Management Areas [*Marine Parks (Cairns Zoning Plan) Order 1995*, **s.30**], and Mission Bay at Yarrabah has been so declared. However, the *Marine Parks (Woongarra Zoning Plan) Order 1991* contains no such provisions.

Under **s.9**(1) of the Act, "aboriginal remains, artefacts or traces thereof" are "marine products" and therefore, if found within a marine park, "shall be taken to be the marine park and, for the purposes of this Act, part of the area" (**s.15**). Apart from this reference, there is no explicit reference to Indigenous interests with regard to marine parks.

State marine parks, because they involve coastal waters and estuaries, contain areas of "sea country" of great cultural and economic significance to coastal Indigenous communities (see, for example, Smyth, 1990). However, the Act does not empower those communities to enable them to have formal input into the creation and management of marine parks other than through the general public consultation processes required under the Act (**s.12**).

The general failure of the Act to explicitly take account of Indigenous interests in marine parks would appear to contravene the *Legislative Standards Act 1992* (Qld) with regard to having "sufficient regard to Aboriginal tradition and Island custom" as a "fundamental legislative principle" (**s.4**). For the purposes of this Act and other Queensland legislation:

> **" Aboriginal tradition"** means the body of traditions, observances, customs and beliefs of Aboriginal people generally or of a particular community or group of Aboriginal people, and includes any such traditions, observances, customs and beliefs relating to particular persons, areas, objects or relationships; (**s.24**).

Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987

While the potential for Indigenous involvement exists within the general provisions for the administration of the Act (eg., through an advisory committee [**s.12**], Regional Landscapes Queensland Committee with respect to DOGIT communities [**s.14**], as Landscapes Queensland Protectors [**s.9**] and Advisers [**s.10**]), none is required by the legislation, thus also leaving the potential for complete exclusion. For example, under **s.12.**(1):

> To assist him in the administration of this Act the Minister may establish and maintain such advisory committees as he thinks fit comprised of persons having, in the Minister's opinion, such expertise as he considers appropriate to the preservation of Landscapes Queensland and the Queensland Estate.

While an Aboriginal Cultural Heritage Advisory Committee was established in 1989 it did not survive past 1991 and currently no such committee exists.

Widely condemned by the Indigenous and academic communities (see, for example Marrie, 1990), the Minister for Environment and Heritage in 1990 indicated the Government's intention to replace the *Cultural Record Act* (QDEH, 1990:1). It was also a recommendation of the Queensland Legislative Review Committee (1991:41): "That there be an immediate review... with a view to amending the Act in a manner consistent with Aboriginal and Torres Strait Islander interests". Such a review has not taken place. While mainstream society had the *Queensland Heritage Act 1992* proclaimed to protect its heritage and which also enables the general community to have input through a 12 member statutory Queensland Heritage Council (**s.10**), Queensland's Indigenous communities are still awaiting their replacement Act.

While QDEH receives input from a number of statutory bodies and departmental instrumentalities it receives no such input at that level from the Indigenous community. In terms of an holistic and integrated approach to Indigenous cultural heritage management including the capacity to effectively participate in bioregional planning and conservation, then the establishment of some form of Indigenous cultural heritage body (preferably statutory) is essential from the viewpoint of Indigenous peoples. Membership of this body might include, for example, members from the Aboriginal Coordinating Council and the Island Coordinating Council, the Aboriginal members of the GBRMPA and WTMA, and various land councils. In turn, the Indigenous cultural heritage body could provide Indigenous membership to such statutory bodies as the Rural Lands Protection Board (*Rural Lands Protection Act 1985*, **ss.17-19**), the

Timber Research and Development Advisory Council (*Forestry Act 1959*, **ss.22A, 22B**), the board of trustees of the Queensland Museum (*Queensland Museum Act 1970*), the Queensland Fisheries Policy Council or the Queensland Fisheries Management Authority *Fisheries Act 1994*, **s.15** and **s.23** respectively), any relevant advisory committees appointed by the Queensland Recreation Areas Management Authority (*Recreation Areas Management Act 1988*, **s.16**), and to the various advisory committees established under **s.132** of the *Nature Conservation Act 1992* (ie, the scientific, wilderness area, protected area management and wildlife management advisory committees). This would enable maximum networking opportunities to ensure that Indigenous interests are represented on a wide range of bodies, all of which could be expected to have a role in biodiversity conservation.

While there are two statutory Indigenous bodies, the Aboriginal Co-ordinating Council (constituted under the *Community Services (Aborigines) Act 1984*) and the Island Co-ordinating Council (*Community Services (Torres Strait) Act 1984*), both only represent their respective DOGIT communities who only comprise about a quarter of the State's Indigenous population. Both are responsible to the Minister in charge of Aboriginal and Islander Affairs.

Fisheries Act 1994

This Act establishes the Queensland Fisheries Management Authority (QFMA). While its primary functions are "... to ensure the appropriate management, use, development and protection of fisheries resources" [**s.25.**(1)], its other functions include ensuring "the fair division of access to fisheries resources for commercial, recreational and Indigenous use;" [**s.26.**(1)(a)]. In order for the Authority to carry out these functions, it has established two sets of committees: Management Advisory Committees (MACs) and Zonal Advisory Committees (ZACs) (QFMA, 1995). Under its policy document, six MACs are established having such names as Trawl MAC, Reef MAC and so on. Each has between 12 and 15 members and all but one, Trawl Mac, has provision for Indigenous membership. Membership of the eight ZACs is voluntary, and can be comprised of representatives of a number of interests which include Indigenous interests.

The *Fisheries Act* can thus be seen to be putting into practice the thrust of the Resource Assessment Commission's recommendations regarding Indigenous interests in the coastal zone by ensuring Indigenous input through the committee structure of its principal management body, the QFMA.

5.2.4 South Australia

*Aboriginal Lands Trust Act 1966 **
*Pitjantjatjara Land Rights Act 1981 **
*Maralinga Tjarutja Land Rights Act 1984 **
Crown Lands Act 1929

*National Parks and Wildlife Act 1972 **

The five member Reserves Advisory Committee is established under this Act (**s.15**), however no qualifications governing membership are stipulated. Division II of PART VA governs hunting and food gathering by Aborigines.

*Wilderness Protection Act 1992 **

The Act establishes a 5-member Wilderness Advisory Committee comprising the Director of National Parks and Wildlife; an academic from a tertiary institution who teaches wildlife conservation and management; a person selected by the Wilderness Society SA Branch Incorporated; and 2 who have wide experience in the management or recreational use of wilderness (**s.8**). One of the initial responsibilities of the Wilderness Advisory Committee is to prepare a draft code of management of wilderness protection areas and zones for submission to the Minister, which, *inter alia*, must address the preservation of Aboriginal sites and objects, hunting in wilderness protection areas and zones by Aboriginal people and entry into and use of wilderness protection areas and zones by Aboriginal people to observe Aboriginal tradition [**s.12.**(2)(c, n and o)]. Under **s.22**(1)(a), the Governor has the power "to constitute as a wilderness protection area or a wilderness protection zone... (ii) any other land if the proclamation is made with the consent of the owner of the land and of all others who have an interest in the land and of all other persons who have an interest in the land registered under the *Real Property Act 1886*". This gives the Governor the power by, proclamation, and only with the consent of the owners, to constitute, for

example, a part of the Anangu Pitjantjatjara or Maralinga Tjarutja lands or any other lands held by the Aboriginal lands trust of South Australia, a wilderness protection area or zone. Pursuant to **s.22.**(6), the Minister, before making a recommendation concerning land which should be constituted as a wilderness protection area or zone, must comply with the requirement that:

(a) if, in the minister's opinion, an Aboriginal organisation has a particular interest in the land to which the proposal relates, the Minister must consult that organisation in relation to the proposal;

All governments by now should be proceeding on the assumption that all land within their respective jurisdictions could be Aboriginal land and therefore there are Aboriginal people or communities with traditional interests in any land being considered under any form of proposal which affects that land. However, under such legislation, Ministers can exercise their discretionary powers to the extent, that if in their opinion there are no Aboriginal people having an interest in a particular area of land, then there is no need to consult. Aboriginal interests can therefore be very easily overlooked in cases where they do not have title to land or have not had an interest granted or recognised under another Act. It is therefore appropriate that Aboriginal membership of the Advisory Committee should be a requirement of legislation such as the Wilderness Protection Act 1992 to ensure that Aboriginal interests are not overlooked either in the deliberations of such statutory committees as the Wilderness Advisory Committee or by Ministers in the exercise of their discretionary powers. Also, given the extent of Aboriginal interests in relation to sites, hunting rights and the need to access sites for traditional purposes in relation to wilderness areas and zones, then Aboriginal representation on the Wilderness Advisory Committee is regarded by Indigenous peoples as essential.

Aboriginal Heritage Act 1988

While the term "Aboriginal Heritage" is not defined it is clearly interpreted within the Act to refer to sites, objects and remains of traditional or archaeological, anthropological or historical significance (**s.3**). Despite this constricted interpretation restricting the functions of the Aboriginal Heritage Committee, established under **s.7**, the Committee nevertheless has the potential to provide an adequate consultative and networking structure which could address bioregional planning in South Australia. Under **s.7** of the Act **:**

(2) The Committee consists of Aboriginal persons appointed, as far as practicable, from all parts of the State by the Minister to represent the interests of Aboriginal people throughout the State in the protection and preservation of the Aboriginal heritage.

(3) The Minister must, as far as is practicable, appoint equal numbers of men and women to the Committee.

(4) The members of the Committee will be appointed on such conditions and for such terms as the Minister considers appropriate.

(5) The Committee may, with the approval of the Minister, establish subcommittees (which may - but need not - consist of or include members of the Committee) to investigate and report on any matter.

Depending on the size and representativeness of the Committee and the liberal use, by the Minister, of his discretionary powers, the Committee could, under sub-section (5) (above), involve itself in bioregional planning issues and be used to provide membership and networking opportunities to other bodies whose interests involve in some way bioregional planning and conservation, such as the Pastoral Board (see below), the Reserves Advisory Committee (see above), the Conservation Council of SA, the Native Vegetation Council, the Wilderness Advisory Committee and the Soil Conservation Council.

Pastoral Land Management and Conservation Act 1989

The Act establishes the Pastoral Board (**s.12**) although subsections (2-8) did not come into operation until 7 March 1996. The five members appointed by the Governor comprise one member, with wide experience in administration of pastoral leases, nominated by the Minister of Lands; one member with a wide knowledge of ecology and experience in the management of pastoral land, nominated by the Minister of Environment and Planning; one member with wide experience in the field of land and soil conservation of pastoral land, nominated by the Minister of Agriculture; one from 3 nominees submitted to the Minister of Lands by the United Farmers and Stockowners Association of SA; and the fifth member from 3 nominees submitted to the Minister of Lands by the Conservation Council of SA. [**s.12.**(2)(a-e)]. The final membership requirement is that : "At least one member must be a woman and

one a man" [**s.12.**(3)]. Given the extent of pastoral lease-hold land in South Australia, Aboriginal interests in that land and that one of the objects of the Act is "to recognise the right of Aborigines to follow traditional pursuits on pastoral land" [**s.4.**(d)], it therefore seems appropriate that the Pastoral Board should also include Aboriginal membership. Under **s.47** concerning the rights of Aborigines, "an Aborigine may enter, travel across or stay on pastoral land for the purpose of following the traditional pursuits of the Aboriginal people" but must not camp within a kilometre of any (station) buildings or within 500 metres of any "constructed stock watering point" [**s.47.**(2)].

Native Vegetation Act 1991 *

The Act establishes the Native Vegetation Council (**s.7**) with a membership of 7 appointed by the Governor among whom there must be a person selected by the Minister from each of 3 nominees from the United Farmers and Stockowners of SA; the Conservation Council of SA; and the Soil Conservation Council: while one must be a nominee of the Local Government Association, another a nominee of the Commonwealth Minister for the Environment and one must be a nominee of the Minister with extensive knowledge and experience in native vegetation preservation and management (**s.8**). Again, given the extensive interests in land, either as owners or for traditional hunting and gathering purposes, and given that one of the objects of the Act is "the conservation of the native vegetation of the State in order to prevent further reduction of biological diversity and further degradation of the land and its soil" [**s.6.**(b)], it seems logical that the Act also require Indigenous membership on the Council. In terms of ensuring effective involvement of Aboriginal people in SA in bioregional planning having an Aboriginal member of the Council would seem essential.

Soil Conservation and Landcare Act 1989 *

The Act establishes a 12-member Soil Conservation Council with members appointed by the Governor through the Minister. Nominees, either selected from panels of names submitted by such organisations as the United Farmers and Stockowners Association of SA, the Conservation Council of SA and the universities, or from the Ministerial nominations from the Pastoral Board, the Department of Agriculture, Environment and Planning and Water Resources, cover such expertise as the management of pastoral leases, horticulture, dryland cropping and grazing, intensive agriculture in high rainfall country, education and training in land management or soil sciences, environmental conservation and public administration of land management and water resources strategies [**s.14**(2)]. Again, there is no requirement for Indigenous membership even though Aboriginal communities have title to an area equivalent to about one-fifth of the State.

The Minister may, on the recommendation of the Council, declare a defined area of land a soil conservation district and establish a soil conservation board for the district (**s.22**). These boards are to consist of not more than 7 members: one to represent local government (or a Ministerial appointee if a district falls outside local government council areas); and others who are residents in the district and who have, in the opinion of the Soil Conservation Council, suitable knowledge and experience in land management or soil conservation while representing the diversity of major land uses within the district with at least 3 being owners of properties used for agriculture, pastoral, horticultural or other similar purposes (**s.24**). Since the Soil Conservation Council has a major role in recommending to the Minister on appointments to these soil conservation district boards it would be an important responsibility of any Aboriginal member of the Council to ensure that these district boards have Aboriginal membership where appropriate. Hence the need to have such Aboriginal members on statutory bodies to see that Aboriginal interests are protected right throughout the administrative structure.

5.2.5 Tasmania

National Parks and Wildlife Act 1970 (Tas) *

In relation to Tasmania, Sutherland and Smyth (1995:63) report that:

> ... the only land owned by Aboriginal people is that which has been acquired under previous Acts, or which has been bought, leased by or given to ATSIC or other Aboriginal corporations or individuals. There is no statutory land claims process in place in Tasmania (other than native title procedures). The National Parks and Wildlife Act 1970 (Tas) does not include co-management arrangements.

5.2.6 Victoria

*Aboriginal Lands Act 1970 **
*Aboriginal Land (Northcote Land) Act 1989 **
*Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987 (Cwlth) **
*Aboriginal Land (Manatunga Land) Act 1992 **
*Land Titles Validation Act 1993 **
*Victorian Conservation Trust Act 1972 **
*Flora and Fauna Guarantee Act 1988 **
*Wildlife Act 1975 **
*Planning and Environment Act 1987 **
*Catchment and Land Protection Act 1994 **
*Soil Conservation and Land Utilisation Act 1958 **
*Aboriginal Lands Act 1991 **
National Parks Act 1975
Unlike similar legislation elsewhere in Australia this Act does not acknowledge Aboriginal interests per se, for example, by containing provisions which would enable Aboriginal people to hunt and gather traditional foods and raw materials in (certain) parks in Victoria. In contrast, certain rights (of, presumably, non-Indigenous people) to graze cattle through the issue of licences are respected in relation to such parks as the Alpine National Park and the Barmah Park. Aboriginal interests are confined to those of archaeological significance (refer **s.4**) or to the occasional changing of the name of a park to a local Aboriginal name (see, for example, **s.30E**). The National Parks Advisory Council is established by **s.10**. In addition to the Director, the 8 members are appointed to represent the Conservation Council of Victoria and the Victorian National Parks Association (one each), one member who is an academic teaching ecology, biology or earth science from a university in Victoria, one from the Municipal Association of Victoria, and four members (two of whom must reside outside the metropolitan area) "with experience in matters affecting the interests of the community." Under such requirements an Aboriginal member could be appointed but there is no guarantee.
*Conservation, Forests and Lands Act 1987 **
This Act, like the *National Parks Act*, does not recognise Aboriginal interests per se. No statutory body is established by the Act, although the Minister has the power to create advisory bodies (**s.12**).
Aboriginal and Torres Strait Islander Heritage Protection Act 1984: Part IIA Victorian Aboriginal Cultural Heritage (Cwlth)
With respect to the protection of Aboriginal Cultural Heritage in Victoria, Part IIA is virtually an Act within an Act. It contains no provisions for the establishment of a state Aboriginal cultural body, and therefore has no value in terms of creating a consultative and networking structure. However, it does enable local Aboriginal communities to enter into cultural heritage agreements with a person "who owns or possesses any Aboriginal cultural property in Victoria"(**s.21K**) . This might also concern areas of land and thus has potential for bioregional planning purposes, although the areas of land involved are likely to be comparatively small.

5.2.7 Western Australia

*Land Act 1933 **
*Aboriginal Heritage Act 1972 **
*Aboriginal Affairs Planning Authority Act 1972 **
*Aboriginal Communities Act 1979 **
*Local Government Act 1960 **
*Land (Titles and Traditional Usage) Act 1993 **

*Conservation and Land Management Act 1984 **
This Act establishes the Lands and Forest Commission (**s.18**), the National Parks and Nature Conservation Authority (**s.21**) and the Forest Production Council (**s.24**). While the Lands and Forest Commission comprises only 3 members, both the Authority and Council are substantial bodies having 15 and 14 members respectively. Of these only the Authority is required to have a member " representative of

aboriginal interests" [**s.23.**(1)(b)(viii)], which of course does not guarantee that person will be Aboriginal. The Act does not recognise Aboriginal interests *per se*.

Wildlife Conservation Act 1950 *

The Western Australian Wildlife Authority is constituted under **s.10** and consists of 12 members: 4 *ex officio* members (the Director of Wildlife Conservation, Conservator of Wildlife, Chief Agriculture Protection Officer and the Conservator of Forests) and the remaining 8 comprising a botanist, 2 zoologists and 5 others of whom one shall be representative of country interests, one shall have a wide practical knowledge of the native fauna of the state and one shall have such knowledge in relation to the flora. Aboriginal interests *per se* are not recognised in the Act.

6. ESTABLISHING EFFECTIVE CONSULTATIVE AND NETWORKING STRUCTURES

> **...** there is a long way to go before Aboriginal land, political and economic rights receive the attention they merit. There continues to be only token efforts made to obtain the input of Aboriginal people in the formulation of policies and procedures which control land use activities. There continues to be government and non-Aboriginal non-government bodies who claim to represent Aboriginal interests in environment forums, or worse, suggest that Aboriginal people share their views on environment issues. There remains no consistent practice for the primacy of Aboriginal interests in environment issues to be expressed and no mechanism for exerting these interests in an autonomous manner. There is a need for the development of a clear process and structure to ensure that Aboriginal concerns for environment issues are able to be input into domestic and international environment policy formulation processes. Aboriginal people must also have the ability to monitor the extent to which government and its instruments are able to implement procedures and practices which deal with Aboriginal concerns.
>
> Central Land Council
> (1994:2-3)

A number of factors will determine the effectiveness of Indigenous consultative structures and networks in terms of Indigenous involvement in bioregional conservation:

1) legislative conditions (where legislation involves or impacts upon Indigenous interests, are there statutory requirements for Indigenous involvement, eg., on statutory bodies, input into management plans, provision for joint management agreements, etc. To be considered at Federal and State levels.
2) departmental structures (existence of State Aboriginal Affairs departments, what is the general spread between departments regarding responsibility for different Indigenous interests);
3) Indigenous structures (are they comprehensive on a state-wide basis and involve more than just ATSIC, eg., NSW Aboriginal Land Council Structure, NT Land Council structure, Aboriginal Lands Trust in SA);
4) level of Indigenous land ownership or control over land (as pastoral leases, national parks, other protected areas, etc) (Aboriginal domains eg., Kimberleys, CYP. Arnhem Land, Central Australia, Torres Strait)

One of the major flaws frequently occurring in current governmental and departmental practice of including or inviting Indigenous people into their decision and policy making bodies, whether statutory or informal, is the lack of formal guidelines from the Indigenous community's perspective as to who such appointees should be and how they should be selected. Consequently, the wrong people often end up in the right places — right in the sense that at least provision has been made for the appointment of Indigenous representatives to these various statutory and non-statutory bodies. Wrong in the sense that the Indigenous community whose interests are concerned have little or no say in these appointments. This can happen on a national, state, regional or local level - "Indigenous community" being defined accordingly. In order that the Indigenous community does have a say, it is necessary to have the appropriate consultative and networking structures in place. This will then better ensure that appointing authorities (whether Ministers, Directors, or Heads of Departments) do indeed appoint people who are regarded by the Indigenous community as their appropriate representatives. Just as importantly, if the

necessary consultative networks are in place, then Indigenous representatives on these bodies also have a structure through which they can account and be accountable. This will ensure that Indigenous appointments are not token and that the Indigenous community is in a better position to give direction to their representatives and to receive information back from them. It is also an important application of the principle of self-determination enabling Indigenous communities to become effectively involved in the activities of mainstream agencies where their interests are affected.

Networking is vital to the flow of information, to decision-making and lobbying and is important to the exercise of self-determination. Networking has to be effective amongst Aboriginal communities and organisations as well as with mainstream agencies. What might be termed the "inter-agency networking principle" should apply. Frequently a statutory body within one department is required to have members from other departments, agencies and professional associations. For example, the 14-member National Parks and Wildlife Advisory Council established by the *National Parks and Wildlife Act 1974* (NSW), is required to have a member from each of the following bodies: the Nature Conservation Council of NSW, Australia ICOMOS, the National Parks Association of NSW, the Australian Museum, the CSIRO and a NSW Government Department or instrumentality concerned with the management of natural resources (refer section 5.3.1 this report). This principle could work both ways with Indigenous membership from an Indigenous statutory body being required of other relevant statutory bodies as well as other statutory bodies being represented on an Indigenous statutory body. Conditions governing voting and *ex-officio* status might apply. For the "inter-agency networking principle" to be effective the appropriate Indigenous statutory body should exist in the first place.

Consultative structures and networks fulfil two basic functions:

1) They enable the various Indigenous community stake-holders and interest groups to come together to discuss and resolve issues which are generally internal to the Indigenous community; and
2) They enable the Indigenous community to articulate their interests within the wider community as one stake-holder/interest group interacting with other interest groups to ensure that their interests are protected and balanced against those of all the others.

Unfortunately, in terms of the second situation, the Indigenous community does not participate to the extent that it should for a number of reasons, namely:

a) there is no effective consultative network in place in the first place;
b) Indigenous interests are overlooked, even actively excluded, within the wider community's forums; and
c) Indigenous interests are "spoken for" by non-Indigenous spokes-people with or without due authority. Sometimes Indigenous communities entrust their concerns to non-Indigenous people to speak on their behalf (usually because they feel they lack the appropriate skills and expertise to negotiate their interests in what can be quite daunting committee situations). On other occasions, non-Indigenous people feel they can provide the necessary input because they think they know something about a matter from an Indigenous perspective. However, as the CLC (1994:12) points out, "that to have non-Aboriginal people representing the views of Aboriginal people is an unacceptable situation".

6.1 National

6.1.1 ATSIC

ATSIC, with its 36 Regional Councils and 17 ATSIC Zones, potentially provides the best national network to assist in the involvement of Indigenous communities in bioregional planning. In addition, ATSIC has established a number of portfolio policy committees with heritage protection, the environment and sustainable development coming under the Social and Cultural Policy Committee (ATSIC 1994a:xxi). There is also the Land, Heritage and Environment Branch within the Social and Cultural Division in the central office in Canberra. The Branch released a discussion paper on ATSIC's draft environment policy in April 1994 (ATSIC 1994d) and an environment policy was formally adopted in November (ATSIC 1994c). However, this document contains no policy with regard to Indigenous community involvement in bioregional planning per se.

Recently ACDO released a draft document, *Guidelines for the Protection, Management and Use of Aboriginal and Torres Strait Islander Cultural Heritage Places*, and which was developed through inter-agency co-operation involving ACDO, AHC, ANCA, AIATSIS and ATSIC (ACDO 1995). The *Burra Charter*'s definition of 'cultural significance' is used as the basis for the document and which means "social, aesthetic, historic, or scientific value for present, past, or future generations" (ACDO 1995:47). While the term "environmental" does not appear, such terms as cultural and social might be applied in determining aspects of environmental significance to Indigenous communities. Perhaps the main value in this document is that it does highlight the planning factors necessary for the management of Indigenous cultural heritage places (taken to include those of environmental significance) and thus has relevance in considerations for bioregional planning.

One of the primary goals of ATSIC's environmental policy is:

> For our peoples to participate equitably in, and contribute to, the development and implementation of environmental policies at all levels of government, including the provision of advice to Governments on matters particularly affecting our peoples (ATSIC 1995b:2).

In order to achieve this and the other goals two of the policy objectives stated are concerned:

> To provide a basis by which ATSIC may assess its policy priorities, submissions for funding support, program delivery, deployment of resources, and its performance in relation to the environment;

and

> To further an effective and continuing input by our people into international and national, regional, and local environmental policies, and develop a channel by which communities can develop policy and implement local strategies (p.2).

Among the general environmental strategies assigned to the Regional Offices is the

> administ[ration of] program funding for environmental initiatives, where no funding program exists to support Aboriginal and Torres Strait Islander environment related proposals, or where existing programs are inappropriately administered for the relevant communities (p.3);

while the Central Office deals with such matters as:

> **to advocate** Indigenous land and environmental rights and interests within the machinery of Government and public administration;
>
> **to support** the recognition, acknowledgment and preservation of group intellectual property in traditional knowledge;
>
> **to promote indigenous participation** in decision making and planning processes at all levels of government; and
>
> **to provide** for identified officers to carry out environmental issues within ATSIC, including facilitating the flow of information to communities (p.4).

With regard to the conservation of biodiversity, the policy states that :

> Our peoples should consider the need to protect biodiversity in our decisions over the use of the land and natural resources, the provision of infrastructure, development of enterprises etc (p.6).

Within this policy framework ATSIC has established for itself a vital role in assisting Indigenous communities in their involvement in bioregional planning by not only having an accessible national administrative structure which already includes some inter-agency alliances, but by being able to assist with funding, information, advocacy in bioregional fora and (possibly) secretariat services to local community groups.

However, it must be recognised that Indigenous support for ATSIC is by no means universal amongst Indigenous communities and the notion of ATSIC having a role in environmental management has been vehemently opposed at a number of public forums, for example, at the recent Ecopolitics IX conference

in Darwin in September 1995. In commenting on both ATSIC's draft environmental policy and its track record to date, the CLC (1994:10) stated that:

> ... initial drafts of the document have met with criticisms from other Aboriginal groups because it failed to recognise the primacy of Aboriginal interests.
>
> The document is constructed on a raft of policies and obligations which were instituted without the involvement of Aboriginal people. It provides no indication that ATSIC is itself aware of the importance of Aboriginal representation in issues which have implications for land in relation to international conventions and principles. ATSIC has not proven capable of dealing with the complex details of structuring and initiating negotiations between government and Indigenous groups and formulating an Aboriginal position for the various conventions.

In relation to the last point, the CLC (p.9) cites, as an example, the failure of the Australian delegation to the final negotiating conference on the *UN Convention to Combat Desertification and Mitigate the Effects of Drought* in Paris in 1994 to include Aboriginal representatives when such organisations as the National Farmers Federation and the environment lobby were invited.

Also at times local communities and particular land affiliated groups experience severe problems with their Regional Councils. Regional Councils are political entities open to conflicts of interest, factions within Council, nepotism and so on — factors which directly affect, for example, funding decisions concerning which local communities and organisations receive funds and for what purposes. This means that some local communities and organisations can be favoured over others because they have the "right connections" in their Regional Council or traditional tribal enmities can be translated into voting blocs amongst Councillors again with the consequence that a particular community or group is disadvantaged. These situations have the potential to inhibit the successful involvement of some local community groups in bioregional planning and conservation initiatives, particularly if funding sought by a particular community under ATSIC's environmental policy is turned down by its Regional Council. It is therefore necessary to consider other alternatives to ATSIC in terms of ensuring uniform and effective involvement of Indigenous communities in bioregional planning.

6.1.2 A National Statutory Aboriginal and Torres Strait Islander Heritage Authority

The Resource Assessment Commission's 1993 *Coastal Zone Inquiry Final Report* recommended that ATSIC, the AHC and ANCA, in conjunction with representatives of land councils and other Indigenous organisations, review the role of Commonwealth programs and legislation in securing a national approach to recording and protecting Indigenous cultural heritage, and with a view to establishing a national Aboriginal and Torres Strait Islander Heritage Council to assist Indigenous communities in the management of their own heritage (CFAR 1994:31). Early in 1994 the Federal Parliament's House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs launched a "Culture and Heritage Inquiry". The terms of reference, in part, are:

> To inquire and report on the maintenance and promotion of Australia's Indigenous arts, cultures and cultural identity. This encompasses the full range of artistic and cultural activities, both traditional and contemporary, including visual arts, craft, language, design, dance, music, drama, story telling, folklore, writing, sound, films, heritage, traditional cultural practices and spiritual beliefs (in CFAR 1994:31)

The implied definition of what constitutes cultural heritage largely restricts its usage to the arts, with natural heritage being ignored and therefore, in light of the discussion in section 2.2 of this report, does not constitute an holistic approach to Australia's Indigenous cultural heritage. Considerations of natural heritage might be dealt with, however, within the meaning of "traditional cultural practices". This issue has already been brought to the Standing Committee's attention in a submission from the Aboriginal and Torres Strait Islander Social Justice Commissioner (1994) and in which the establishment of a statutory national Aboriginal and Torres Strait Islander Cultural Authority is also recommended. The ultimate decision as to whether the Federal Parliament will proceed to establish such a body will most probably depend on it being recommended in the House of Representatives Standing Committee's report of the inquiry.

However, if such an authority were to be established, it might provide the appropriate body and administrative structure to oversee, amongst other things, the involvement of Indigenous communities in bioregional planning in conjunction with the other relevant federal, state and local authorities. Given the

importance of the issue in terms of its relevance to all Indigenous communities, the national scale of the program, the specific but diverse needs of Indigenous communities and the problems in resourcing Indigenous communities so that they can effectively participate in bioregional planning, the creation of such a body warrants serious attention.

6.1.3 An Aboriginal and Torres Strait Islander Environmental Advisory Body within the Environment Portfolio, DEST

In advocating the establishment of an Aboriginal Environment Office, the CLC (1994:10) points out that:

> On a regional level Land Councils have articulated the grass roots concerns of their constituents on a range of issues relating to land use and development. It is these concerns which must form the basis of the Aboriginal position and which need to be communicated effectively in national and international forums.
>
> Clearly, however, the Land Councils are not sufficiently resourced to bring all of the regional views together or to have effective input at national or international levels. Such input can only come from an organisation with a structure which is nationally representative of Aboriginal environmental concerns and which draws together regional approaches and perspectives.

Given the substantial roles that ANCA and AHC already have in relation to Indigenous cultural heritage, and that Indigenous interests are of major concern to several areas within the Department of the Environment, Sport and Territories, there is a strong case for considering the establishment of an Indigenous heritage body within the Environment Portfolio. In identifying a lack of coordination and consistency of approach within DASET [now DEST] and between the portfolio agencies, Smyth (HRSCERA 1993:62) proposed that an Indigenous Environment Policy Unit be established to:

> give leadership and advice to portfolio and other government agencies; monitor policy and program initiatives and develop new ones; promote an understanding of the relationship between environmental management and Indigenous people and their culture; liaise with relevant community organisations; and support Aboriginal and Torres Strait Islander initiatives in conservation management.

It is envisaged that an Aboriginal and Torres strait Islander Environment Advisory Body, supported by an Aboriginal and Torres Strait Islander Environment Unit, would have similar status to such bodies as the National Greenhouse Advisory Committee, and would be able to formulate policy, provide strategic direction and advice to the relevant units within ANCA and AHC as well as other sections within DEST, provide Indigenous representation on international and national environmental policy forums, monitor the administration of Indigenous cultural policies at federal, state and local levels and act as a reference group for other government agencies on matters to do with Indigenous cultural heritage.

While its membership would have to be determined by the Indigenous community at large, representation could be provided by peak State and Territory Indigenous cultural bodies (where they exist - refer section 6.2 following), land councils, ATSIC, the AIATSIS Council, and Indigenous members of bodies set up to administer World Heritage listed properties (eg., the Willandra Lakes Region World Heritage Property Community Management Council, WTMA, GBRMPA, and the management boards of Kakadu and Uluru National Parks).

For Indigenous communities such a body might be an acceptable alternative to ATSIC in terms of formulating, administering and advising on Indigenous environmental policy and, although of lower status than a statutory Indigenous authority which would require its own separate Act of Parliament or an amendment to an existing Act, easier to establish.

6.2 State - Indigenous Cultural Heritage Management Bodies

As pointed out in section 3, while the Commonwealth, in conjunction with the States, has set the policy framework for bioregional planning, it is expected that it will be the State and Territory governments which will be responsible for implementing the policy through their respective departments whose primary responsibility is the environment. The lead agencies within these departments will, of course, be expected to liaise with other government instrumentalities at federal, state and local levels. In terms of the successful involvement of Indigenous communities in bioregional planning it is important that Indigenous people be represented on all bodies (statutory or non-statutory) involved with policy formulation and implementation. It is clear from the numerous examples given in Section 5.2 that, even

where Indigenous people are major stakeholders or their interests are the subject of various Acts, they are not represented on the statutory bodies charged with advising Ministers. While no doubt Indigenous input is sought, that input is represented by non-Indigenous people making decisions while supposedly taking those Indigenous views into account. From an Indigenous perspective, this is entirely unsatisfactory and could be perceived as institutional racism.

Taking into account the variation between the States and Territories in their administration of Indigenous affairs it is suggested that the peak State and Territory Indigenous advisory bodies might be used to provide representation on any body whose function it is to oversee bioregional planning. This would then take advantage of an existing networking and administrative structure Ultimately, of course, it is a matter for the respective State/Territory Indigenous communities to decide how they should be represented and by whom. Some States, such as NSW, already have in place a land council structure operating at state, regional and local levels as provided by the *Aboriginal Land Rights Act 1983* and are thus well placed to have direct involvement in bioregional planning. The Northern Territory is similarly well placed with its 4 land councils, however, some Aboriginal communities, because they have so far been unable to benefit from the *Aboriginal Land Rights (Northern Territory) Act 1976*, are not represented by these bodies.

Another option, particularly in those states which lack an effective Indigenous administrative structure, is to take advantage of existing state Indigenous cultural heritage protection legislation. While the deficiencies of this legislation have been pointed out in section 5.3 (see also Fourmile 1989a) and in the interests of the structural reform advocated within the Social Justice Package it is nevertheless argued that the Indigenous statutory bodies created under the respective State and Territory legislation could also be used to provide membership on the relevant bioregional planning bodies. In some States there is the added advantage that Indigenous heritage protection legislation is administered by the State departments primarily concerned with the environment (Queensland and NSW, and it was the case in SA until April 1994).

The management of Indigenous cultural heritage was reviewed by the Queensland, South Australian, New South Wales, Victorian and Western Australian governments in the 1980s. These reviews resulted in the *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987* and the *Aboriginal Heritage Act 1988* in Queensland and South Australia respectively (see sections 5.3.3 and 5.3.4 this report). The governments of the other three States seriously considered setting up, under separate legislation, statutory Aboriginal cultural authorities to administer, on a more holistic basis, the Indigenous cultural heritage in their respective states (NSW Ministerial Task Force on Aboriginal Heritage and Culture 1989; Ministry for Planning and Environment - Vic. 1985; and Aboriginal Interests Working Group WA 1991). Unfortunately, changes of government, departmental restructuring, and also in WA's case, the impending Mabo decision, has meant that these legislative intentions were never realised. Given that the debate about environmental issues - and particularly Indigenous participation in conservation - and policy development not being as advanced as it is today, environmental considerations did not feature so prominently in these government reviews, however they do serve as models of what could have been.

The NSW MTFAHC (1989:39-41) considered four administrative options for the protection and management of Aboriginal cultural heritage: 1) to leave it within the National Parks and Wildlife Service; 2) create a separate Aboriginal Heritage and Culture Council under the umbrella of the National Parks and Wildlife Service; 3) establish a similar council but within the New South Wales Aboriginal Land Council system; or 4) establish a completely separate Aboriginal Heritage and Culture Commission independent of both the National Parks and Wildlife Service and the Aboriginal Land Council system - the preferred option which was then further developed within the report. The current arrangement appears as a compromise between options 2) and 3) with an Aboriginal Cultural Heritage (Interim) Advisory Committee (status downgraded from the originally proposed council) having 5 of its 8 members provided by the NSW Aboriginal Land Council (refer section 5.3.1 this report). Interestingly, as a twist to the inter-agency networking principle, the report, in considering option 4), recommends that the Director, NSW National Parks and Wildlife Service; the Director, NSW Forestry Commission; a representative of the Australian Archaeology Association ; and the Director of the Australian Museum could be appointed by the relevant Minister "to serve as non-voting advisory members of the Commission" (p.43). The NSW Aboriginal Heritage Council Working Party (1987:5) saw the role of the

proposed council as including the preparation of management plans for sites or places of significance, participation in environmental impact studies and the development of local environment plans, and the recognition and exercise of traditional hunting and gathering rights.

In Western Australia, the Aboriginal Interests Working Group State Task Force for Museums Policy (WA) (AIWG WA) recommended the establishment of an Aboriginal Cultural Heritage Commission comprising a board of 15 Aboriginal Commissioners (AIWG WA 1991:195) and that one of the fundamental principles guiding the formulation of the necessary legislation was: "The recognition of the Aboriginal world view that natural and cultural heritage are integrated and one" (p.192). In order to achieve a more holistic or integrated approach to Aboriginal cultural heritage administration it was proposed that the Commission be represented on the Western Australian Museums Commission, the Board of the Art Gallery, the Board of the Library and the Board of Conservation and Land Management (p.196). Despite the founding principle of natural and cultural heritage being "integrated and one", the report pays little attention to the natural and it is overlooked as a major division within the Commission's 6-division structure (p.197). However, the point is that a division given to nature conservation as its primary goal could easily be accommodated within its structure. The diagrammatic representation of the proposed Aboriginal Culture and Heritage Commission (see Diagram 2) clearly shows its administrative and networking potential within the framework of the state, and with the necessary adjustments in focus, could play a major role in overseeing and facilitating Indigenous community involvement in bioregional planning and conservation.

6.3 Regional

In most States the land councils already exist as regional bodies having networking and consultative functions, often acting as the first point of contact for local communities, particularly those in remote areas. Most land councils exist in regional urban centres and have the resources and expertise to deal with the common concerns of the local communities which are their constituents. Many land councils, such as the Central Land Council (CLC) and Northern Land Council (NLC) in the Northern Territory and the regional land councils within the New South Wales land council structure, have been established for a long time and therefore have built up considerable expertise in dealing with a range of concerns. A number of new regional land councils have been formed to act as representative bodies, in addition to the already established councils, to facilitate the native title claims process, such as the North Queensland Land Council, which is based in Cairns. Such land councils are taking on roles beyond the facilitation of native title claims and, together with the other land councils, are seen as alternatives to ATSIC Regional Councils for the reasons mentioned in section 6.1.1 above.

With the consent of the local communities, the regional land councils are ideally situated to facilitate local Indigenous community involvement in bioregional planning because, in most instances bioregions will encompass the traditional lands of several local communities and land affiliated groups.

In the unique case of the GBRMP, because of the huge extent of its coastal boundary, its division for administrative purposes into four sections creates a regional structure for wider community consultation purposes. The establishment of an Aboriginal consultative committee has been recommended for the Far Northern Section (Smyth 1993), and probably others will be established in time. Such committees will be able take on a role in bioregional planning especially when dealing with biodiversity conservation issues affecting the coastal zone. However, it might be anticipated that such committees will have representation from their respective regional land councils.

6.4 Local

While much depends on how regional and local boundaries are defined, even at the local level several land owning groups or land affiliated groups can be involved. The relationships between these groups, who often have reciprocal rights in each others territories, are intricate and finely balanced. Because they are the land owning groups they have the fundamental rights and responsibilities of caring for their country and are the ones who will effectively be involved in biodiversity conservation. These local groups

are the basic units of the whole consultative and networking structure which exists to more effectively service their needs. At this level consultation must be a comprehensive and on-going process.

7. INDIGENOUS RANGER SERVICES

In terms of the day to day management of the biodiversity of bioregions it is expected that Indigenous rangers will have a leading role. However, in keeping with a more holistic approach to cultural heritage, these rangers should also have a key role in the management of various components of cultural property and cultural resources particularly related to land.

Currently Indigenous rangers are employed in two contexts: as Indigenous community rangers or as rangers employed within mainstream services. Most are employed by their communities with very few being employed by federal and state agencies.

One of the most pressing issues at the moment with regard to Indigenous community ranger services is their overall role within the context of their communities. While a number of community ranger training programs under various guises were established (for example, at Bachelor College, Charles Sturt University, Cairns Far Northern Institute of TAFE) little attention was given as to how these rangers would be employed to serve their communities. While the situation is certainly not universal, in Queensland for example, community ranger services are under-resourced working from inadequate quarters, with few facilities and without adequate enforcement powers. The rangers themselves, although trained to be professionals, work under the CDEP (like just about everybody else within their communities) as essentially part-time staff. Consequently the services don't operate on weekends and rostered days off. Their funding is insecure and not on a long term basis. Their relationship with their federal and state colleagues is ill-defined although collaboration between the services is often essential (see also Smyth, 1993:56).

In those bioregions where the land, or the bulk of it, is under Indigenous community control (ie, owned, leased, or Indigenous-managed national park) then Indigenous community rangers would be expected to have major responsibilities regarding the management of those bioregions. This would probably apply across large areas of northern and central Australia in what are still primarily Indigenous domains (Arnhem Land, the Kimberleys, Cape York Peninsula, Torres Strait and the Central and Western Deserts). However, it is still fundamental that the community ranger services in these areas are properly trained, resourced and empowered so that they have the same professional status as their federal and state counterparts.

In those bioregions where Indigenous land-holdings are minimal or non-existent it is still important that trained Aboriginal people be employed as rangers, preferably by mainstream services, and in other capacities to undertake various responsibilities with regard to bioregional planning and biodiversity management and conservation.

8. MINIMISING CONFLICT BETWEEN CONSERVATION REQUIREMENTS AND INDIGENOUS RIGHTS

One of the major sources of conflict between Indigenous communities and the wider Australian community is the issue of traditional hunting rights. This issue is exacerbated when traditional hunting rights involve taking species (whether endangered or not) in national parks. It is also the issue which causes the most conflict between conservation groups and Indigenous people. For example, a conservation group called Sanctuary, based in Mossman in northeast Queensland, actively petitioned against new State laws which they claimed would "allow Aborigines to shoot unique possums, harmless echidnas, beautiful fruit-pigeons, rare tree-kangaroos and gentle dugongs for 'traditional use'", also claiming that such practices "in any National Parks claimed by them will destroy the concept and practice of sanctuary in National Parks" (Sanctuary 1993).That many species during the last two centuries have become extinct , endangered or vulnerable to extinction is generally not the fault of the Indigenous inhabitants of this continent yet they feel that they are being blamed and penalised for it. Clearly the colonisation of Australia by Europeans has wrought massive ecological and environmental damage to most parts of the country and many native species have suffered accordingly.

A recent incident which occurred at a popular tourist destination off the coast from Cairns high-lights the controversy surrounding traditional hunting activities. On July 12 a number of residents of Yarrabah were apprehended for allegedly taking sea-bird eggs and chicks from Michaelmas Cay which is within the traditional "sea country" of the Gunggandji. The eggs of various species of sea-birds are an important component of the traditional diet of coastal Indigenous communities and are gathered in accordance with traditional laws - ie, they can only be taken at particular times of the breeding season of the various species and only fresh eggs in which no embryo has formed (determined by a "flotation test") are taken. Traditionally, the chicks were not taken. Michaelmas Cay is an island national park under Queensland State laws and the alleged taking of the sea-bird eggs and chicks would appear to be in breach of the state's *Nature Conservation Act 1992*. However, while most of the Act is now in force, **s.93** which governs "Aborigines' and Torres Strait Islanders' rights to take etc. protected wildlife" and the relevant Regulations have not yet been proclaimed. The incident was reported in the local newspaper, *The Cairns Post* , (McCallum, 1995a, 1995b), and was the subject of editorial comment and a number of letters to the editor opposing the concept of Indigenous people being allowed to hunt endangered species and to be allowed to hunt in national parks. The issues raised were:

1) It is neither fair nor equitable that one section of the community should be extended rights not available to the rest of the community (the majority);
2) that the reason why certain species are not allowed to be taken is because they are endangered and are therefore protected for that reason. Anybody taking those species is only further endangering them; and
3) use of modern (western) technology makes a mockery of "traditional hunting".

Many studies dispute point 2. For example, in reference to turtle and dugong, GBRMPA (1994b:3) "considers that traditional hunting alone does not necessarily endanger the species and would encourage traditional practices to continue, while the species remain ecologically secure".

Bush foods, and the gathering of them, remain an important part of the lives of many Indigenous communities. On Cape York Peninsula, in a recent study (Cordell 1995), it was estimated that "bush tucker" alone accounts for a "'subsistence economy' with a conservative market value of $6 million, about the same as the pastoral industry" (Kennedy 1995a, reporting on the study), with subsistence foods providing up to 80% of dietary protein. The report notes that:

> all families in the [Northern Peninsula Area] collect bush tucker — such as yams and fruits — on a seasonal basis, 'for its traditional value rather than for its economic value'.
>
> 'Indigenous people do not consider hunting, fishing and gathering to be recreational, nor are they regarded merely as subsistence activities. ... There is a very significant social and cultural element involved, and ... important information on Indigenous culture and knowledge is passed on from the old to the young' (Kennedy 1995a).

It was also noted that the combined commercial and subsistence Indigenous economies "do not seem to over-exploit the region's resources" (p5). Another study carried out in the Trinity Inlet, the western side of which the city of Cairns is situated, takes into account traditional subsistence activities of Indigenous people associated with the Inlet. Even in this area close to a major urban centre , it was estimated that, "on average, bush foods contribute some 30% (and perhaps more) of the meat intake of Aboriginal people on the eastern side of the Inlet, while plant bush foods are also important (although their calorific contribution may not be significant)' (David 1994:21). This report also noted that these traditional subsistence activities were also important to Aboriginal social life:

> Plant gathering and hunting/fishing activities often present people with their key reasons for bush excursions, while at the same time constituting social activities fundamental to their cultural and psychological well-being. Such practices are an important mechanism by which stresses brought about by social circumstances are relieved, and are further expression of traditional social practices linking land and people (pp 21-22).

Given that subsistence activities are important to the maintenance of Indigenous cultures and are an essential human right and that such activities frequently raise the ire of some members of the general public, how can the issue be resolved?

Short of the "full on" recognition of Indigenous hunting rights, one way of reducing conflict is to manage it by bringing the stakeholders together to negotiate solutions, even using the services of

professional mediators if required. The outcomes can emerge in the form of regional and local agreements formalised in management plans, not only for protected areas, but also for particular species. These management plans, where they exist, will form an integral part of the bioregional planning process as a whole.

8.1 Traditional Hunting, Fishing and Gathering Rights and Native Title

The *Native Title Act 1993* (Cwlth) defines native title by reference to the rights and interests possessed under traditional laws and customs and recognised by common law. Hunting, fishing and gathering rights are expressly included in the definition [**s.223.**(1) and (2)]. While the Australian Law Reform Commission made no recommendations in its report on *The Recognition of Aboriginal Customary Laws* (*1986*) regarding legislative action by the Commonwealth with respect to land management issues, environmental protection and natural resource management, seeing them as primarily State and Territory responsibilities, the *Native Title Act* "constitutes the most substantial legislative recognition of customary law yet made by the Commonwealth" (OIA 1994:29) .

The OIA report states in regard to traditional hunting, fishing and gathering rights in relation to native title:

> Section 211 of the Native Title Act protects the enjoyment of certain customary hunting, fishing and gathering activities which are recognised by the common law as native title rights. The section deals with the situation where native title rights to a particular area include or consist of the right to carry on an activity such as hunting, fishing or gathering (amongst other activities not relevant here) and there is a law of the State, Territory or Commonwealth that requires that a person hold a licence, permit or other instrument in order to carry on that activity. Section 211 provides that the holders of native title rights to hunt, fish or gather do not require a licence, permit or other instrument to carry out those activities where they do so in exercise of their native title rights and to meet the native title holder's personal, domestic or non-commercial communal needs.
>
> Section 211 does not apply to Indigenous persons who are hunting, fishing and gathering where they are not exercising native title rights, for example, where their rights have been extinguished. Further, the section has no application where the carrying on of an activity is prohibited absolutely, or where the permits are issued under laws which confer rights on Aboriginal people or Torres Strait Islanders only.

8.2 Endangered species management plans

Apart from the outright banning of traditional hunting, fishing and gathering rights with regard to protected species and the exercise of such rights in national parks, one solution is to implement management plans with regard to particular endangered species, particularly where they are a valued food source, which integrally involve Indigenous communities.

A number of Commonwealth and State Acts already provide for management plans for national/state parks and protected areas with some providing for management plans for particular endangered and vulnerable species. For example, Part 3 (regarding Recovery Plans and Threat Abatement Plans) and Part 4 (Conservation Agreements) of the *Endangered Species Protection Act 1992* (Cwlth) enable arrangements to be made regarding particular species in which Indigenous communities (or particular members, such as rangers) can have key roles. Under this Act, the content of both the recovery and threat abatement plans must identify organisations or persons who will be involved in evaluating the performance of the plans, **s.32.**(2)(f)(ii) and **s.34.**(2)(e) respectively. With regard to conservation agreements, which are legally binding (**s.53**), under **s.51**

> The Director may, on the Commonwealth's behalf, enter into an agreement, with a person who has an interest in a Commonwealth area, for the conservation and management of:
>
> (a) any listed native species or listed ecological communities that occur in the Commonwealth area; or
>
> (b) any areas within the Commonwealth area that are habitats for such species of communities.

Since Commonwealth areas include Aboriginal lands leased by the Commonwealth as National Parks and much of the coastal seas outside state waters (**s.5**), then the potential for the involvement of Indigenous communities in such plans and to be party to agreements with the Director is clear.

Recent amendments to the *Great Barrier Reef Marine Park Act 1975* take the *Endangered Species Protection Act* a step further by directly enabling Indigenous communities along the reef to enter into joint management agreements with the GBRMPA in regard to a species (whether endangered or not) or an ecological community (refer 3.2.1.2 this report). While none have yet been struck, the GBRMPA (1994b) has formulated a turtle and dugong conservation strategy for the GBRMP.

To return to the alleged taking of sea-bird chicks, in the execution of management plans in which Indigenous communities are involved it is vitally important both from a conservation and a public relations point of view that the plans are strictly adhered to and that any infringements are dealt with, if they involve Indigenous community residents, by community rangers properly empowered to do so (refer Part 7 of this report).

8.2.1 Turtle and Dugong Conservation Strategy for the GBRMP

The GBRMP has an estimated 12,000 dugongs and is also a habitat for four species of turtle (green, loggerhead, hawksbill and flatback). Of these, the green and hawksbill turtles are listed under the *Endangered Species Protection Act 1992* (Cwlth) as being vulnerable to extinction, while the loggerhead is listed as endangered. Dugongs are not listed under this Act, however, the Queensland Government's *Nature Conservation Act 1992* lists dugongs and all species of marine turtles found in Queensland as protected wildlife. As traditional foods, dugongs and green turtles are hunted by Aborigines and Torres Strait Islanders for whom the consumption of these animals serves important economic, cultural and social functions. Commercial hunting of these species is banned. As the GBRMPA (1994b:4) points out:

> Present day turtle and dugong populations face numerous impacts that contribute to the decline in their numbers. The seriousness of these impacts needs to be understood for the continued existence of turtles and dugongs. Factors identified as currently posing a real or potential risk to populations include (in no particular order):
> - commercial gill netting
> - boat traffic
> - pollution
> - coastal development
> - international over-exploitation
> - traditional hunting
> - shark netting operations
> - habitat degradation
> - commercial trawling
> - illegal take
> - disturbance of nesting sites
> - terrestrial practices and run-off
> - natural impacts including tropical cyclones, floods, storms and predators.
>
> For turtle and dugong populations to exist in a healthy state, these impacts must be effectively managed and where necessary, prevented altogether.

Because of their traditional economic, cultural and social importance Indigenous communities are not only concerned that populations of these species remain viable in local waters, but that they can still be hunted in an ecologically sustainable way. In terms of traditional and other conservation values attached to turtles and dugongs a conservation goal has been set, namely:

> To have conservation strategies that contribute to maintaining turtle and dugong populations at current or higher levels throughout their range in the Great Barrier Reef Region, whilst providing for their traditional, cultural use by Aboriginals and Torres Strait Islanders (p.18).

As the document points out:

> The strategies are to be implemented with consideration of the biological constraints of the species and through negotiation with scientists, Aboriginals and Torres Strait Islanders, conservation groups, the commercial fishing industry, management agencies and the general public (p.18).

To implement the strategies necessary to achieving the goal a GBRMP Turtle and Dugong Review Group, chaired by GBRMPA staff is proposed with representation invited from: ANCA, QDEH, QDPI, QFMA, QCFO, Coastal development interests, Conservation interests, Aboriginal and Torres Strait Islander interests and Research interests (GBRMPA 1994b:17).

Conservation plans regarding a particular species are provided for in both the *Great Barrier Reef Marine Park Act 1975* (Cwlth) (**s.39ZA**) and the *Nature Conservation Act 1992* (Qld) (**s.112**) with additional provisions in the Commonwealth Act clearly enabling GBRMPA to enter into joint management arrangements with Indigenous communities to manage such species [**s.39V.**(1)]. Already under the permit system, which enables Aborigines and Torres Strait Islander people to take turtle and dugong, responsibility for the numbers of each species to be taken over a set period can now be determined by each local reef community in conjunction with GBRMPA and QDEH staff and some communities have already undertaken conservation measures on their own volition. For example, at Bowen, the Council of Elders banned dugong hunting early in 1994 and the Kuku Yalanji have also outlawed dugong hunting in their traditional territory between Mossman and Rattle Snake Bay because the dugong is integral to their dreaming (Kennedy 1995b:26). However, these initiatives by Indigenous communities will not alone stop the decline of dugong populations in their waters and, therefore other measures must be undertaken by other groups, such as commercial fishers, local government planning authorities and rural industry associations with respect to agricultural lands in coastal regions.

The new provisions of the *Great Barrier Reef Marine Park Act* now enable local Indigenous communities to draw up their own plans with GBRMPA taking into account their own local concerns, but within the overall strategic conservation plan for turtles and dugongs. The management plans for turtle and dugong stocks off-shore from Cairns and Port Douglas, where both species are in serious decline, will reflect different management concerns and strategies than, say, community plans for those species in the Far Northern Section of the GBRMP where the species remain relatively plentiful. Thus the differing concerns of each local reef community can be taken into account through such a management structure, a critical factor in retaining community support for the conservation strategy.

8.3 Nature Conservation (Macropod Harvesting) Plan

The Queensland Department of Environment and Heritage, in accordance with **s.112** of the *Nature Conservation Act 1992*, has prepared the Nature Conservation (Macropod Harvesting) Conservation Plan 1994 (QDEH 1995b), the purpose of which is "to provide for the ecologically sustainable use of macropods as a renewable resource under a system of licensing allowing the use of macropods to be scientifically monitored" [**s.5.**(1)]. The macropods subject of the plan are the eastern grey kangaroo, wallaroo, whiptail wallaby and the red kangaroo. Pursuant to **s.132** of the *Nature Conservation Act* the Macropod Management Advisory Committee has been established "to provide the Minister for Environment and Heritage with advice concerning macropod conservation management in Queensland (QDEH 1995b:26). Its 13 members comprise the Director, QNPWS; the Manager, Wildlife Management; a QDEH macropod specialist; a macropod expert invited by the Minister and a representative of each of the following: The Queensland Graingrowers' Association, United Graziers' Association of Queensland, Cattlemen's Union, Department of Primary Industries, Wildlife Preservation Society, Queensland Conservation Council, the Aboriginal community and the Association of Professional Shooters. In terms of their mode of operation, any advisory committee established by the Minister under the Act "may refer matters to other Advisory Committees appointed by the Minister and may establish working groups and seek the assistance of expertise beyond the membership of the Committee in considering issues and providing advice" (p.26). Such a Plan, which has statutory force, thus does enable Indigenous communities to have direct input through their representative into the plan and its implementation. Likewise, if an issue of sufficient magnitude needs to be addressed in relation to the macropods subject of the Plan and which affects Indigenous communities, then it can either be dealt with by the Aboriginal representative on the Advisory Committee or by a specially convened working group which may contain Aboriginal membership.

By now providing such avenues, the Queensland Government is enabling (empowering) Indigenous communities to be part of the planning process and enabling them to negotiate their interests in a common forum with other stake-holders.

9. PROTECTING INDIGENOUS INTELLECTUAL PROPERTY RIGHTS IN BIODIVERSITY

Article 29

> Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property.
> They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs and visual and performing arts.
>
> Draft Declaration on the Rights of Indigenous Peoples

Australia's biological diversity is rich and unique, numbering about 475,000 species: 225,000 insects and invertebrates, 5,800 vertebrates, 44,000 plants and 200,000 fungi. The fauna of coastal waters surrounding the Australian continent is among the most species-rich and diverse on earth. Much of this diversity is unique. More than 80% of our plant and animal species occur only in Australia, far more than any other country. At the species level, 82% of mammals, 45% of birds, 85% of flowering plants, 89% of reptiles and 93% of frogs are endemic (Mummery and Hardy 1994).

Aboriginal customary law as it relates to intellectual and cultural property rights, is the longest surviving form of intellectual property law in existence today (Lofgren, 1993:3). The anthropological literature provides numerous examples of "regulated access to places, ceremonies and knowledge" (Maddock, 1989:1). In terms of biodiversity, totemic identification with certain species, the use of various floral and faunal species to provide materials for food, artefacts, medicines and decoration, and the detailed preparation of certain toxic species to render them edible all indicate the development of bodies of knowledge about plants and animals and the exercise of usufructuary rights. These examples indicate the development and exercise of Indigenous intellectual and cultural property rights.

From a global perspective Indigenous peoples are asserting these rights and are demanding they be recognised and respected. The *Draft Declaration on the Rights of Indigenous Peoples,* while having no legal force, nevertheless provides a definitive statement of such rights in relation to biodiversity, reaffirming that Aboriginal and Torres Strait Islander people, as Indigenous peoples have:

- the right to full ownership, control and protection of their cultural and Indigenous property (**Article 29**);
- the right to restitution of cultural and intellectual property taken without their free and informed consent (**Article 12**);
- the right to the protection of vital medicinal plants, animals and minerals (**Article 24**);
- the right to own, develop and control traditionally owned or used resources (**Article 26**);
- the right to determine and develop priorities for their resources (**Article 28**); and
- the right to compensation to mitigate adverse environmental, economic, social, cultural or spiritual impact (**Article 30**).

The *Draft Declaration* also gives State Parties an obligation to adopt national legislation to give full effect to the *Declaration* (**Article 37**), and it explicitly recognises in **Article 42** that "the rights recognised herein constitute the minimum standards for the survival, dignity and well-being of the Indigenous peoples of the world". **Article 44** further states that "nothing in this *Declaration* may be construed as diminishing or extinguishing existing or future rights Indigenous peoples may have or acquire" (Lofgren, 1993:4-5).

Since the invasion and settlement of the Australian continent, the Crown, through the States and Commonwealth, has asserted ownership not only of the land but all its natural resources as well. The most recent assertion of this ownership is contained in the *Native Title Act 1993* (Cwlth):

212.(1) Subject to this Act, a law of the Commonwealth, a State or Territory may confirm:

(a) any existing ownership of natural resources by the Crown in right of the Commonwealth, the State or the Territory, as the case may be;

Each State and Territory, in passing legislation in response to the Commonwealth *Native Title Act*, has reaffirmed Crown ownership of all natural resources within their boundaries [see, for example, **s.6**, *Native Title (Queensland) Act 1993*]. The Queensland Government has asserted in relation to Native Title that

> ...native title can be extinguished by action taken by government other than in the issue of grants[of land]. For example, if native title rights had existed in species of fauna or in minerals these have long since been extinguished. This is because the Mining Act 1968 and its predecessors reserved to the Crown the ownership of all minerals and the Forestry Act 1959 and the Fauna Conservation Act 1974 vested ownership of native plants and animals in the Crown. Queenslands' legal advisers are therefore of the view that, as a result, these resources are the absolute property of the Crown (Queensland Government, 1993).

While this view might be challenged, such that where Native Title survives, so do the rights of the Native Title holders to the flora, fauna and minerals found on their lands, it does point to the immense obstacles placed by governments in the path of Indigenous people trying to economically benefit from the biodiversity of their lands and their knowledge of it.

While the Australian continent possesses a unique, rich and varied biodiversity it was largely unappreciated by the European settlers who would rather clear the land in order to plant and graze their introduced species, many of which also became feral to create another largely uncontrollable source of destruction of our biodiversity. Thus, apart from the exploitation of timber, wildflowers, fisheries, kangaroos for pet food and skins, minerals and some species for game (duck and kangaroo), few species have been subject to large scale commercial exploitation and development. In a recent government publication from the Office of the Chief Scientist (1994) it is pointed out that:

> As the only megadiverse country which is developed, Australia is in an advantageous position to benefit from its extensive store of biological resources, with comparatively well developed research and development capabilities and knowledge base (p.12) . .... [I]ts own biological diversity may provide the basis for significant new industries or products. ... Forest tree seed represents Australia's largest export of a genetic resource originating from wild populations. ... [Yet a]s a genetic resource, only 5 to 10 percent of Australian tree species have been thoroughly researched for their potential for commercial utilisation (p.44).

With respect to foods, the macadamia nut stands out, while kangaroo, crocodile and emu meats enjoy niche markets. However, with regard to the "bush-food" industry, this is about to change. The Australian Native Bushfood Industry Committee (ANBIC) has recently been established with a grant from the Rural Industries Research and Development Corporation. Currently the bushfood industry is worth an estimated $15 million per year with ANBIC hoping to accelerate its growth to $100 million within three years. It is also concerned to establish a native bush food industry association "which will take bush foods to local and export markets underpinning them as mainstream food ingredients of our Australian food culture for the 21st century" (ANBIC, 1995). There are a number of companies, some with Indigenous involvement, now operating to create and supply this market , for example, Australian Native Produce Industries Pty Ltd, Bush Tucker Supply Australia, Australian Food and Flora Ltd. The point is that the groundwork for the establishment of such an industry has already been undertaken by Indigenous people who have identified over millennia the edible species and their preparation thus establishing their intellectual and cultural property rights with regard to those species. This knowledge, of course, has been recorded, over the years by anthropologists, government scientists (principally from the CSIRO), Defence Force personnel and so on with little acknowledgment of their Indigenous sources.

However, it is the pharmaceuticals industry which perhaps stands to gain most from Indigenous knowledge regarding biodiversity. From the earliest explorers to the present, Australia's native plants have been subject to investigation for their commercial potential. Nearly three decades ago Webb (1969:137) pointed out:

> Since World War II, a systematic survey of the Australian flora for plants of chemical and pharmacological interest has produced a voluminous chemical literature. For example, during the past 20 years, approximately 500 alkaloids were identified in Australian plants, and of these some 200 were

> new.... One of the methods used to guide the selection of promising species was to search the early literature and collect plants used as medicines by the Aborigines

Using Indigenous knowledge to identify plants and their uses can save researchers considerable time and money. This knowledge can lead researchers to more quickly identify chemically useful compounds which they then patent. Sometimes these compounds might find ready pharmaceutical or industrial application; but more usually the chemical companies, having secured ownership rights, bide their time as new technologies are developed, particularly in the field of genetic engineering, until their "discoveries" can be profitably exploited. Indigenous contributions in identifying useful species leading to their subsequent development are usually overlooked, and the State, having claimed ownership of all flora and fauna in the first place can assign commercial rights to companies in exchange for royalties. Indigenous people and their communities therefore receive no financial compensation for their original contribution. Two examples of this situation concern the Duboisia industry and the Smokebush plant.

Using Aboriginal knowledge, Dr Bancroft, a Brisbane surgeon, in the 1870s and 1880s used extracts from two species of *Duboisia* in ophthalmic cases, substituting it for the atropia drug which was transported from England. On further analysis the species were found to contain the important drugs, atropine and hyoscine. Both were widely used as sedatives but were also useful in other ways. Atropine was also used to treat diarrhoea and congestion, as a pre-anaesthetic for operations on casualties and was highly effective in counteracting nerve gases. Hyoscine also had additional uses in treating motion sickness and as a so-called "truth drug". However, until the start of World War II, supplies of these drugs were imported from Britain. With the onset of the war it was necessary to develop local supplies. The *Duboisia* industry was therefore developed and by the 1970s there were 250 farmers growing it on plantations in northern New South Wales and south-east Queensland. At least 10 of these plantations were greater than 75 acres. The *Duboisia* leaf was baled and exported to chemical factories in Germany and Japan as well as in Australia. In 1976 900 tonnes of dried leaf was exported and the industry was now worth over $1 million per year. Apart from employment harvesting the leaves on some of the farms, the traditional users of these plants or their descendants have derived no other benefit (Robinson, 1980).

Smokebush grows on the coast between Geraldton and Esperance. In 1981 specimens were sent to the US and tested for chemicals to combat cancer. Having been found to have no effect the specimens were stored until the late 1980s when they were tested again in the hope of finding a cure for AIDS. One of only four plants screened from more than 7000 plants from around the world, smokebush was found to contain the chemical concocurvone which laboratory trials showed destroyed the HIV virus in low concentrations. The WA government has signed an agreement with Amrad, a Victorian pharmaceutical company, to develop the anti-Aids drug. Amrad has been provisionally granted a world exclusive licence by the US National Cancer Institute for the development of this drug. Amrad has paid an initial $1.15 million to the WA government to ensure access to other smokebush species. Legislation on native plants gives power to the WA Environment Minister to grant exclusive rights to WA flora and forest species for research. Multi-national drug companies could be sold exclusive rights to entire species of unique flora, and no one else would be able to use those species for any purpose without the consent of the companies (*The Mercury*, 1994). Armstrong and Hooper (1994:15) indicate the potential value of royalties if the drug becomes commercially available:

> If Conocurvone progresses to become a commercial drug, the State could receive royalties by the year 2002 of $100 million per annum. Imagine the potential value of just five pharmaceutically useful compounds derived from Western Australian plants. While you think about that, CALM scientists are working in partnership with scientists from tertiary institutions and other government agencies to discover more such compounds.

If one chemical can bring such enormous returns, the benefits to Indigenous communities whose knowledge leads to the identification of commercially useful plants would be enormous, even if royalties of only one per cent of commercial value were charged.

Indigenous peoples world-wide, whether as sovereign states or in Fourth World colonial situations, have been voicing great concern about the exploitation of their natural resources and abuse of their intellectual and cultural property rights. Statements to this effect have been issued by organisations such as COICA (the Coordinating Body for the Indigenous Peoples' Organisations of the Amazon Basin) and at a number of regional meetings which have taken place in Bolivia, East Malaysia and Fiji. An Indigenous

Biodiversity Network has been set up to monitor and research issues concerning Indigenous intellectual property. In Australia delegates at a conference in the Daintree issued the *Julayinbul Statement on Indigenous Intellectual Property Rights* which asserts Indigenous intellectual property rights as common law rights in accordance with customary laws and which should be recognised and respected as common law traditions the equal of any other. In relation to the environment, it was declared that:

> Indigenous Peoples and Nations share a unique spiritual and cultural relationship with Mother Earth which recognises the inter-dependence of the total environment and is governed by natural laws which determine our perceptions of intellectual property.
>
> Inherent in these laws and integral to that relationship is the right of Indigenous Peoples and Nations to continue to live within and protect, care for, and control the use of that environment and of their knowledge.

The *Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples*, while asserting the Indigenous right to self determination and to be recognised as the exclusive owners of their intellectual and cultural property, insists that

> ...the first beneficiaries of Indigenous knowledge (cultural and intellectual property rights) must be the direct Indigenous descendants of such knowledge.

These two documents, generated by Indigenous peoples, form a powerful assertion of our rights to own, control, and benefit from our cultural and intellectual property in accordance with our own common law traditions. Together they also give a more specific reinforcement and direction to Principle 22 of the *Rio Declaration on Environment and Development* (the Rio Declaration) which states:

> Indigenous people and their communities, and other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognise and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.

The Plenary of the Rio Summit also adopted *Agenda 21*, Chapter 26 of which contains a detailed statement in which the participants to the Conference recognise the historical relationship between Indigenous peoples and their lands. The term 'lands' is expressly stated to include the environment. The discussion paper, Access to Australia's Biological Resources, summarises the concerns of *Agenda 21* regarding Indigenous peoples and the environment:

> ...hitherto, the ability of Indigenous peoples to participate fully in sustainable development practices on their lands has tended to be limited as a result of factors of an economic, social and historical nature. The Conference intimated that this must change and said that, in view of the interrelationship between the natural environment and its sustainable development and the cultural, social, economic and physical well-being of Indigenous peoples, national and international efforts to implement environmentally sound and sustainable development should recognise, accommodate, promote and strengthen the role of Indigenous people and their communities (para 26.1). (Department of the Prime Minister and Cabinet Office of the Chief Scientist. 1994:29)

An important strategy for achieving this is to recognise Aboriginal Common Law (Common Law as understood in terms of the *Julayinbul Statement*) as an equal and parallel system of law with that of English/Australian Common Law, thereby also giving force to the Law Reform commission's recommendations regarding the recognition of Aboriginal customary Law.

In general, it is recognised that existing instruments for the protection of intellectual property based on primarily Western notions of patenting industrial property (eg. inventions, trade marks, industrial designs) and copyrighting work of an artistic nature (eg. literary, musical, visual, photographic and audiovisual works) and as embodied in the **Paris Convention for the Protection of Industrial Property** (1883) and the **Berne Convention for the Protection of Literary and Artistic Works** (1886) are largely inappropriate for the protection of Indigenous intellectual property (Posey 1991; Daes 1993; Nijar 1994). In this context it should also be pointed out that even such instruments as *Agenda 21* and the *Convention on Biological Diversity* fail to recognise and give legal protection to Indigenous intellectual property rights in biodiversity. Both are framed within the parameters of economically sustainable development with the main aim being to increase the yield of crops, livestock and aquaculture species with a focus on "maintaining intellectual property rights to genetic resources. These rights are usually

held as patents by multinational companies" (Peteru, 1995:23-4). Furthermore, as Peteru (p.24) points out:

Community organisations were particularly disappointed that Agenda 21 failed to recognise the traditional stewardship by Indigenous and local communities of plant and other living genetic resources and their entitlement (eg., in the form of royalty payments) to intellectual property protection.

Copyright protects works that owe their origin to an individual's expressive efforts and is now being extended to data collected regarding species, their chemical and genetic extracts, and their use when written up or described in publications and data banks. Patents, which involve the grant of an exclusive (monopoly) right to exploit an invention, were originally granted only to industrial inventions but are now extended to also cover living things. The United States grants patent protection for a wide variety of living material: novel DNA sequences, genes, plant parts, plant or animal varieties, purified compounds, and genetically altered microbes, plants and animals. Peteru (p.15) argues that:

> With patents being applied to a vast array of things, it is conceivable now that patent claims will be made over genes of biochemicals that occur in nature, even though innovation, not discovery, is the basis of the patent claim. Thus, in many industrialised countries, patents are allowed if the discovery requires a notable input of human effort and ingenuity. The argument goes that companies should be rewarded for undertaking the difficult task of making natural genes useful. Although the research costs are high the imitation costs are slight, hence, protection is warranted.
>
> For example, in the case of agriculture, a gene will usually be patentable only if it is used in a species in which it did not evolve or which it could not have been transferred to through conventional breeding. Similarly, the purified form of a chemical can be patented if the chemical is found in nature only in an unpurified form. Thus, the purified sample or genetically altered organism could be protected while the raw material or the original organism remains part of the public domain available for others to use. Little wonder then that developing countries are frustrated with a system that labels their resources as open access but then establishes private property rights for improved products based on those resources.

It is also little wonder then that Indigenous peoples are talking about "another wave of colonialism" based on the exploitation by the "biological bounty hunters" of the industrial nations in their " feverish pursuit of the... 'green gold'" contained in the knowledge and biodiversity resources of Indigenous peoples (Pacific News Bulletin, 1995). Biopiracy thrives under conditions in which Indigenous peoples have little by way of legal protection in terms of ownership of the natural resources found on their lands and their related intellectual property rights (RAFI and IPBN, 1994).

For some Indigenous communities in Australia, their "economic liberty" (Posey, 1991:32) might well depend on receiving just compensation for traditional knowledge concerning flora and fauna now being commercially exploited by non-Indigenous interests, or their future commercial use of knowledge and species found exclusively on the Native Title lands (and possibly on lands held by Indigenous communities under other tenure arrangements).

9.1 Australia's Obligations to Aboriginal and Torres Strait Islander Peoples under the Convention on Biological Diversity

When the *Convention on Biological Diversity* entered into force in Australia on December 29, 1993 it became the first treaty ratified by Australia to expressly recognise the important contribution of Aboriginal and Torres Strait Islander peoples to the environment and, in doing so, imposed a number of specific obligations on Australia. The relevant sections of the Convention are:

Preamble:

> Recognising the close and traditional dependence of many Indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components,

Article 8. **In-situ** Conservation

> Each Contracting Party shall, as far as possible and as appropriate:

(j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of Indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices;

Article 10. Sustainable Use of Components of Biological Diversity

Each Contracting Party shall, as far as possible and as appropriate:
(c) Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation and sustainable use of components of biological diversity;

Article 18: Technical and Scientific Cooperation

(4). The Contracting Parties shall, in accordance with national legislation and policies, encourage and develop methods of cooperation for the development and use of technologies, including Indigenous and traditional technologies, in pursuance of the objectives of this Convention. For this purpose, the Contracting Parties shall also promote cooperation in the training of personnel and exchange of experts.

Craig (1996) in citing the *Explanatory Guide to the Convention on Biological Diversity* (IUCN Environmental Law Centre 1994:48) notes that:

> ... the proviso of subjecting these obligations to national legislation is unusual. The objectives of [Article 8 (j)] could be defeated since the wording implies that existing national legislation will take precedence. It also could be taken to imply that these concerns of Indigenous peoples can be respected and preserved without addressing outstanding issues of Indigenous peoples rights to land and biological resources. It is obvious that such communities cannot continue these traditional practices in isolation from land and biological resources that they need (IUCN ,1993 at p 93), and this is inconsistent with a growing body of international obligations such as ILO 169 and the Draft Universal Declaration on the Rights of Indigenous Peoples.

In terms of "national legislation" which impacts on Indigenous intellectual property rights, Smrdel (1995:1) points out that:

> The Australian Constitution gives the Federal Parliament the power to make laws with respect to "copyrights, patents of inventions and designs, and trade marks". In this regard, the Parliament has enacted several pieces of legislation, the more significant of which are:
> - *Copyright Act 1968;*
> - *Patents Act 1990;*
> - *Designs Act 1906;*
> - *Trade Marks Act 1995; and*
> - *Plant Breeder's Rights Act 1994.*

In commenting on the role of the Australian Industrial Property Organisation (AIPO) in protecting Indigenous peoples' intellectual property rights, and noting the Commonwealth's Access and Equity Strategy "embodies the Government's commitment that all Australians should have equal access to and an equitable share of the resources which are managed by the Government on behalf of the community" and which has included Aboriginal and Torres Strait Islander peoples as a target group since 1989, Smrdel (pp 4-5) makes the point that:

> ... the [HRSCATSIA] recently brought to our attention that AIPO's industrial property programs and services may not be capable of reaching many Aboriginal and Torres Strait Islander communities as a matter of course. As a consequence, AIPO may have been in breach of its access and equity obligations by not having in place specific mechanisms that readily allow Aboriginal and Torres Strait Islander peoples to be aware of and oppose the grant of patents for inventions that are derived from their traditional knowledge. We have therefore had to re-examine our access and equity strategies as they apply specifically to Aboriginal and Torres Strait Islander peoples. As a result we have had to acknowledge that our current access and equity plan does not wholly address our unique obligations to Australia's Indigenous peoples, notwithstanding the strategies we currently have in place.

> Consequently, we are exploring possible measures that we can take to inform and educate Aboriginal and Torres Strait Islander communities about industrial property laws, so that they might more effectively protect their traditional knowledge rights within the existing industrial property system. ... [However, w]hile Australia's Indigenous peoples are free to avail themselves of Australia's existing industrial property system, the extent to which the existing system meets their needs is not clear.

Smrdel (p.5) then acknowledges that:

> Existing Australian (and foreign) intellectual property does not recognise the existence of Indigenous intellectual property rights and appears to be inappropriate to address the concerns of Indigenous peoples.
>
> Aspects of existing intellectual property laws that may not be compatible with Indigenous peoples' concerns include:

- most intellectual property rights are of limited duration;
- intellectual property rights are designed to promote the dissemination and use of the results of intellectual creativity through licensing and sale;
- there must be an identifiable owner (eg. patentee, author, etc.) of the intellectual property.

> Thus 'intellectual property rights' may be an inadequate term to encompass the broad category of concerns Indigenous peoples have for their cultural, sacred and communal property. Ultimately it may be necessary to create a new category of rights providing Indigenous peoples' traditional values, knowledge and resources protection from unauthorised use, recognition of origin and just compensation.

Given the acknowledgment by AIPO that the "national legislation", comprising a body of laws, does not adequately acknowledge and protect Aboriginal and Torres Strait Islander peoples' intellectual property, Craig's (1996) observation that a "close analysis of the Convention reveals a serious risk that Indigenous peoples will be seen as a 'resource' for biological diversity rather than as peoples who hold legal and cultural rights in relation to it" is justified. Add to this the fact of State ownership of all biological resources and that many Indigenous communities have no title to land , or only to very small areas, then the capacity for Australia to deliver on its obligations to Indigenous peoples as per the *Convention on Biological Diversity* must be questioned.

Other issues also arise about the convention, for example, the use of the term "traditional lifestyles"; the ability of governments to ensure that there is "equitable sharing" of the benefits accrued from the use of Indigenous knowledge; if Indigenous concerns in relation to conservation and sustainable use are to be formulated, then the need for appropriate Indigenous controlled processes to be established; and in regard to intellectual property rights, the ability of ownership of Indigenous knowledge to be attributed correctly to an individual, group or community (CLC 1994:8-9; Craig 1996; Sutherland and Smyth 1995:74-78).

There is also a "legitimate expectation" that the broad principles of the *Convention* will be applied. In the opinion of the Foundation for Aboriginal and Islander Research Action (FAIRA, 1994:2-3)

> ... the ratification of the Convention, and Australia's support for other major human rights instruments such as the *Convention on the Elimination of All Forms of Racial Discrimination* creates a legitimate expectation amongst Aboriginal and Torres Strait Islander people that their cultural and intellectual property rights will be protected.

It is further asserted that the continued denial of legislative protection of communal ownership of Aboriginal and Torres Strait Islander cultural and intellectual property rights, and the vesting of perpetual ownership with the group may violate the following articles of the *International Convention on the Elimination of All Forms of Racial Discrimination*:

- the right to own property alone as well as in association with others [Article 5(d)(v)];
- the right to inherit [Article 5(d)(vi)];
- the right to equal participation in cultural activities [Article 5(e)(vi)].

Consequently, FAIRA concludes that the issue of genetic resources must be examined from a human rights perspective, on the basis that it is discriminatory to deny legislative protection of the rights of Aboriginal and Torres Strait Islander people with respect to their cultural and intellectual property. All State and Territory Governments have a legally enforceable obligation to ensure that discriminatory laws and practices are addressed in accordance with the obligations imposed on Australia by the *International Convention on the Elimination of All Forms of Racial Discrimination*, and the *Racial Discrimination Act 1975* (Cwlth), which transforms all the rights mentioned in Article 5 of the Convention into laws of the Commonwealth.

Furthermore, as Lofgren (1993:14-15) argues, *Agenda 21* (Chapter 26) could also be used to justify amendments to State and Territory legislation which asserts Crown ownership of biodiversity, such as the *Nature Conservation Act 1992* (Qld), to affirm subsisting native title rights of Aboriginal and Torres Strait Islander people to the biological resources that are Indigenous to the respective States and Territories in accordance with **Article 26.33 (a)(i)**:

In full partnership with Indigenous people and their communities, Governments and where appropriate, intergovernmental organisations should aim at fulfilling the following objectives:

(a) establish a process to empower Indigenous people and their communities through measures that include:

(i) adoption or strengthening appropriate policies and/or legal instruments at the national level;

Amendment of legislation such as the *National Parks and Wildlife Conservation Act 1975* (Cwlth), the *Native Title Act 1993* (Cwlth) and their State and Territory counterparts, to provide legislative recognition of Aboriginal and Torres Strait Islander peoples as the native title owners of knowledge of the biological resources Indigenous to the continent, would make a major contribution to meeting the concerns of Indigenous peoples and would also enable Australia to properly honour its obligations to Indigenous communities in the terms of the *Convention on Biological Diversity*.

9.2 An Alternative Rights Regime for the Protection of Indigenous Rights in Biodiversity

In the light of the above situation there is a need to establish an equitable system that not only recognises Indigenous intellectual property rights but enables Australia's Indigenous communities to economically benefit from their natural resources and their knowledge of them. However, as Posey (1994:1) points out, Indigenous property rights are seen to

... threaten the "free exchange" of information and resources that has presumed to benefit humanity through research, scholarship, and development of medicines, agriculture, forest and conservation systems. A new dialogue is necessary that establishes equitable relationships between Indigenous, traditional and local communities, and the scientific research institutions that increasingly provide the intellectual and informational underpinnings for international trade and development. Existing legal and non-legal mechanisms are inadequate to insure the equity of partnerships, pointing to the necessity of developing additional and alternative strategies that are built more upon human rights and environmental concerns than upon economic considerations. The negotiations of the terms of — and the mechanisms and methodologies for — this dialogue will dominate debates until sufficient consensus can be attained to insure trust from all partners. The process will undoubtedly include re-evaluation of Nation State sovereignty, the role of science and scientists, international monitoring and enforcement structures, business ethics and practice, and transparency, accountability, and control of trade.

It is therefore necessary to formulate a rights regime which reflects the culture and value-system of Indigenous communities " as a device to prevent the usurpation, commoditisation and privatization of their knowledge and ward off any threats to the integrity of these societies" (Nijar 1994:2). The main elements of such a regime would be based on an holistic approach to Indigenous cultural heritage protection and inalienable community ownership. As Nijar (1994:6-7) describes it:

> The rights regime formally incorporates and recognises all the elements of the culture, systems and practices of local communities. And bestows them the status of 'rights' which then become enforceable. The right is recognised in the form and manner in which it is recognised by the local community itself. It goes beyond the mere utilitarian. The entire identity and integrity of the knowledge system replete with its values, rituals and sacredness is accorded recognition. In respect of genetic resources and local seeds, for example, recognition extends to the whole livelihood system and the system of production by which marginalised communities make a living. One such specific value relates to the cultural practices whereby communities freely exchange knowledge of products incorporating this knowledge amongst themselves. This is expressly preserved and recognised in this rights regime.
>
> The community is declared the 'owners' of this community knowledge. They exercise complete control collectively. They hold it in trust for themselves as well as for the beneficiaries of their ancestors; and they also hold it in trust for future generations. The community therefore holds this right as custodians or stewards and it is thus held in perpetuity. The knowledge therefore always remains in the community and its integrity cannot be impaired. This also means that it cannot be extinguished or divested. More particularly, no exclusive monopoly rights or other rights can be created in respect of the right, for to do so is to impair its integrity and to violate the basis on which it is held.

There is a need to recognise and enforce Indigenous intellectual property systems and identify and codify their elements. Statutory and Common Law considerations and their codification then arise out of the recognition of those systems.

Despite formidable obstacles, Indigenous peoples are attempting to have their rights to be involved in decisions affecting their lives, cultures and heritages recognised. There are many Indigenous organisations and alliances, such as the Co-ordinating Body for the Indigenous Peoples' Organisations of the Amazon Basin (COICA) and the Indigenous Biodiversity Network, which are pushing to have their Indigenous Intellectual property rights and systems recognised. Meetings have been held in Bolivia, East Malaysia and Fiji to expressly address the issue and the Pacific Concerns Resource Centre (1995b) has drafted a *Treaty for a Lifeforms Patent-Free Pacific*. This treaty was signed by 14 NGOs at the recent South Pacific Conference in Papua New Guinea. The basis for legislative recognition is already embedded in the recommendations and declarations of these organisations.

In Australia, debate amongst Indigenous communities on the content of such an Indigenous intellectual property rights regime, which is relevant to them, has hardly begun and therefore, at this stage, one can only contemplate what it might involve. Some of its elements might include the establishment of a royalty fund into which payments from the existing commercial use of natural species in which Indigenous knowledge has played a part might be paid; the assignment of certain rights, by the State, to particular species for exclusive Indigenous use and development to assist in the establishment of an economic base for communities; recognition of exclusive Indigenous ownership rights to species found only on Indigenous community owned lands as native title rights; as well as containing the kinds of elements outlined by Nijar above. One of its guiding principles should be the provision of incentives so that Indigenous communities can derive direct commercial benefits from their traditional natural resources. Such a regime could therefore have deep implications for Indigenous communities with regard to biodiversity conservation and its sustainable use, implications which could ultimately be written into regional agreements and plans for the management of bioregions.

10. RESOURCING INDIGENOUS COMMUNITIES

> The architects of Land Rights for Aboriginal people appear to have given no thought to the subsequent management of Aboriginal land. The land returned is generally degraded with exotic plants and animals. This diminishes its value for traditional use and as traditional use generates little cash (but saves massively in social security costs) there is little capacity to manage the land. Aboriginal

people quite reasonably say white people brought these problems and therefore should get rid of them. This problem is still not being satisfactorily addressed by government.

Dr Dick Braithwaite

[in House of Representatives Standing Committee on Environment, Recreation and the Arts (HRSCERA 1993:72)]

The bulk of money for environmental protection programs, some of which also are also relevant to biodiversity conservation, is provided through such programs as the Contract Employment Program for Aboriginals in Natural and Cultural Resource Management (CEPANCRM), administered by ANCA; the National Land Care Program administered through the Department of Primary Industries and Energy (DPIE); and the Save the Bush Program and One Billion Trees Program (HRSCERA 1993:72). The AHC also provides funds under the National Estate Program. These programs are delivered on a submission-for-grant basis and do not provide on-going or recurrent funding. The Standing Committee (p.72) also points out:

> For Aboriginal communities which do not seek to establish a jointly managed park, or to provide services under contract to another agency, few medium to long term funding mechanisms are available for land management projects which would contribute greatly to maintaining cultural and biological diversity.

While ATSIC's budget for land acquisition under its Land Heritage and Environment Sub-program in 1993-4 was $45,735,000 (which includes some Aboriginal Benefit Trust Account funds), the money for the Environment component amounted to only $407,000 (ATSIC 1994a:79). During the 1993-4 financial year, a total of 3,587 square kilometres of land were transferred to Aboriginal Land Trusts in the NT. None of the funds assigned to the environment was allocated to "on the ground" conservation. The objective of the Environment Sub-program is:

> To advocate Aboriginal and Torres Strait Islander positions on environmental issues and to ensure Aboriginal and Torres Strait Islander input in national and international agreements, instruments, protocols and strategies on environmental matters (p.96).

Accordingly ATSIC's Environment function, administered by its Heritage and Environment Section, exists to:

- contribute Aboriginal and Torres Strait Islander perspective to national and international protocols, agreements and strategies on environmental issues;
- represent the Commission in the development of strategies and agreements on environmental issues;
- develop and maintain a high degree of liaison on these issues; and
- encourage the contribution of Aboriginal and Torres Strait Islander views and concerns through Regional Councils into major development projects and other significant matters related to the environment(p.96).

To this end ATSIC continued to represent Indigenous peoples' interests at "over 15 Commonwealth inter-departmental processes relating to the development of Commonwealth environmental policies and strategies" (p.97). However, ATSIC has endorsed its Environment Policy which provides for Regional Councils to administer program funding for environmental initiatives "where no funding program exists to support Aboriginal and Torres Strait Islander environment related proposals, ... " (ATSIC 1994c:3) (see also section 6.1 this report). Clearly ATSIC does not, at this stage, see the funding of environmental and conservation programs on Indigenous lands as one of its primary responsibilities and has, presumably, negotiated for other agencies to assume this role. Indigenous community organisations, like the Dhimurru Land Management Corporation, have, however, submitted that ATSIC should provide funds "targeted to supporting Aboriginal controlled conservation and environmental initiatives" (in HRSCERA 1993:72).

One source of funds appears to have been overlooked. The AHC administers grants through the National Estate program which can be applied to cultural as well as environmental projects. While ANCA and various other agencies, such as GBRMPA and the WTMA, provide funds to address environmental concerns, as Table 2 - Distribution of Grants for Cultural and Natural Heritage Projects: National Estate Grants Program 1992-93 shows, this source is also tapped by mainstream groups to carry out many projects highly relevant to biodiversity conservation. Indigenous communities, however, appear to have entirely overlooked the AHC for environmental and conservation projects. However, the AHC has a long-

established practice of consultation and communication with Indigenous communities about their component of the National Estate, and more recently, with respect to Indigenous values in natural areas. Also, since 1989, there has been at least one Indigenous Heritage Officer employed in AHC's Aboriginal and Torres Strait Islander Environment Section to liaise with Indigenous communities. It seems that, at this point in time, Indigenous communities give far greater priority to the protection of cultural sites than they do to other natural heritage (see, for example, Rose 1995:9) . Presumably, within the National Estate guidelines for funding allocations, if more Indigenous environmental projects were funded, then less funds would be available for projects concerned with site protection and management.

While there is a diversity of programs and funds available which are relevant to biodiversity conservation on Indigenous lands (see Young et al. 1991) and for Indigenous involvement in bioregions where Indigenous communities have title to no land (in terms of being available to all members of the public) these funds fall far short of the needs to be addressed. The plight of community ranger services, as the day-to-day mangers of Indigenous lands, is adequate testament to this fact.

For effective Indigenous involvement in bioregional planning and because ATSIC is generally the most accessible agency for Indigenous communities it appears vital that ATSIC should take a lead role through its Regional Councils, and in line with its Environment Policy (ATSIC 1994c:3), in providing both administrative and financial support to local Indigenous groups and communities to facilitate that involvement. Administrative support might be in the form of providing secretariat services for any Indigenous committees set up to address bioregional planning issues. For example, the Cairns and District ATSIC Regional Council was asked to fund the setting up of a "Great Barrier Reef Aboriginal Management Network" — a proposal of one of its Councillors (Neal 1994).

The funding of community ranger services needs to be seriously looked at (again) and probably within the context of an overall environmental funding package negotiated between federal and State agencies, perhaps on a "dollar for dollar" basis as has been done with Indigenous education funding.

Table 2..Distribution of grants for cultural and natural heritage projects: National Estate Grants Program 1992-93*

	Aboriginal Mainstream Total Environment Grants $	Aboriginal Cultural Projects $	Aboriginal Cultural No. of Projects	Aboriginal Environment Cons. Projects $	Aboriginal Environment No. of Projects	Mainstream Cultural Projects $	Mainstream Cultural No. of Projects	Mainstream Cons. Projects $	Mainstream Non of Projects
National	256 664	55 700	1	-	-	107 964	5	93 000	3
N.S.W.	649 936	123 000	8	-	-	261 000	20	265 936	15
Vic.	649 936	102 230	6	-	-	319 206	24	228 500	10
Qld.	649 936	136 594	6	40 428	1	268 829	13	204 085	8
S.A.	649 936	134 218	5	20 000	1	289 818	13	205 900	9
W.A.	649 936	216 646	9	-	-	201 645	13	231 645	8
Tas.	649 936	183 500	4	-	-	207 718	13	258 718	11
N.T.	313 265	119 197	7	-	-	99 438	5	94630	7
ACT	108 024	6 700	1	-	-	71 271	8	30 053	3
TOTAL	4 557 569	1 079 785	47	60 428	2	1 826 889	114	1 612 467	74

* Projects were categorised as either cultural or natural on the basis of their title only. In each State only one or two projects involved both, in which case an attempt was made to balance the projects between the two categories.
Aboriginal Cultural projects involved such things as site recording, surveys, conservation and assessment; archaeological work; oral history programs; etc. The two Aboriginal environmental conservation projects involved an assessment of Aurukun wetlands cultural and environmental values, and the Finniss Springs Management Project (Marree Arabana Peoples Committee).
Source: Compiled by H. Fourmile from data in the Australian Heritage Commission Annual Report 1992–93 (1993-143–161)

11. INDIGENOUS PARTICIPATION IN RESEARCH

There is a significant amount of interest among non-Aboriginal scientists in working with Aboriginal and Torres Strait Islander people in conducting research because of the improved quality of the

> information gathered, and the savings in time and resources, when traditional knowledge is utilised. The successful collaboration between Anangu and non-Aboriginal scientists and managers in undertaking an ecological survey of the vertebrate fauna of Uluru National Park is one example. Anangu have demonstrated a superior knowledge of tracks, scats, burrows, traces and calls of wildlife; they have highly developed skills in finding and catching animals; they are able to provide very detailed natural history information, some of which is new to western science; and they have the necessary knowledge and skills to implement appropriate patch burning practices. ... [It was] emphasised how essential it was that Anangu controlled the project and continue to control, and benefit from, the knowledge that they impart. Participating in the survey reaffirmed the worth of Anangu specialist knowledge, enhanced the status of those who are the most knowledgeable and skilled within Anangu society, and encouraged younger members to value and learn about traditional knowledge and culture. The project provided direct employment opportunities and the potential for further employment, either as a result of the survey's recommendations or because of the non-Aboriginal management and skills which have been acquired. Benefits could also be expected in improved land management.
>
> HRSCERA 1993:64

Indigenous communities want and need to be involved in research. So often as the objects of research they want to be, instead, equally involved in research projects as participants in all phases of execution: identifying and prioritising research needs; preparation of submissions; research design and planning; execution; and feedback and monitoring of outcomes. While there are very few Indigenous people formally qualified to carry out scientific research, nevertheless, by participating, in addition to the ecological knowledge they already possess, they will be able to acquire much needed additional knowledge and skills.

A frequent criticism was that much research, even when Indigenous interests were crucially involved, was irrelevant, or when they wanted research to be carried out to address a particular ecological problem resources (ie, funds and research expertise) were unavailable. For example, the Yarrabah community has become greatly concerned about the decline in turtle and dugong stocks in the last 20 years. The traditional owners of the "sea country" off-shore from Cairns have to share the reefs with a number of non-Indigenous user-groups: commercial tourism operators, recreational "boaties" and fishers, commercial fishers, divers, and so on. Of the estimated 2 million tourists now visiting the Great Barrier Reef each year, 75% go to the Cairns Section and traditional owners are getting "crowded out" and can no longer enjoy their traditional hunting, fishing and gathering activities as they once used to. Research activities off-shore from Cairns have tended to focus on monitoring the impacts of tourism, and associated installations, at various reefs. Thus, while the "corals and fishes" have been the focus of research activities "because that's what the tourists come for", the wider impacts of the tourism industry and other activities on the total ecology of the area have been neglected. These impacts include examining the effects that the large volume of boat traffic may have on local turtle and dugong populations, particularly in relation to the disruption caused by this traffic cutting across the paths taken by turtle and dugong as they move around the local waters. The Yarrabah community has been requesting such studies because they have seen a serious decline, not only in turtle and dugong numbers, but in the level of marine life generally in the reefs where they traditionally fish and gather. They are greatly concerned that they are continually blamed for the decline in turtle and dugong numbers because of what critics see as the non-use of traditional hunting methods which, they say, enable Indigenous people to more effectively hunt these species. Among the benefits of the appropriate research could be the correction of such public perceptions.

In terms of their knowledge, Yarrabah community Elders would be able to contribute greatly to any attempts to provide some form of "base-line ecological picture" of the off-shore Cairns area which would cover marine as well as terrestrial (island) species.

Another example of how Indigenous research interests are overlooked is found in the research activities of the Cooperative Research Centre for Tropical Rainforest Ecology and Management (CRC-TREM), the principal research body concerned with the WTWHA. The following 1994 data are instructive:

- of the 47 PhD, Masters and Honours research topics, none were concerned with rainforest Aboriginal cultural heritage;
- Of the 69 research staff associated with CRC-TREM, only one was Aboriginal (pp. 29-30);
- Of the 22 research grants received from various sources by Centre participants for 1993/94 and totalling $482,782, none was specifically concerned with Aboriginal cultural heritage interests (p.25); and
- Of the 42 publications involving books, journals, and invited conference papers, none was specifically concerned with rainforest Aboriginal cultural heritage (pp. 21-22).

Of CRC-TREM's 6 programs, only Program 3 — Socio-Economic Studies incorporates rainforest Aboriginal interests with regard to the control and management of tourism if cultural integrity is to survive (p.15). The only other involvement of CRC-TREM is through public relations activities involving rainforest Aboriginal groups (24).

If the WTWHA is renominated to the World Heritage List for its cultural landscape as well as natural values, and following, for example, the Nunavut regional agreement model (Richardson, et al., 1994) whereby bi-cultural institutions are set up for conservation and land management, and CRC-TREM became the Co-operative Research Centre for Tropical Rainforest Aboriginal Cultural Heritage, Ecology and Management, then the staffing, research activities and the resourcing of such a centre might take on a very different character indeed. Rainforest Aboriginal people would benefit hugely from such an arrangement which would give them real hope for the survival of their cultures.

As noted above, there are examples of Indigenous communities working with government agencies in conservation research. Conventional biological surveys or research programs are often constrained by time and finances, and the management strategies resulting from these are therefore based on limited information. Aboriginal ecological knowledge is not constrained by either of these factors and can significantly expand the information base on which to develop management strategies (Baker et al., in Birckhead et al. 1992:65-73).

It is important to note that the relationship that Anangu have achieved with ANCA is the direct result of the joint management arrangement between the two. Indeed, at Uluru National Park where Anangu own the land and are in a joint management arrangement, the provision of knowledge is seen by both parties as part of that joint management process. If Indigenous communities are to share their knowledge with planners and scientists for improved management of land and resources, those communities must have a real, tangible and meaningful role in all levels of management and decision making. Baker et al. (in Birckhead et al. 1992) acknowledge this, stating that difficulties may arise in areas where Aboriginal people do not have control over their land.

12. CONDITIONS NECESSARY TO ENSURE SUCCESSFUL INDIGENOUS INVOLVEMENT IN BIOREGIONAL PLANNING

In order for Indigenous involvement to be effective in bioregional planning there must be fundamental recognition by all levels of government that it is the right of all Indigenous communities, whether they have title to land or not, to be involved in biodiversity conservation. This right has been recognised by Australia in regard to its obligations under the *Convention on Biological Diversity* specifically regarding *in situ* conservation, sustainable use of components of biological diversity, and technical and scientific co-operation. The *National Strategy for the Conservation of Australia's Biological Diversity* specifically addresses this issue in Objective 1.8 (Recognise and ensure the continuity of the ethnobiological knowledge of Australia's Indigenous peoples to the conservation of Australia's biological diversity), as well as Action 4.1.8 (Recognise the value of the knowledge and practices of Aboriginal and Torres Strait Islander peoples and incorporate this knowledge and those practices in biological diversity research and conservation programs).

These rights have been further articulated in instruments which are not legally binding on Australia, some of which Australia has been integrally involved in developing (for example, *ILO Convention 169* and the *Draft Declaration on the Rights of Indigenous Peoples*), and which set standards to which governments should aspire. These standards have also been articulated in terms of social justice and

reconciliation. Furthermore, effective Indigenous involvement in bioregional planning and biodiversity conservation would assist in fulfilling some of the recommendations of the Royal Commission into Aboriginal Deaths in Custody, in particular Recommendation 315. Acknowledgment of these rights may be contained in a preamble to any legislation established to protect biodiversity by formalising the bioregional planning process, in the objectives to the plans themselves, or incorporated throughout any strategic plans designed by conservation agencies and other planning groups to carry out biodiversity conservation. These expressions can then act as reference points or criteria by which the effectiveness of Indigenous involvement can be assessed.

For bioregional planning to have any relevance to Indigenous communities they must be involved in the determination of not only what constitutes a bioregion in terms of both cultural and natural criteria, but also in the determination of the boundaries of regions.

Indigenous communities must be treated as stake-holders who have an equal right to be involved in bioregional planning and biodiversity conservation and therefore all planning groups associated with a bioregion are obligated to involve the local Indigenous communities in all activities incorporating these processes and their implementation.

Planners must respect the fact that in any one bioregion there will be a number of local Indigenous communities involving a number of clans, families and other land affiliated groups. Relationships between these groups are intricate and need to be respected. Some responsibilities in biodiversity conservation will necessarily involve matters internal to the communities and therefore should be left to those communities to manage. An example might be the allocation of quotas between family groups for the harvesting of a particular species, or the taking into account of traditional rights and obligations to particular areas of country, particularly if sacred sites are involved. Respecting the diversity of Indigenous communities necessitates that a “bottom up” or grass roots approach to Indigenous involvement in bioregional planning be taken. Consultation and negotiation must also necessarily reflect this approach.

Bioregional planning and biodiversity conservation must accommodate Indigenous subsistence rights, understanding that the enjoyment of such rights involves far more than just subsistence activities and therefore is fundamental to the maintenance of each Indigenous community’s way of life. Local Indigenous communities must therefore necessarily be involved in determining what constitutes the economically and ecologically sustainable levels of all activities associated with natural resource use which impact on biodiversity conservation within a particular bioregion.

To create the conditions necessary for effective Indigenous involvement in bioregional planning, and to promote social justice and reconciliation, reform including structural reform, is necessary in departments and agencies concerned with biodiversity conservation and at all levels of government. The following series of suggestions are made:

Legislation should be the starting point, and at the very least should entail amendment to any Acts which are in some way relevant to biodiversity conservation to require Indigenous representation on any statutory bodies charged with duties under such legislation. The creation of Federal and State statutory Indigenous cultural heritage authorities is advocated as part of the structural reform and whose basis for existence is to manage Indigenous cultural heritage holistically in order to reintegrate the cultural and natural components of Indigenous heritage which have been historically separated for mainstream administrative convenience. Such authorities should be involved with inter-agency networking in order to facilitate an holistic approach to Indigenous cultural heritage management. Structural reform could also extend to the establishment of Indigenous units within departments and agencies involved with biodiversity conservation; in consultation with Indigenous peoples, incorporation of Indigenous interests in departmental and agency strategic plans; and employment of Indigenous people throughout a range of positions within those departments and agencies (for example, as rangers, researchers, administrators, etc.).

Indigenous communities must be adequately resourced in order to effectively undertake bioregional planning and biodiversity conservation responsibilities. This applies particularly to Indigenous community ranger services in their day-to-day responsibilities of “caring for country”. Such services should be established as full-time professional services (and not reliant on CDEP status) with the same status, employment conditions, etc., as their mainstream counterparts. Biodiversity conservation cannot be effectively carried out “on the cheap” by the continued application of short term grants to serious Land

care and environmental problems, through such programs as CEPANCRM and the application of National Estate and ATSIC land management grants, laudable as these programs may be. This also includes having adequate secretariat services/support to enable local, regional and state Indigenous consultation and networking structures to operate.

Agreements at regional and local level must have a statutory basis. In some cases bioregional planning and biodiversity conservation may form just one component of a comprehensive regional agreement negotiated to address a range of needs. In other instances agreements may be negotiated to specifically address biodiversity conservation and may take the form of joint management agreements in which case the Uluru/Kakadu management model deserves respect as the model widely preferred by Indigenous communities.

Indigenous intellectual property rights in biodiversity must be acknowledged, respected and compensated. The western industrial system of protecting knowledge (primarily through patents) is inappropriate and discriminates against Indigenous knowledge systems. Alternative systems of knowledge protection appropriate to the protection of Indigenous intellectual property rights must be established as a matter of priority.

Indigenous communities must be involved in research. A code of research ethics should be formally established to guide all research in Australia which involves Indigenous interests. Indigenous involvement in research must include participation in such activities as mapping out research agendas, setting research priorities, initiating community based research programs, and being fully informed of the results of research (and if needs be in a form or language understood by the local community).

Conservation agencies must remain cognisant of the fact that their programs where Indigenous communities are involved, while retaining conservation as their primary focus, must also recognise Indigenous culture as an integral part of that focus, and resist formulating nature conservation programs which fail to further the purposes of Indigenous communities as well as those of the conservation agencies.

The wider community must accept that Indigenous ownership and control of lands is not a lesser form of ownership than that enjoyed by other land-owners and therefore able to be treated with less respect. Indigenous community land-owners feel under continual assault by governments wanting to encroach on Indigenous lands in ways which they would not do if the land-owners were non-Indigenous. Indigenous communities have their own priorities and particular ways of enjoying and managing their lands and these must be respected. Agendas concerning biodiversity planning and conservation will not always match local community aspirations for their lands and where this occurs negotiations should take place on a basis of respect for Indigenous rights regarding their lands.

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APPENDIX 1

People and Organisations Consulted

We thank the following people and organisations for their assistance in providing information for this Report.

New South Wales:

NSW Aboriginal Land Council	Aden Ridgeway, Council members. Robert Lester.
Far Sth Coast Regional Ab. land Council	Noeleen Mooney
Far Nth Coast Regional Ab. Land Council	John Roberts
Sean Docker - NSW A.L.C. (Witawintji Local Aboriginal Land Council)	William Bates.

Gungil Jindibah Centre,	Prof. Stephan Schnierer,
Southern Cross University	Gary Martin, Adam Faulkner.
Soilworks	Graham Moore
Awabakal Newcastle	
Aboriginal Co-op.	Ray Kelly
Newcastle City Council	Louise Faulkner & Barbara Heaton
NSW NPWS	Vic Sharmans

Queensland

Cape York Land Council	Noel Pearson, Joan Staple, Archie Tanna, Chris Roberts.
Foundation for Aboriginal and	Les Malezer, David Dilion, Derek Flucker,
Islander Research Action(FAIRA).	Neil Lofgren
Wet Tropics Management Agency:	Dr. Vicki Pattimore, Tom Dacey.
Cairns Indigenous Women's	Virginia Kruger, Evelyn Scott.
Organisation	
Aboriginal Co-ordinating Council	Lloyd Fourmile, Mike Collins
Queensland Federation of Land Councils	
Rainforest Aboriginal Network	Bruce White, Gerald Appo.
Cardwell	Paul Turpin
Aboriginal Tripartite Forum	Mick Miller
Jean Christie	Director of International Liaison RAFI.
Ngarang Wal Land Council	Mary Graham, Dave Dillon, Christine Morris,
Gold Coast	Graham Dillon, Bernie Williams & other members.
ATSIC Councillors	Warren Martin, Peter Leo.
North Queensland Land Council	Kevin Busch
Quandamooka Land Council	Aileen Moreton-Robinson

Northern Territory:

Northern Land Council	Andrew Jackson
Dhimurru Land Management	Joe Yunipungu, Wayilu Wunungmurra.
(at the Alice Springs meeting)	
NT University, Darwin	Greg Wearne
Batchelor College Natural	Bruce Lawson & Students
Resource Management.	
Irrwanyere Aboriginal Corporation	Paul Ah Chee

ACT

ANCA	Kim Orchard, Steve Szabo
Australian Heritage Commission	Betty Meehan
Aboriginal and Torres Strait Islander	Michael Davis
Office of the Social Justice	
Commissioner	

Western Australia:

Kimberley Land Council	Sue Jackson
CALM	Maxine Chi,
Native tribunal members	Allan Padgett
Aboriginal Legal Service	Rob Riley
Perth. WA	
Manjimup	Marilyn Morgan, Glen and Terry

National Native Title Tribunal	Lillian Maher, Allan Padgett

South Australia:

Aboriginal Land Trust, SA.	John Chester
Dept Env. & Natural Resource Mangt.	Peter Copley.
	David Barrington
	Mr. Chris Larkin
Port Pirie	Chris Dodd
Natural Resources Group	Sue Barker

Victoria

	Albert Mullett
Victorian Native Title Unit	Richard Frankland
Aboriginal Affairs, Victoria	Victoria Archaeological Survey

Others Consulted:

Canadian Inuit	Les Carpenter.
Oxford Centre for the Environment, Ethics & Society.	Darrell Posey
Director of International Liaison, RAFI.	Jean Christie
Islander Coordinating Council consulted briefly at Alice Springs.	Joe David

National Native Title Conference (21-22nd June — Jika International Melb.) — various people

APPENDIX 2.

Kari-Oca Declaration and Indigenous Peoples Earth Charter (25 - 30 May 1992)

Preamble

The World conference of Indigenous Peoples on Territory, Environment and Development, (25-30 May, 1992)

The Indigenous Peoples of the Americas, Asia, Africa, Australia, Europe and the Pacific, united in one voice at Kari-Oca Villages express our collective gratitude to the Indigenous peoples of Brazil. Inspired by this historical meeting, we celebrate the spiritual unity of the Indigenous peoples with the land and ourselves. We continue building and formulating our united commitment to save our Mother the Earth. We, the Indigenous peoples, endorse the following declaration as our collective responsibility to carry our Indigenous minds and voices into the future.

Declaration

We the Indigenous Peoples, walk to the future in the footprints of our ancestors.

From the smallest to the largest living being, from the four directions, from the air, the land and the mountains, the creator has placed us the Indigenous peoples upon our Mother the Earth.

The footprints of our ancestors are permanently etched upon the land of our peoples.

We the Indigenous Peoples, maintain our inherent rights to self-determination.

We have always had the rights to decide our own forms of government, to use our own laws to raise and educate our children, to our own cultural identity without interference.

We continue to maintain our rights as peoples despite centuries of deprivation, assimilation and genocide.

We maintain our inalienable rights to our lands and territories, to all our resources - above and below - and to our water, we assert our ongoing responsibility to pass these onto the future generations.

We cannot be removed from our lands. We the Indigenous Peoples, are connected by the circle of life to our land and environments.

We the Indigenous peoples, walk to the future in the footprints of our ancestors.

Signed at Kari-Oca, Brazil on the 30th day of May, 1992.

Indigenous People Earth Charter
Human Rights and International Law

1. We demand the right to life.
2. International law must deal with the collective human rights of Indigenous peoples.
3. There are many international instruments which deal with the rights of individuals but there are no declarations to recognize collective human rights.
   Therefore, we urge governments to support the United Nations Working Group on Indigenous Peoples' (UNWGIP) Universal Declaration of Indigenous Rights, which is presently in draft form.
4. There exist many examples of genocide against Indigenous peoples. Therefore, the convention against genocide must be changed to include the genocide of Indigenous peoples.
5. The United Nations should be able to send Indigenous peoples' representatives, in a peace keeping capacity, into Indigenous territories where conflicts arise. This would be done on the request and consent of the Indigenous peoples concerned.
6. The concept of **Terra Nullius** must be eliminated from international law usage. Many state governments have used internal domestic laws to deny us ownership of our own lands. These illegal acts should be condemned by the World.
7. Where small numbers of Indigenous peoples are residing within state boundaries, so-called democratic countries have denied Indigenous peoples the right of consent about their future, using the notion of majority rules to decide the future of Indigenous peoples. Indigenous peoples' right of consent to projects in their areas must be recognized.
8. We must promote the term "Indigenous peoples" at all fora. The use of the term "Indigenous peoples" must be without qualifications.
9. We urge governments to ratify International Labour Organisation (ILO) convention 169 to guarantee an international legal instrument for Indigenous peoples. (Group 2 only).
10. Indigenous peoples' distinct and separate rights within their own territories must be recognised.
11. We assert our rights to free passage through state imposed political boundaries dividing our traditional territories. Adequate mechanisms must be established to secure this right.
12. The colonial systems have tried to dominate and assimilate our peoples. However, our peoples remain distinct despite these pressures.
13. Our Indigenous governments and legal systems must be recognised by the United Nations, State governments and International legal instruments.
14. Our right to self-determination must be recognised.
15. We must be free from population transfer.
16. We maintain our right to our traditional way of life.
17. We maintain our right to our spiritual way of life.
18. We maintain the right to be free from pressures from multinational (transnational) corporations upon lives and lands. All multinational (Transnational) corporations which are encroaching upon Indigenous lands should be reported to the United Nations Transnational Office.
19. We must be free from racism.
20. We maintain the right to decide the direction of our communities.

21. The United Nations should have a special procedure to deal with issues arising from violations of Indigenous treaties.
22. Treaties signed between Indigenous peoples and non-Indigenous peoples must be accepted as treaties under international law.
23. The United Nations must exercise the right to impose sanctions against governments that violate the rights of Indigenous peoples.
24. We urge the United Nations to include the issue of Indigenous peoples in the agenda of the World conference on Human Rights to be held in 1993. The work done so far by the United Nations Inter-American Commission of Human Rights and the Inter-American Institute of Human Rights should be taken into consideration.
25. Indigenous peoples should have the right to their own knowledge, language, and culturally appropriate education, including bicultural and bilingual education. Through recognizing both formal and informal ways, the participation of family and community is guaranteed.
26. Our health rights must include the recognition and respect of traditional knowledge held by Indigenous healers. This knowledge, including our traditional medicines and their preventive and spiritual healing power, must be recognized and protected against exploitation.
27. The World court must extend its powers to include complaints by Indigenous peoples.
28. There must be a monitoring system from this conference to oversee the return of delegates to their territories. The delegates should be free to attend and participate in International Indigenous Conferences.
29. Indigenous Women's rights must be respected. Women must be included in all local, national, regional and international organisations.
30. The above mentioned historical rights of Indigenous peoples must be guaranteed in national legislation.

(*Please note for the purposes of the Declaration and this statement any use of the term "Indigenous Peoples" also includes Tribal Peoples.)

Land and Territories

31. Indigenous peoples were placed upon our Mother, the earth by the Creator. We belong to the land. We cannot be separated from our lands and territories.
32. Our territories are living totalities in permanent vital relation between human beings and nature. Their possession produces the development of our culture. Our territorial property should be inalienable, unceaseable and not denied title. Legal, economic and technical back up are needed to guarantee.
33. Indigenous peoples' inalienable rights to land and resources confirm that we have always had ownership and stewardship over our traditional territories. We demand that these be respected.
34. We assert our rights to demarcate our traditional territories. The definition of territory includes space (air), land, and sea. We must promote a traditional analysis of traditional land rights in all our territories.
35. Where Indigenous territories have been degraded, resources must be made available to restore them. The recuperation of those affected territories is the duty of the respective jurisdiction in all nation states which can not be delayed. Within this process of recuperation the compensation for the historical ecological debt must be taken into account. Nation states must revise in depth the agrarian, , mining and forestry policies.
36. Indigenous peoples reject the assertion of non-Indigenous laws onto our lands. States cannot unilaterally extend their jurisdiction over our lands and territories. The concept of Terra Nullius should be forever erased from the law books of states.
37. We as Indigenous peoples, must never alienate our lands. We must always maintain control over the land for future generations.
38. If a non Indigenous government, individual or corporation wants the use of lands, then there must be formal agreement which sets out the terms and conditions. Indigenous peoples maintain the right to be compensated for the use of their lands and resources.

39. Traditional Indigenous territorial boundaries, including waters, must be respected.
40. There must be some control placed upon environmental groups who are lobbying to protect our territories and the species within those territories. In many instances, environmental groups are more concerned about animals than human beings. We call for Indigenous peoples to determine guidelines prior to allowing environmental groups into their territories.
41. Parks must not be created at the expense for Indigenous peoples. There is no way to separate Indigenous peoples from their lands.
42. Indigenous peoples must not be removed from their lands in order to make it available to settlers or other forms of economic activity on their lands.
43. In many instances, the number of Indigenous peoples have been decreasing to encroachment by non-Indigenous peoples.
44. Indigenous peoples should encourage their peoples to cultivate their own traditional forms of products rather than to use imported exotic crops which do not benefit local peoples.
45. Toxic wastes must not be deposited in our areas. Indigenous peoples must realise that chemicals, pesticides and hazardous wastes do not benefit the peoples.
46. Traditional areas must be protected against present and future forms of environmental degradation.
47. There must be a cessation of all uses of nuclear material.
48. Mining of products for nuclear production must cease.
49. Indigenous lands must not be used for the testing or dumping of nuclear products.
50. Population transfer policies by state governments in our territories are causing hardship. Traditional lands are lost and traditional livelihoods are being destroyed.
51. Our lands are being used by stare (sic) governments to obtain funds from the World Bank, the International Monetary fund, the Asian Pacific Development Bank and other institutions which have led to a loss or our lands and territories.
52. In many countries our lands are being used for military purposes. This is an unacceptable use of the lands.
53. The colonizer governments have changed the names of our traditional and sacred areas. Our children learn these foreign names and start to lose their identity. In addition, the changing of the name of a place diminishes respect for the spirits which reside in those areas.
54. Our forests are not being used for their intended purposes. The forests are being used to make money.
55. Traditional activities, such as making pottery, are being destroyed by the importation of industrial goods. This impoverishes the local peoples.

Biodiversity and Conservation

56. The Vital Circles are in a continuous interrelation in such a way that the change of one of its elements affects the whole.
57. Climatic changes affect Indigenous peoples and all humanity. In addition ecological systems and their rhythms are affected which contributes to the deterioration of our quality of life and increases our dependency.
58. The forests are being destroyed in the name of development and economical gains without considering the destruction of ecological balance. These activities do not benefit human beings, animals, birds and fish. The logging concessions and incentives to the timber, cattle and mining industries affecting the ecosystems and the natural resource should be cancelled.
59. We value the efforts of the protection of the Biodiversity but we reject to be included as part of an inert diversity which pretend to be maintained for scientific and folkloric purposes.
60. The Indigenous peoples strategies should be kept in a reference framework for the formulation and application of national policies on environment and biodiversity.

Development Strategies

61. Indigenous peoples must consent to all projects in our territories. Prior to consent being obtained the peoples must be fully and entirely involved in any decisions. They must be given all the information about the project and its effects. Failure to do so should be considered a crime against the Indigenous peoples. The person or persons who violate this should be tried in a world tribunal within the control of Indigenous peoples set for such a purpose. This could be similar to the trials held after World War 11.
62. We have the right to our own development strategies based on our cultural practices and with a transparent, efficient and viable management and with economical and ecological viability.
63. Our development and life strategies are obstructed by the interests of the government and big companies and by the neoliberal policies. Our strategies have, as a fundamental condition, the existence of International relationship based on justice, equity and solidarity between the human beings and the nations.
64. Any development strategy should prioritize the elimination of poverty, the climatic guarantee the sustainable manageability of natural resources, the continuity of democratic societies and the respect of cultural differences.
65. The global environmental facility should assign at best 20% for Indigenous peoples' strategies and programs of environmental emergency, improvement of life quality, protection of natural resources and rehabilitation of ecosystems. This proposal in the case of South America and Caribbean should be concrete in the Indigenous peoples of other regions and continents.
66. The concept of development has meant the destruction of our lands. We reject the current definition of development as being useful to our peoples. Our cultures are not static and we keep our identity through a permanent recreation of our life conditions; but all of this is obstructed in/the name of so-called developments.
67. Indigenous peoples have been here since the time before time began. We have come directly from the Creator. We have lived and kept the Earth as it was on the First Day. Peoples who do not belong to the land must go out from the lands because those things (so-called "Development" on the land) are against the laws of creator.
69. (a) In order for Indigenous peoples to assume control, management and administration of their resources the territories, development projects must be based on the principles of self-determination and self-management

(b) Indigenous peoples must be self-reliant.

70. If we are going to grow crops, we must feed the peoples. It is not appropriate that the lands be used to grow crops which do not benefit the local peoples.

(a) Regarding Indigenous policies. State Government must cease attempts of assimilation and (sic) integration.

(b) Indigenous peoples must consent to all projects in their territories. Prior to consent being obtained, the peoples must be fully and entirely involved in any decisions. They must be given all the information about the project and its effects. Failure to do so should be considered a crime against Indigenous peoples. The person or persons responsible should be tried before a World Tribunal, with a balance of Indigenous peoples set up for such a purpose. This could be similar to the Trials held after the second World War.

71. We must never use the term "land claims". It is the non-Indigenous peoples which do not have any land. All the land is our land. It is non-Indigenous peoples who are making claims to our lands. We are not making claims to our lands.
72. There should be a monitoring body within the United Nations to monitor all the land disputes around the World prior to development.
73. There should be a United Nations Conference on the topic of Indigenous Lands and Development.
74. Non-Indigenous peoples have come to our lands for the purpose of exploiting these lands and resources to benefit themselves, and to the impoverishment of our peoples. Indigenous peoples are victims of development. In many cases Indigenous peoples are exterminated in the name of a development program. There are numerous examples of such occurrences.

75. Development that occurs on Indigenous lands, without the consent of Indigenous peoples, must be stopped.
76. Development which is occurring on Indigenous lands is usually decided without local consultation by those who are unfamiliar with local conditions and needs.
77. The eurocentric notion of ownership is destroying our peoples. We must return to our own view of the world, of the land and of development. The issue cannot be separated from Indigenous peoples' rights.
78. There are many different types of so-called development: road construction, communication facilities such as electricity, telephones. These allow developers easier access to the areas, but the effects of such industrialisation destroy the lands.
79. There is a world wide move to remove Indigenous peoples from their lands and place them in villages. The relocation from the traditional territories is done to facilitate development.
80. It is not appropriate for governments or agencies to move into our territories and to tell our peoples what is needed.
81. In many instances, the state-governments have created artificial entities such as "district council" in the name of the state-government in order to deceive the international community. These artificial entities then are consulted about development in the area. The state-government then, claim that if Indigenous peoples were consulted about the project. These lies must be exposed to the international community.
82. There must be an effective network to disseminate material and information between Indigenous peoples. Thus necessary in order to keep informed about the problems of other Indigenous peoples.
83. Indigenous peoples should form and direct their own environmental network.

Culture, Science and Intellectual Property

84. We feel the Earth as if we are within our mother. When the Earth is sick and polluted, human health is impossible. To heal ourselves, we must heal the Planet, and to heal the Planet we must heal ourselves.
85. We must begin to heal from the grassroots level and work towards the international level.
86. The destruction of the culture has always been considered an internal, domestic problem within national state. The United Nation must set up a tribunal to review the cultural destruction of the Indigenous peoples.
87. We need to have foreign observers come into our Indigenous territories to oversee national state elections to prevent corruption.
88. The human remains and artifacts of Indigenous peoples must be returned to their original peoples.
89. Our sacred and ceremonial sites should be protected and considered as the patrimony of Indigenous peoples and humanity. The establishment of a set of legal and operational instruments at both national and international levels would guarantee this.
90. The use of existing Indigenous languages is our right. These languages must be protected.
91. States that have outlawed Indigenous languages and their alphabets should be censured by United Nations.
92. We must not allow tourism to be used to diminish our culture. Tourists come into the communities and view the people as if Indigenous peoples were part of a zoo. Indigenous peoples have the right to allow or to disallow tourism within their area.
93. Indigenous peoples must have the necessary resources and control over their own education systems.
94. Elders must be recognized and respected as teachers of the young people.
95. Indigenous wisdom must be recognized and encouraged.
96. The traditional knowledge of herbs and plants must be protected and passed onto future generations.
97. Traditions cannot be separated from land, territory or science.
98. Traditional knowledge has enabled Indigenous peoples to survive.

99. The usurping of traditional medicines and knowledge from Indigenous peoples should be considered a crime against peoples.
100. Material culture is being used by the non-Indigenous to gain access to our lands and resources, thus destroying our cultures.
101. Most of the media at this conference were only interested in the picture which will be sold for profit. This another case of exploitation of Indigenous peoples. This does not advance the cause of Indigenous peoples.
102. As creators and carriers of civilizations which have given and continue to share knowledge, experience and values with humanity, we require that our right to intellectual and cultural properties be guaranteed and that the mechanism for each implementation be in favour of our peoples and studies in depth and implemented. This respect must include the right over genetic resources, gene banks, biotechnology and knowledge of biodiversity programs.
103. We should list the suspect museums and institutions that have misused our cultural and intellectual properties.
104. The protection, norms and mechanism of artistic and artisan creation of our peoples must be established and implemented in order to avoid plunder, plagiarism, undue exposure and use.
105. When Indigenous peoples leave their communities, they should make every effort to return to the community.
106. In many instances, our songs, dances and ceremonies have been viewed as the only aspects of our lives. In some instances, we have been asked to change a ceremony or song to suit the occasion. This is racism.
107. At local, national, international levels, governments must commit funds to new and existing resources to education and training for Indigenous peoples, to achieve their sustainable development, to contribute and to participate in sustainable and equitable development at all levels. Particular attention should be given to Indigenous women, children and youth.
108. All kinds of folkloric discrimination must be stopped and forbidden.
109. The United Nations should promote research into Indigenous knowledge and development of a network of Indigenous sciences.

COMMISSION ON HUMAN RIGHTS
Sub-Commission on Prevention of
Discrimination and Protection of
Minorities
Working Group on Indigenous Populations
19 - 30 July 1993
FIRST INTERNATIONAL CONFERENCE ON THE CULTURAL AND INTELLECTUAL PROPERTY RIGHTS OF INDIGENOUS PEOPLES
WHAKATANE, 12 - 18 JUNE 1003 AOTEAROA NEW ZEALAND

THE MATAATUA DECLARATION ON CULTURAL AND INTELLECTUAL PROPERTY RIGHTS OF INDIGENOUS PEOPLES JUNE 1993

In recognition that 1993 is the United Nations International Year for the World's Indigenous Peoples;

The Nine Tribes of Mataatua in the Bay of Plenty Region of Aotearoa New Zealand convened the First International Conference on the Cultural and Intellectual Property Rights of Indigenous Peoples, (12 - 18 June 1993, Whakatane).

Over 150 Delegates from fourteen countries attended, including Indigenous representatives from Aiun (Japan), Australia, Cook Islands, Fiji, India, Panama, Peru, Philippines, Surinam, USA and Aotearoa.

The Conference met over six days to consider a range of significant issues, including; the value of Indigenous knowledge, biodiversity and biotechnology, customary environmental management, arts, music, language and other physical and spiritual cultural forms. On the final day, the following Declaration was passed by the Plenary.

PREAMBLE

Recognising that 1993 is the United Nations International Year for the World's Indigenous Peoples;

Reaffirming the undertaking of United Nations Member States to:

"*Adopt or strengthen appropriate policies and/or legal instruments that will protect indigenous intellectual and cultural property and the right to preserve customary and administrative systems and practices.*" - United Nations Conference on Environmental Development; UNCED Agenda 21 (26.4b);

Noting the Working principles that emerged from the United Nations Technical Conference on Indigenous Peoples and the Environment in Santiago, Chile from 18 - 22 May 1992 (E/CN.4/Sub.2/1992/31);

Endorsing the recommendations on Culture and Science from the World Conference of Indigenous Peoples on Territory, Environment and Development, Kari-Oca, Brazil, 25 - 30 May 1992;

We

Declare that Indigenous People of the world have the right to self determination; and in exercising that right must be recognised as the exclusive owners of their cultural and intellectual property.

Acknowledge that Indigenous Peoples have a commonalty of experiences relating to the exploitation of their cultural and intellectual property;

Affirm that the knowledge of the Indigenous Peoples of the world is of benefit to all humanity;

Recognise that Indigenous Peoples are capable of managing their traditional knowledge themselves, but are willing to offer it to all humanity provided their fundamental rights to define and control this knowledge are protected by the international community;

Insist that the first beneficiaries of Indigenous knowledge (cultural and intellectual property rights) must be the direct Indigenous descendants of such knowledge;

Declare that all forms of discrimination and exploitation of Indigenous peoples, Indigenous knowledge and Indigenous culture and intellectual property rights must cease.

1. RECOMMENDATIONS TO INDIGENOUS PEOPLES

In the development of policies and practices, indigenous peoples should:

1.1 Define for themselves their own intellectual and cultural property.

1.2 Note that existing protection mechanisms are insufficient for the protection of Indigenous Peoples Intellectual and Cultural Property Rights.

1.3 Develop a code of ethics which external users must observe when recording (visual, audio, written) their traditional and customary knowledge.

1.4 Prioritise the establishment of Indigenous education, research and training centres to promote their knowledge of customary environmental and cultural practices.

1.5 Re acquire traditional Indigenous lands for the purpose of promoting customary agricultural production.

1.6 Develop and maintain their traditional practices and sanctions for the protection, preservation and revitalisation of their traditional intellectual and cultural properties.

1.7 Assess existing legislation with respect to the protection of antiquities.

1.8 Establish an appropriate body with appropriate mechanisms to:

a) Preserve and monitor the commercialism or otherwise of Indigenous cultural properties in the public domain

b) generally advise and encourage Indigenous peoples to take steps to protect their cultural heritage

c) allow a mandatory consultative process with respect to any new legislation affecting Indigenous peoples cultural and intellectual property rights.

1.9 Establish international Indigenous information centres and networks

1.10 Convene a Second International Conference (Hui) on the Cultural and Intellectual Property Rights of Indigenous Peoples to be hosted by the Coordinating Body of the Indigenous Peoples Organisations of the Amazon Basin (COICA).

2. RECOMMENDATIONS TO STATES, NATIONAL AND INTERNATIONAL AGENCIES

In the development of policies and practices, States, National and International Agencies must:

2.1 Recognise that Indigenous peoples are the guardians of their customary knowledge and have the right to protect and control dissemination of that knowledge.

2.2 Recognise that Indigenous peoples also have the right to create new knowledge based on cultural tradition.

2.3 Note that existing protection mechanisms are insufficient for the protection of Indigenous Peoples Cultural and Intellectual Property Rights.

2.4 Accept that the cultural and intellectual property rights of Indigenous peoples are vested with those who created them.

2.5 Develop in full co-operation with Indigenous peoples an additional cultural and intellectual property rights regime incorporating the following:

- collective (as well as individual) ownership and origin
- retroactive coverage of historical as well as contemporary works
- protection against debasement of culturally significant items
- co-operative rather than competitive framework
- first beneficiaries to be the direct descendants of the traditional guardians of that knowledge
- multi-generational coverage span

BIODIVERSITY AND CUSTOMARY ENVIRONMENTAL MANAGEMENT

2.6 Indigenous flora and fauna is inextricably bound to that territories of Indigenous communities and any property right claims must recognise their traditional guardianship.

2.7 Commercialisation of any traditional plants and medicines of Indigenous Peoples, must be managed by the Indigenous peoples who have inherited such knowledge.

2.8 A moratorium on any further commercialisation of Indigenous medicinal plants and human genetic materials must be declared until Indigenous communities have developed appropriate protection mechanisms.

2.9 Companies, institutions both government and private must not undertake experiments of commercialisation of any biogenetic resources without the consent of the appropriate Indigenous peoples.

2.10 Prioritise settlement of any outstanding land and natural resources claims of Indigenous peoples for the purpose of promoting customary, agricultural and marine production.

2.11 Ensure current scientific environmental research is strengthened by increasing the involvement of Indigenous communities and of customary environmental knowledge

CULTURAL OBJECTS

2.12 All human remains and burial objects of Indigenous peoples held by museums and other institutions must be returned to their traditional areas in a culturally appropriate manner.

2.13 Museums and other institutions must provide, to the country and Indigenous peoples concerned, an inventory of any Indigenous cultural objects still held in their possession.

2.14 Indigenous cultural objects held in museums and other institutions must be offered back to their traditional owners.

3. RECOMMENDATIONS TO THE UNITED NATIONS

In respect for the rights of indigenous peoples, the United Nations should:

3.1 Ensure the process of participation of Indigenous peoples in United Nations fora is strengthened so their views are fairly represented.

3.2 Incorporate the Mataatua Declaration in its entirety in the United Nations Study on Cultural and Intellectual Property of Indigenous Peoples.

3.3 Monitor and take action against any States whose persistent policies and activities damage the cultural and intellectual property rights of Indigenous peoples.

3.4 Ensure that Indigenous peoples actively contribute to the way in which Indigenous cultures are incorporated into the 1995 United Nations International Year of Culture.

3.5 Call for an immediate halt to the ongoing 'Human Genome Diversity Project' (HUGO) until its moral , ethical, socio-economic, physical and political implications have been thoroughly discussed, understood and approved by Indigenous peoples.

4. CONCLUSION

4.1 The United Nations, International and National Agencies and States must provide additional funding to indigenous communities in order to implement these recommendations.

Julayinbul Statement on Indigenous Intellectual Property Rights

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Moana Jackson
Steve Newcomb
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Gertrude Davis
Nola Joseph
William Joseph

On November 27 1993, Jingarrba, North-Eastern coastal region of the continent of Australia, it was agreed and declared that:

Indigenous Peoples and Nations share a unique spiritual and cultural relationship with Mother Earth which recognises the inter-dependence of the total environment and is governed by the natural laws which determine our perceptions of intellectual property.

Inherent in these laws and integral to that relationship is the right of Indigenous Peoples and Nations to continue to live within and protect, care for, and control the use of that environment and of their knowledge.

Within the context of this statement Indigenous Peoples and Nations to reaffirm their right to define for themselves their own intellectual property, acknowledging their own self-determination and the uniqueness of their own particular heritage.

Within the context of this statement Indigenous Peoples and Nations also declare that we are capable of managing our intellectual property ourselves, but are willing to share it with all humanity provided that our fundamental rights to define and control this property are recognised by the international community.

Aboriginal Common Law and English/Australian Common Law are parallel and equal systems of law.

Aboriginal intellectual property, within Aboriginal Common Law, is an inherent inalienable right which cannot be terminated, extinguished, or taken.

Any use of the intellectual property of Aboriginal Nations and Peoples may only be done in accordance with Aboriginal Common Law, and any unauthorised use is strictly prohibited.

Just as Aboriginal Common Law has never sought to unilaterally extinguish English/Australian Common Law so we expect English/Australian Common Law to reciprocate.

We, the delegates assembled at this conference urge Indigenous Peoples and Nations to develop processes and strategies acceptable to them to facilitate the practical application of the above principles and to ensure the dialogue and negotiation which are envisaged by the principles.

We also call on governments to review legislation and non-statutory policies which currently impinge upon or do not recognise Indigenous intellectual property rights. Where policies, legislation and international conventions currently recognise these rights, we require that they be implemented.

Declaration Reaffirming the Self Determination and Intellectual Property Rights of the Indigenous Nations and Peoples of the Wet Tropics Rainforest Area.

(1) Recognising that the Indigenous Nations and Peoples of the Wet Tropics Rainforest Area have exercised their inherent right to self determination in regard to the care, protection and use-control of the forest since time immemorial, and

(2) Acknowledging that in the exercise of that right of self determination the Indigenous Nations and Peoples continue to foster and develop a unique relationship with their total environment, and

(3) Affirming that the values, processes, Law and Lore which the Indigenous Nations and Peoples have developed throughout that relationship are expressed in their intellectual property rights,

Delegates gathered at the Julayinbul Conference, (November 25,26,27,1993) on the north-eastern coastal region of the Australian continent hereby affirm:

(1) That the intellectual property rights of the Indigenous Nations and Peoples of their territories in the wet tropical forest areas have traditionally included the recognition of a cultural heritage inherent in their interdependent relationship with the natural environment, and that such cultural heritage remains an integral part of the Indigenous Peoples perception of their inherent rights in relation to their territories in the Wet Tropics region,

(2) That inherent in the exercise of self determination is the prerogative of the Indigenous Nations and Peoples of the Wet Tropics region to freely exercise the right to hunt and gather within the forests according to such rules and regulations as they deem appropriate,

(3) That in the exercise of their self-determination the Indigenous Nations and Peoples have had and continue to have the inherent rights to restore and maintain their spiritual and ceremonial practices in relation to the forests and waters,

(4) The right of self-determination is predicated upon the right of **development** by which Indigenous Nations and Peoples may make such adaptations and changes to their traditional methods of harvest as they deem appropriate,

(5) That the intellectual property of the Indigenous Nations and Peoples of the Wet Tropics region includes and has always included the ability to discover and make what they deem appropriate use of new knowledge derived from their total environment: such as the discovery of new genotypes and the right to control subsequent use of and access to the genetic make-up within the flora and fauna of the forests.

(6) That in the exercise of their self-determination Indigenous Nations and Peoples of the Wet Tropics region are prepared to negotiate joint-management arrangements with appropriate non-Indigenous agencies for the care, protection and controlled use of the Wet Tropics region.

(7) That in the exercise of self-determination by the Indigenous Nations and Peoples no presumption should be inferred that such peoples acknowledge the prerogative of any non-Indigenous government or agency to extinguish or otherwise delimit their inherent right, title and authority to their territories. Any unauthorised use of Indigenous Nations' and Peoples' intellectual property is strictly prohibited.

Without derogating in any way from the rights of Indigenous Nations and Peoples to self-determination, the delegates at the Julayinbul Conference hereby call on the Federal and State Governments to honour and fulfil the serious and important international and domestic commitments which they have made about the rights of Indigenous Nations and Peoples relating to the care, protection and use-control of their territories.

(1) These commitments include relevant obligations under international conventions, declarations and other instruments such as the:

- Convention on Biological Diversity
- Rio Declaration on Environment and Development
- Agenda 21, Chapter 26

- UNCED Statement of Forest Principles
- Convention on Conservation of Nature in the South Pacific
- 1991 SPREP Ministerial Declaration on Environment and Development
- Charter of the United Nations
- World Heritage Convention
- International Covenant on Civil and Political Rights, and the
- International Covenant on Economic, Social and Cultural Rights

(2) Federal and State governments have also made serious and important undertakings in a range of negotiated government policy instruments, including the:
- National Strategy for Ecologically Sustainable Development
- National Forest Policy Statement
- 1992 Inter-governmental Agreement on the Environment
- National Commitment to Improved Outcomes in the Delivery of Services for Aboriginal and Torres Strait Islander Peoples, and in
- Government responses to the recommendations of the Royal Commission into Aboriginal Deaths in Custody.

(3) The above demands are justified further because of the Federal government's support for the development of the proposed UN Declaration on the Rights of Indigenous Peoples.

(4) These demands are also justified in the light of the recommendations of the Australian Law Reform Commission in its report on the Recognition of Customary Law, and in view of the national expectations of the process of reconciliation as being developed by the Council for Aboriginal Reconciliation.

(5) We also call on Federal and State Governments to review the world heritage management arrangements internationally, nationally and locally which impinge upon or do not recognise the intellectual property rights of Indigenous Nations and Peoples.

(6) In particular, the management of the Queensland Wet Tropics World Heritage Area is in need of review immediately, as agreed in the Federal-State agreement of 1990 on Wet Tropics World Heritage management.

AGREED AT JINGARRBA 27 NOVEMBER, 1993

COICA
Coordinating Body for the Indigenous Peoples'
Organizations of the Amazon Basin

REGIONAL MEETING SPONSORED BY COICA AND UNDP ON "INTELLECTUAL PROPERTY RIGHTS AND BIODIVERSITY"

Santa Cruz de la Sierra, Bolivia
28 - 30 September 1994

I BASIC POINTS OF AGREEMENT

1. Emphasis is placed on the significance of the use of intellectual property systems as a new formula for regulating North-South economic relations in pursuit of colonialist interests.
2. For Indigenous peoples, the intellectual property systems means legitimation of the misappropriation of our peoples' knowledge and resources for commercial purposes.
3. All aspects of the issue of intellectual property (determination of access to national resources, control of the knowledge or cultural heritage of peoples, control of the use of their resources and regulation of the terms of exploitation) are aspects of self-determination. For Indigenous peoples, accordingly, the ultimate decision on this issue is dependent on self-determination. Positions adopted under a trusteeship regime will be of a short-term nature.
4. Biodiversity and a people's knowledge are concepts inherent in the idea of Indigenous territoriality. Issues relating to access to resources have to be viewed from this standpoint.

5. Integral Indigenous territoriality, its recognition (or restoration) and its reconstitution are prerequisites for enabling the creative and inventive genius of each Indigenous people to flourish and for it to be meaningful to speak of protecting such peoples. The protection, reconstitution and development of Indigenous knowledge systems call for additional commitments to the effort to have them reappraised by the outside world.
6. Biodiversity and the culture and intellectual property of a people are concepts that mean Indigenous territoriality. Issues relating to access to resources and others have to be viewed from this standpoint.
7. For members of Indigenous peoples, knowledge and determination of the use of resources are collective and intergenerational. No Indigenous population, whether of individuals or communities, nor the Government, can sell or transfer ownership of resources which are the property of the people and which each generation has an obligation to safeguard for the next.
8. Prevailing intellectual property systems reflect a conception and practice that is:
   - colonialist, in that the instruments of the developed countries are imposed in order to appropriate the resources of Indigenous peoples;
   - racist, in that it belittles and minimises the value of our knowledge systems;
   - usurpatory, in that it is essentially a practice of theft.
9. Adjusting Indigenous systems to the prevailing intellectual property systems (as a world-wide concept and practice) changes the Indigenous regulatory systems themselves.
10. Patents and other intellectual property rights to forms of life are unacceptable to Indigenous peoples.
11. It is important to prevent conflicts that may arise between communities from the transformation of intellectual property into a means of dividing Indigenous unity.
12. There are some formulas that could be used to enhance the value of our products (brand names, appellations of origin), but on the understanding that these are only marketing possibilities, not entailing monopolies of the product or of collective knowledge. There are also some proposals for modifying prevailing intellectual property systems, such as the use of certificates of origin to prevent use of our resources without our prior consent.
13. The prevailing intellectual property systems must be prevented from robbing us, through monopoly rights, of resources and knowledge in order to enrich themselves and build up power opposed to our own.
14. Work must be conducted on the design of a protection and recognition system which is in accordance with the defence of our own conception, and mechanisms must be developed in the short and medium term which will prevent appropriation of our resources and knowledge.
15. A system of protection and recognition of our resources and knowledge must be designed which is in conformity with our world view and contains formulas that, in the short and medium term, will prevent the appropriation of our resources by the countries of the North and others.
16. There must be appropriate mechanisms for maintaining and ensuring the right of Indigenous peoples to deny indiscriminate access to the resources of our communities or peoples and making it possible to contest patents or other exclusive rights to what is essentially Indigenous.
17. There is a need to maintain the possibility of denying access to Indigenous resources and contesting patents or other exclusive rights to what is essentially Indigenous.
18. Discussions regarding intellectual property should take place without distracting from priorities such as the struggle for the right to territories and self-determination, bearing in mind that the Indigenous population and the land form an indivisible unity.

II SHORT-TERM RECOMMENDATIONS

1. Identify, analyse and systematically evaluate from the standpoint of the Indigenous world view different components of the formal intellectual property systems, including mechanisms, instruments and forums, among which we have:

Intellectual property mechanisms

- Patents
- Trademarks
- Authors' rights

- Rights of developers of new plant varieties
- Commercial secrets
- Industrial design
- Labels of origin

Intellectual property instruments

- The Agreement on Trade-Related International Property Rights (TRIPS) of the General Agreement on Tariffs and Trade (GATT)
- The Convention on Biodiversity, with special emphasis on the following aspects: environmental impact assessments, subsidiary scientific body, technological council, monitoring, national studies and protocols, as well as on rights of farmers and ex situ control of germ plasm, which are not covered under the Convention.

Intellectual property forums

Define mechanisms for consultation and exchange of information between the Indigenous organizational universe and international forums such as:

- The Treaty for Amazonian Cooperation
- The Andean Pact
- The General Agreement on Tariffs and Trade
- The European Patents Convention
- The United Nations Commission on Sustainable Development
- The Union for the Protection of New Varieties of Plants
- The World Intellectual Property Organization (WIPO)
- The International Labour Organization (ILO)
- The United Nations Commission on Human Rights

2. Evaluate the possibilities offered by the international instruments embodying cultural, political, environmental and other rights that could be incorporated into a sui gneris legal framework for the protection of Indigenous resources and knowledge.
3. Define the content of consultations with such forums.
4. Define the feasibility of using some mechanisms of the prevailing intellectual property systems in relation to:

- Protection of biological/genetic resources
- Marketing of resources

5. Study the feasibility of alternative systems and mechanisms for protecting Indigenous interests in their resources and knowledge.
   Sui generis systems for protection of intellectual property: inventor's certificate, model legislation on folklore.
   New deposit standards for material entering germ plasm banks.
   Commissioner for intellectual property rights.
   Tribunals.
   Bilateral multilateral contracts or conventions.
   Materials Transfer Agreements.
   Biological prospecting.
   Defensive publication.
   Certificates of origin.
6. Seek to make alternative systems operational within the short term, by establishing a minimal regulatory framework (for example bilateral contracts).
7. Systematically study, or expand studies already conducted of, the dynamics of Indigenous peoples, with emphasis on:

- Basis for sustainability (territories, culture, economy)
- Use of knowledge and resources (collective ownership systems, community use of resources)
- Community, national, regional and international organizational bases that will make it possible to create mechanisms within and outside Indigenous peoples capable of assigning the same value to Indigenous knowledge, arts and crafts as to western science.

8. Establish regional and local Indigenous advisory bodies on intellectual property and biodiversity with functions involving legal advice, monitoring, production and dissemination of information and production of materials.
9. Identify national intellectual property organizations, especially in areas of biodiversity.
10. Identify and draw up a timetable of forums for discussion and exchange of information on intellectual property and/or biodiversity. Seek support for sending Indigenous delegates to participate in such forums. An effort will be made to obtain information with a view to the eventual establishment of an Information, Training and Dissemination Centre on Indigenous Property and Ethical Guides on contract negotiation and model contracts.

III MEDIUM-TERM STRATEGIES

1. Plan, programme, establish timetables and seek financing for the establishment of an Indigenous programme for the collective use and protection of biological resources and knowledge. This programme will be developed in phases in conformity with areas of geographical coverage.
2. Plan, draw up timetables for and hold seminars and workshops at the community, national and regional levels on biodiversity and prevailing intellectual property systems and alternatives.
3. Establish a standing consultative mechanism to link community workers and Indigenous leaders, as well as an information network.
4. Train Indigenous leaders in aspects of intellectual property and biodiversity.
5. Draw up a Legal Protocol of Indigenous Law on the use and community knowledge of biological resources.
6. Develop a strategy for dissemination of this Legal Protocol at the national and international levels.

Santa Cruz, Bolivia, 30 September 1994

Asian Consultation Workshop on the Protection and Conservation of Indigenous Knowledge
TVRC Tambunan, Sabah, East Malaysia
24 - 27 February 1995

Basic Points of Agreement on the Issues Faced by the Indigenous Peoples of Asia

From the deliberations it is clear that self-determination is most important to the Indigenous people. The definition of self-determination is different in different countries, ranging from land right, autonomy, self rule without secession, autonomy under federal system, to independence. Indigenous peoples' struggle and right to self-determination are being threatened by repressive government (eg Burma); development policies and projects such as large dams (eg North Thailand, Sarawak in East Malaysia); unjust land laws (eg Hill Tribes of Thailand, Malaysia, Vietnam); genocide (eg Chittagong Hill tribes, Bangladesh); religion and the dominant culture.

Land, in particular native customary or ancestral lands, is significant to Indigenous peoples because it is the source of their livelihood and the base of their Indigenous knowledge, spiritual and cultural traditions.

The Indigenous peoples' struggle for self-determination is a very strong counter-force to the intellectual property rights system vis-a-vis Indigenous knowledge, wisdom and culture. Therefore, the struggle for self-determination cannot be separated from the campaign against intellectual property rights systems, particularly their applications on life forms and Indigenous knowledge.

Specific Points Raised on Indigenous Knowledge and Intellectual Property Rights (IPR)

For the Indigenous peoples of Asia, the intellectual property rights system is not only a very new concept but it is also very western. However, it is recognized that the threats posed by the intellectual property rights systems are as grave as the other problems faced by the Indigenous peoples at present. When in the past, Indigenous peoples' right to land has been eroded through the imposition of exploitative laws

imposed by outsiders; with intellectual property rights, alien laws will also be devised to exploit the Indigenous knowledge and resources of the Indigenous peoples.

The prevailing intellectual property rights system is seen as a new form of colonization and a tactic by the industrialized countries of the North to confuse and to divert the struggle of Indigenous peoples from their rights to land and resources on, above and under it.

The intellectual property rights system and the (mis) appropriation of Indigenous knowledge without the prior knowledge and consent of Indigenous peoples evoke feelings of anger, or being cheated, and of helplessness in knowing nothing about intellectual property rights and Indigenous knowledge piracy. This is akin to robbing Indigenous peoples of their resources and knowledge through monopoly rights.

Indigenous peoples are not benefiting from the intellectual property rights system. Indigenous knowledge and resources are being eroded, exploited and/or appropriated by outsiders in the likes of transnational corporations (TNCs), institution, researchers and scientists who are after the profits and benefits gained through monopoly control.

The technological method of piracy is too sophisticated for Indigenous peoples to understand, especially when Indigenous communities are unaware of how the system operates and who are behind it.

For Indigenous peoples, life is a common property which cannot be owned, commercialized and monopolized by individuals. Based on this world view, Indigenous peoples find it difficult to relate intellectual property rights issues to their daily lives. Accordingly, the patenting of any life forms and processes is unacceptable to Indigenous peoples.

The intellectual property rights system is in favour of the industrialized countries of the North who have the resources to claim patent and copyright, resulting in the continuous exploitation and appropriation of genetic resources, Indigenous knowledge and culture of the Indigenous peoples for commercial purposes. The intellectual property rights system totally ignores the contribution of Indigenous peoples and peoples of the South in the conservation and protection of genetic resources through millennia.

The intellectual property rights system totally ignores the close inter-relationship between Indigenous peoples, their knowledge, genetic resources and their environment. The proponents of intellectual property rights are only concerned with the benefits that they will gain from the commercial exploitation of these resources.

The Indigenous peoples of Asia strongly condemn the patenting and commercialization of their cell lines or body parts, as being promoted by the scientist and institutions behind the Human Genome Diversity Project (HGDP).

Plan of Actions as Proposed by the Asian Consultation Workshop

The Consultation recognises that the struggle for self-determination is closely connected to retaining rights over ancestral lands and the entire way of life of the Indigenous peoples. The threats that Indigenous peoples have been facing in this regard are very clear, and they have their own plans of action to address these concerns.

The Consultation also recognises that Indigenous knowledge is closely linked to land which can be taken away from Indigenous peoples. Thus, the need to protect and conserve Indigenous knowledge is just as important as the struggle for self-determination.

In a broad sense, therefore the Indigenous peoples of Asia have one common aspiration - to reclaim their right to self-determination and to their Indigenous knowledge. The question of sovereignty is traditionally understood as land but now it also encompasses Indigenous knowledge since the two are very closely linked.

Towards this end, the Consultation has suggested the following course of actions and strategies;

A. Plan of Actions at the Local Level

Noting the different experiences, prevailing realities in the political environment and varied situations that the Indigenous peoples of Asia currently find themselves in, the methods for achieving their aspirations may again differ, or be in different stages of expression at the local or national level. In such circumstances, it was generally felt that the general plan of action be disseminated to Indigenous peoples organizations for them to implement them in their own ways, based on their specific realities.

However, it became clear during the Consultation that there is a need to emphasize the following aspects in the activities related to Indigenous knowledge at the local level:

Strengthen the Indigenous peoples' organizations and communities to be able to collectively address local concerns related to Indigenous knowledge and intellectual property rights.

Continue the Indigenous peoples' struggle for self-determination since this can be a strong force against the threats posed by intellectual property rights systems on Indigenous knowledge and genetic resources.

Raise the awareness of Indigenous peoples' organizations and communities on the global trends and developments in intellectual property rights systems, especially as they apply to life forms and Indigenous knowledge.

B. General Plan of Action

Immediate/Short-Term Strategies

Issue a statement to the European Parliament calling for the rejection of the patenting of life forms in the European Union, in time for its voting on the issue on 1 March 1995.

Disseminate information pertaining to the Asian Consultation Workshop to the local mass media for publication and wider mass awareness.

Organize follow-up workshops at the community level to raise the awareness of local farmers and Indigenous peoples on the prevailing intellectual property systems.

Organize local or national conferences on customary laws to explore Indigenous mechanisms and systems of effectively protecting and conserving Indigenous knowledge.

Plan regional meetings for follow-up discussion and exchange of information on Indigenous self-determination and related issues such as Indigenous knowledge, intellectual property rights systems and the patenting of life forms. At the outset, the Alliance of Taiwan Aborigines (ATA) has expressed its plan to initiate a regional meeting on these issues in Taiwan in 1996. The ATA will look for funding sources and will welcome financial support from the United Nations Development Programme (UNDP).

Medium-Term Strategies

Intensify advocacy and campaign works against intellectual property systems and the Human Genome Diversity Project (HGDP) at national and international levels.

Provide updates on the HGDP and patenting, to be disseminated to Indigenous peoples, Indigenous organisations and non-governmental organisations sympathetic to the cause of Indigenous peoples. The Rural Advancement Foundation International (RAFI) has been requested to collaborate with local and Asia-based regional organisations to produce and disseminate materials in popular forms, written in the local languages and based on the local context. The Southeast Asia Regional Institute for Community Education (SEARICE) will also distribute their monographs on the impact of global developments on the Indigenous peoples, and will assist in information dissemination.

Develop capacity of the Asian Indigenous Peoples Pact (AIPP), a forum for Indigenous peoples movements in Asia. In this respect, national Indigenous peoples organizations will contribute human and material resources, as well as identify members for short to medium-term internship programmes.

AIPP to coordinate and monitor activities and developments related to the plans formulated for the region.

Build alliances and networks with groups within Asia and outside, such as the AIPP, RAFI, SEARICE and the Indigenous Peoples' Biodiversity Network (IPBN).

Indigenous peoples to design their own educational curriculum that will help promote their culture and Indigenous knowledge. Such educational curriculum will instil a deep awareness and pride among Indigenous peoples, especially children, on the importance of their Indigenous knowledge, culture and resources.

CONSULTATION ON INDIGENOUS PEOPLES KNOWLEDGE AND INTELLECTUAL PROPERTY RIGHTS

FINAL STATEMENT SUVA, APRIL 1995

PREAMBLE

We the participants at the regional consultation on indigenous peoples knowledge and intellectual property rights held in April 1995 in Suva, Fiji, from independent countries and from non-autonomous colonised territories hereby:

Recognise that the Pacific region holds a significant proportion of the world's indigenous cultures, languages and biological diversity,

Support the initiatives of the Mataatua Declaration (1992), the Kari Oca Declaration (1992), Julayinbul Statement (1993) and the South American and Asian consultation meetings,

Declare the right of Indigenous peoples of the Pacific to self-governance and independence and ownership of our lands, territories and resources as the basis for the preservation of Indigenous peoples' knowledge,

Recognise that Indigenous peoples of the Pacific exist as unique and distinct peoples irrespective of their political status,

Acknowledge that the most effective means to fulfil our responsibilities to our descendants is through the customary transmission and enhancement of our knowledge,

Reaffirms that imperialism is perpetuated through intellectual property rights systems, science and modern technology to control and exploit the lands, territories and resources of Indigenous peoples,

Declare Indigenous peoples are willing to share our knowledge with humanity provided we determine when, where and how it is used. At present the international system does not recognise or respect our past, present and potential contributions,

Assert our inherent right to define who we are. We do not approve of any other definition,

Condemn attempts to undervalue Indigenous peoples' traditional science and knowledge,

Condemn those who use our biological diversity for commercial and other purposes without our full knowledge and consent.

Propose and seek support for the following plan of action:

We:

1. Initiate the establishment of a treaty declaring the Pacific region to be a lifeforms patent-free zone.

1.1 Include in the treaty protocols governing bioprospecting, human genetic research, *'in-situ'* conservation by Indigenous peoples, *'ex-situ'* collections and relevant international instruments.

1.2 Issue a statement announcing the treaty and seeking endorsement by the South Pacific forum and other appropriate regional and international fora.

1.3 Urge Pacific governments to sign and implement the treaty.

1.4 Implement an educational awareness strategy about the treaty's objectives.

2. Call for a moratorium on bioprospecting in the Pacific and urge Indigenous peoples not to co-operate in bioprospecting activities until appropriate protection mechanisms are in place.

2.1 Bioprospecting as a term needs to be clearly defined to exclude Indigenous peoples' customary harvesting practices.

2.2 Assert that *'in-situ'* conservation by Indigenous peoples is the best method to conserve and protect biological diversity and Indigenous knowledge, and encourage its implementation by Indigenous communities and all relevant bodies.

2.3 Encourage Indigenous peoples to maintain and expand our knowledge of local biological resources.

3. Commit ourselves to raising public awareness of the dangers of expropriation of Indigenous knowledge and resources.

3.1 Encourage chiefs, elders and community leaders to play a leadership role in the protection of Indigenous peoples' knowledge and resources.

4. Recognise the urgent need to identify the extent of expropriation that has already occurred and is continuing in the Pacific.

4.1 Seek repatriation of Indigenous peoples' resources already held in external collections, and seek compensation and royalties from commercial developments resulting from these resources.

5. Urge Pacific governments who have not signed the general agreement on tariffs and trade (GATT) to refuse to do so, and encourage those governments who have already signed to protest against any provisions which facilitate the expropriation of Indigenous peoples' knowledge and resources and the patenting of life forms.

5.1 Incorporate the concerns of Indigenous peoples to protect their knowledge and resources into legislation by including "prior informed consent or no informed consent" (PICNIC) procedures and excluding the patenting of life forms.

6. Encourage the South Pacific Forum to amend its rules of procedure to enable accreditation of Indigenous peoples and NGOs as observers to future Forum officials' meetings.

7. Strengthen Indigenous networks. Encourage the United Nations Development Programme (UNDP) and regional donors to continue to support discussions on Indigenous peoples' knowledge and intellectual property rights.

8. Strengthen the capacities of Indigenous peoples to maintain their oral traditions, and encourage initiatives by Indigenous peoples to record their knowledge in a permanent form according to their customary access procedures.

9. Urge universities, churches, government, non-governmental organizations, and other institutions to reconsider their roles in the expropriation of Indigenous peoples' knowledge and resources and to assist in their return to their rightful owners.

10. Call on the governments and corporate bodies responsible for the destruction of Pacific biodiversity to stop their destructive practices and to compensate the affected communities and rehabilitate the affected environment.

10.1 Call on France to stop definitively its nuclear testing in the Pacific and repair the damaged biodiversity.

GLOSSARY

IN-SITU "on-site". *In-situ* conservation is the conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings and, in the case of domesticated or cultivated species, in the surroundings where they have developed their distinctive properties.

EX-SITU "Off-Site". This refers, for example, to the conservation of genetic resources outside their natural habitats, eg gene banks and botanical gardens.

APPENDIX 3

Explanatory notes to the definitions of Cultural Heritage, Cultural Property and Cultural Resources

Cultural Heritage

In general terms, the "cultural heritage of a people" refers to the totality of cultural practices and expressions belonging, as of birthright, to a particular group of people who recognise themselves as culturally distinct, and over which they hold primary rights and responsibilities as inherent sovereign rights. Culture is, by nature,

(i) continuously evolving, and

(ii) comprised of both intangible and tangible aspects

With regards to Indigenous cultural heritage intangible (or non-material) aspects include the corporate knowledge of each community as expressed through its

- social
- religious

- political
- ethical
- educational
- legal
- artistic
- ceremonial
- linguistic
- oral and
- intellectual practices

and may generally be regarded as the community's intellectual property. The tangible (or material) aspects include

- cultural objects
- ancestral remains
- monuments
- land, waterways, and sites of significance
- totemic species (flora and fauna), and
- material records and expressions (written, audio, electronic and visual) of the intangible aspects.

Cultural Property

The term cultural property refers to those components or aspects (both intellectual and material) of a people's cultural heritage which they normally consider as belonging to the group either corporately or to its members individually. Items of cultural property remain the property of the group unless transacted to others in accordance with its laws. With due regard to the circumstances of dispossession, Indigenous affairs administration, and legislation in force over the greater period of the Anglo-Indigenous history of this land as not giving rise to transactions in accordance with Indigenous laws, Aborigines and Torres Strait Islanders regard any items of their cultural heritage which were removed from their possession under such circumstances as their cultural property, and to always have been as of sovereign right. They also wish to have ownership of their cultural property fully restored under Australian federal and state law to their communities of origin.

The only items of Indigenous cultural heritage for which exception as cultural property is allowed are those purposely made for sale and which are commonly referred to as art and craftworks.

Cultural Resources

There remains a component of Indigenous cultural heritage which is the product of interaction between Indigenous and non-Indigenous people (most notably explorers, researchers, missionaries, and administrators). In this sense it is a shared heritage and neither party should enjoy exclusive rights to it. This component is primarily documentary in nature involving written, visual, and oral accounts and records of our cultures and interactions between Indigenous and non-Indigenous people. Much of this component, which includes such things as genealogies, photographs, language recordings, written accounts of cultural practices, court removal orders, missionary records, and so on, is invaluable to Indigenous communities. However, access is effectively denied because of disempowerment, distance, the failure of holding institutions to inform communities of the existence of such records, and official restrictions (especially with regard to departmental records). Indigenous communities believe that they must have more equitable access. One simple and cost effective expedient is to copy this information and retain copies in community-based institutions, such as cultural centres and community keeping places.

It should be noted, however, that there are some items which are the product of joint Indigenous and non-Indigenous interactions over which Indigenous communities claim ownership as their exclusive cultural property. These include any records which detail aspects of their cultures which are secret and sacred. Disclosure of such information is in breach of their laws and can do irreparable damage to the fabric of their societies. Likewise, information of a personal nature and such as might be contained in genealogies, is deemed to be the property of those concerned.

Summary Distinction: Cultural Property and Cultural Resources

Cultural property refers to those items or collections of Indigenous cultural heritage over which Indigenous communities assert ownership and wish to have this ownership recognised in Australian law.

Cultural resources refer to those components of Indigenous cultural heritage which are a product of interaction between Indigenous and non-Indigenous peoples and over which equitable rights of access, enjoyment and control are required.