

CHAPTER FOUR

IMPLEMENTING PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISION MAKING AND NATURAL RESOURCES MANAGEMENT: THE PARTICIPATION OF INDIGENOUS PEOPLES IN THE CONSERVATION AND MANAGEMENT OF PROTECTED AREAS

4.1 Introduction

The ensuing chapter will provide the contextual examination of the practical application of the right to public participation in environmental decision making and natural resources management by focusing on the participation of indigenous peoples in the conservation and management of protected areas. The decision to focus on the participation of indigenous peoples in the conservation of protected areas is because, as already indicated, the greatest bulk of the land belonging to indigenous people is occupied by protected areas and so it is fitting the case study should focus on participation in an area which has continuing and ongoing relevance to indigenous peoples in terms of the evolution and development of the rights of indigenous peoples. The discussion in this chapter will set the context for the case studies in chapters five and six on the participation of indigenous peoples in the conservation and management of protected areas in Australia and Uganda.

This chapter commences with an exposition of the concept of indigenous peoples in its varying complexities and intricacies. It examines the history of

protected areas which will include a discussion of the classic and new paradigms for protected area management and the rationale underlying the emergence of the new paradigms. This will be followed by a detailed account of the international framework for the participation of indigenous peoples in the conservation and management of protected areas.

4.2 The concept of indigenous peoples

The dilemma of coming up with an appropriate concept to encapsulate the definition of indigenous peoples was aptly captured by Marsden when he asked:²⁸³

“Who can we really identify as indigenous peoples? Are we dealing only with those people who occupy marginal areas - a very small proportion of the human population? Or do we include groups like the Mennonites in the US? How do we deal with the many others who claim rights to separate identity by virtue of their continuous and original occupancy of particular tracts of land – the Bretons, Armenians, the Kurds, the Palestinians? Where can calls for separate identity end? Indigenous begins to refer to an attitude of mind and assumes a struggle for rights somehow abrogated or ignored by a colonising power. It may also refer to those types of organisations that emphasise communal use of resources,

²⁸³ Marsden D, *Indigenous Management and the Management of Indigenous Knowledge* in S.Wright (ed), *Anthropology of Organization* (1994) 43.

untainted with the selfish individualism associated with the expansion of private property.”

The Convention (No.169) Concerning Indigenous and Tribal People in Independent Countries attempts to offer a solution to the dilemma of a definition of indigenous by describing the kind of people it applies to. It provides in Article 1 that the Convention shall apply to:

- Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations.
- Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

The above provision, as given in Article 1 of the Convention, is the closest description of indigenous people that can be found to date.

Until quite recently, indigenous peoples were usually seen by colonisers as pre-historic remnants of passing ways of life, people without history, primitive

hunter gatherers or tribal horticulturalists, destined to become extinct to make way for *civilization* and *progress*. Such people, it was further assumed, did not use their land or resources productively to its full economic or technological advantage. They were really not part of the modern scientific world and were thus considered to be not fully human, dispensable with few if any rights. Consequently, invasion and dispossession became the lot for indigenous peoples around the world as they were displaced from their lands and resources to open up the country for farms, pastures, mines, logging, cities, military bases, highways, airports, national parks and nuclear testing grounds. Conventional wisdom usually assumed that such people needed to be developed, modernised and absorbed into the nation state in one way or another.²⁸⁴

However, in spite of tortured historic conceptualisation of indigenous peoples, and the associated negative stereotyping, it is now generally agreed that many local or resident people and communities are in fact indigenous peoples or first peoples. Such people were the original inhabitants of their lands before they were colonised by foreigners. Known also as *fourth world* or *original nations*, there are approximately 300 million indigenous peoples living in more than 70 countries around the world. Indigenous peoples constitute some 4 percent of global population and live in diverse environments ranging from arctic and sub arctic tundras and forests in northern Europe, Asia and Canada; to the deserts

²⁸⁴ Brian Furze, Terry De Lacy and Jim Birkhead, *Culture, Conservation and Biodiversity: The social dimensions of linking local level development and conservation through protected areas* (1996) 129.

and steppes of Africa, South America and Australia; to the Pacific Islands; and to Asian and South American forests.²⁸⁵

It is estimated that indigenous peoples occupy as much as 19 percent of the world's surface and, as such, are stewards of a significant portion of the earth's fragile ecosystems. Their living conditions vary as well, from isolated villages and camps in remote environments; to official government settlements, townships and homelands, to urban and sub-urban enclaves in many countries; and to dispersed housing integrated in their respective dominant communities.

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Cultural identity is the hallmark of indigenous peoples. Julian Burger estimates that there are some 5,000 distinct indigenous peoples in the world that can be distinguished by linguistic and cultural differences, and by geographical separation.²⁸⁷ Burger explains that indigenous peoples have a strong sense of their own identity as unique peoples within their own lands, language and cultures. They claim the right to define what is meant by indigenous and to be recognised as such by others.²⁸⁸

These indigenous communities have one thing in common – their present close dependence on local ecosystems for their survival. They also share a common impact from a dominant culture characterised by a high level of national consumption with consequent overexploitation of indigenous peoples' ecosystems. The establishment of protected areas in parts of the world has

²⁸⁵ Ibid.

²⁸⁶ Ibid, 126.

²⁸⁷ Burger J, *The Gaia atlas of first people – a future for the indigenous world* (1990) 180.

²⁸⁸ Ibid 16-17.

often resulted in indigenous peoples being excluded from their local ecosystems and the resources they need for development and even survival.²⁸⁹

In relation to the difficulties associated with an appropriate definition of indigenous peoples, it is important to examine the African conceptualisation of the concept. Smyth reporting on the *Vth IUCN World Congress on National Parks and Protected Areas* (in Caracas in 1992) noted the discussion, which arose as to whether the term indigenous peoples had the same meaning throughout the world. He reported that the delegates from the African countries expressed the view that the term had only meaning where a colonial power had invaded and subjugated the native peoples as is the case in Australia, Latin America, North America and parts of Asia. The important difference between the situations mentioned above, according to many African politicians, is that the white colonial forces withdrew from Africa. Accordingly, they continue to argue, all the people in Africa are indigenous peoples and therefore, the concept might not be particularly helpful in the African context.²⁹⁰

The African position is significant because it raises some of the most complex issues associated with defining indigenous peoples. This is because, as a sociological category, it is subject to various definitions. As a legal concept, it is only beginning to find its form. When it comes to implementation, the concept stands out as particularly difficult to handle for bureaucracies. The only legally binding instrument on indigenous peoples is found in the *ILO Convention 169*, which so far has not been ratified by any African country.

²⁸⁹ Brian Furze, Terry De Lacy and Jim Bickhead above n 284, 126.

²⁹⁰ Ibid 127.

When the *Declaration on the Rights of Indigenous Peoples* was passed by the UN Human Rights Council on the 29th June, 2006, only four of the ten African countries that sit on the Council voted in favor of passing the Declaration.²⁹¹

The legal basis for claiming indigenous rights is therefore still particularly challenging in Africa. There is, therefore, the need to find a balance between the general ideals of equal rights and equal treatment and the special needs of indigenous peoples.

The problems associated with the African conceptualisation of indigenous peoples were noted with concern at the first conference on indigenous peoples in Africa held in 1992.²⁹²

“The concept of indigenous peoples, as applied to the African setting is a complicated and much debated one. But this is mostly so from the perspective of the decision makers and those dealing with international human rights issues, and less so when seen by those themselves who claim to be indigenous....”

The conference participants went on to further note that *indigenous identity was an experienced social reality, whether consciously acknowledged and made part of public and political discourse or not.*²⁹³

In spite of the differences in the conceptualisation of indigenous peoples between Africa and the rest of the world, there is general consensus against a

²⁹¹ Cameroon, Mauritius, South Africa and Zambia voted in favour of the Declaration while Ghana, Morocco, Nigeria, Senegal and Tunisia were not in favour.

²⁹² The conference was convened by the International Work Group for Indigenous Affairs.

²⁹³ Indigenous Affairs: *International Work Group for Indigenous Affairs* 2/99, 8.

very strict definition of indigenous peoples as it might be used as an excuse by some governments not to recognise indigenous peoples. Moreover, according to the current international debate concerning a definition for indigenous peoples, a concept such as human rights has been used in a number of important declarations without a very precise definition. Indigenous is only a relative term: a group is only indigenous in relation to another encompassing group that defines the dominant structures of the state. The meaning thus depends on the context: the core criteria being: priority in time, perpetuation of cultural distinctiveness and experience of subjugation and marginalisation, together with self-identification as a distinct people.²⁹⁴

4.3 The eclectic history of protected areas

Conventional protected area approaches, dominant over the past 100 to 150 years, have tended to see people and nature as separate entities, often requiring the exclusion of human communities from areas of interest, prohibiting their use of natural resources and seeing their concerns as incompatible with conservation.²⁹⁵ Since most protected areas in the world have people residing within them, or dependent on them for their livelihoods, the conventional exclusionary approaches have engendered profound social costs. This is particularly true when the affected indigenous peoples and local communities were already, even before the protected area intervention, among the most marginalised groups.²⁹⁶

²⁹⁴ Ibid.

²⁹⁵ For a detailed exposition on the history of national parks see generally Michael Jeffery, *Public Lands Reform: A Reluctant Leap into the Abyss*, 16 (1) *Virginia Environmental Law Journal*, (1996) 80.

²⁹⁶ Ibid xvi.

The conceptualisation of protected areas as areas of wilderness exclusively reserved for nature is said to have its origins within urban civilisation myths, which have tended to characterise nature as brutish and evil and yet contradictory as a refuge from the ills of city life. Thus, the tale of Gilgamesh, the world's most ancient epic, recounts the primordial struggle between kingly civilisation and the forests, the source of all evil.²⁹⁷

In ancient Greece, untamed nature was perceived as a domain of the wild, irrational, female forces that contrasted with the rational culture ordered by the males. In this world view, not only was nature a dangerous threat to the city state, but the wilderness beyond was peopled by barbarians, the epitome of whom were the Amazons, long haired, naked female savages who represented the antithesis of Greek civilization. Likewise, Judaeo-Christian teachings of the origin of man tell of how he was given dominion over the beasts of the wild.²⁹⁸

Pioneering Christian fundamentalists brought these same views to the New World where they found them strongly reinforced. Beset from the first by naked long haired "savages"²⁹⁹ who knew nothing about Christ or modesty, their precarious frontier world depended on taming nature as they sought to wrest a living from a hostile wilderness. As one poet wrote in 1662, the forests of the New World were:

²⁹⁷ WWF Statement of principles: *Indigenous People and Conservation*. Gland, World-Wide Fund for Nature International (2003).

²⁹⁸ Ibid.

²⁹⁹ The word, which is cognate with the French "sauvage" and Spanish "salvaje" means literally forest dwellers. It's pejorative notion derives entirely from prejudice against such people.

*A waste and howling wilderness,
Where none inhabited
But hellish fiends and brutish men
That devils worshipped³⁰⁰*

It is this eclectic idea of wilderness that influenced the evolving concept of protected areas. The earliest references to protected areas suggest that game reserves for royal hunts were first recorded in history in Assyria in 700 BC. By 400 BC, royal hunts were established in India under Ashoka. The Moguls reinforced this tradition in India where the idea gained a wider currency among the ruling elite. The Normans introduced the same idea to England in the 11th century and enforced the concept of royal forests with such enthusiasm that by the reign of Henry 11, nearly a quarter of England was classified as a royal hunt area. Local people bitterly objected to the restrictions of their rights that those royal forests imposed. In fact, it is believed that the myth of Robin Hood has its roots in popular resistance by Saxon yeomen to the imposition of Norman rules.³⁰¹

In more recent history, the first person to conceive of the idea of a protected area was the artist George Catlin who ventured into the Wild West in the 1830s to capture through his oil paintings the dignified visages of the plains Indians. Catlin had been horrified to see how the guiltless lives of the Indians were being undermined by disease, fire, water and land grabbing. Musing on what

³⁰⁰ WWF Statement of Principles above n 297.

³⁰¹ Ibid.

he felt would be the inevitable disappearance of the Indian way of life, he wrote:³⁰²

“And in future what a splendid contemplation....when one.....*imagines* them as they might be seen, by some great protective policy of government preserved in their pristine beauty and wilderness, *in a magnificent park*, where the world could see for ages to come, the native Indian in his classic attire, galloping his wild horse, with sinewy bow, and shield and lance, amid the fleeing herd of elks and buffaloes....*A nation’s park*, containing man and beast, in all the wild and freshness of nature’s beauty!”³⁰³

Thirty years later, Yosemite Park, the first such park, was created amidst the disruptions of the American civil war at a time when a devastating series of Indian wars were being waged to subdue Indian autonomy and realise the countries “manifest destiny”.³⁰⁴ The proponent of the Park, Lafayette Burnell, who led the attack on the native Indians professed a ‘take no prisoners’ approach and wanted to *sweep the territory of any scattered bands that might infest it*. In common with the prejudices of the day, he thought of the *redskins*

³⁰² Marcus Colchester, Conservation Policy and Indigenous Peoples of the Commonwealth (A paper presented to the Conference on Indigenous Peoples of the Commonwealth at the Millennium Development Goals, Commonwealth Policy Studies Unit, Institute of Commonwealth Studies, University of London, 28 Russell Square, London, 20-21 March 2003) 5.

³⁰³ Catlin, George, The Manner and Customs of the North American Indians, reprinted as Peter Mathiessen (ed), *North American Indian*, (1989), 1841:vii.

³⁰⁴ Keller and Turok, see below 305, relate that the startling landscapes of Yosemite were substantially an outcome of Native American land use systems

as superstitious, treacherous marauders, *yelling demons* and *savages*. Once the Park was established, it was run by the United States (US) army for the following 52 years before being taken over by the National Parks Service in 1916.³⁰⁵

It is this dominant vision of conquest, combined with wilderness preservation, which defined the first parks to be created in the US. Through successive legislation, this exclusionary model of conservation was imposed throughout the US. As stated in the 1964 *United States Wilderness Act*, the expressed aim of creating national parks was to preserve wilderness intact for recreation. Under the Act, a wilderness was defined as *an area where the earth and its community is untrammelled (sic) by man, where man is himself a visitor who does not remain*. In the following century, the US model of nature conservation was exported worldwide. In Africa, the practice of mass exclusion of indigenous peoples from protected areas intensified in the 1960s³⁰⁶ and is reflected in the 1968 *African Convention on Nature and Natural Resources*. The 1968 Convention encouraged the creation of protected areas, which excluded local people but tourists and their activities like sport fishing were permitted.³⁰⁷

4.4 The classic model for protected area management

Accordingly, this model of protected area management commonly referred to as the classic view basically involved setting aside an area for scenic protection

³⁰⁵ Keller, Robert, and Michael Turok, *American Indians and National Parks*. University of Arizona, Press, Tucson (1998) 20-22.

³⁰⁶ Marcus Colchester above n 302, 7.

³⁰⁷ Adrian Phillips, "The New Paradigm for Protected Areas" in Hanna Jaireth and Dermont Smyth (Eds.) *Innovative Governance: Indigenous people, Local Communities and Protected Areas* (2003) 3.

and spectacular wildlife with a major emphasis on how things look rather than how natural systems functioned. Also under the classic model, the protected area was managed mainly for the tourists and visitors whose interests normally prevailed over those of the local people. It placed a high value on wilderness in areas believed to be free of human influence and protection of existing and natural areas and land restoration to retrieve lost values.³⁰⁸

Management of protected areas under the classic model meant that they were run by a central government, or at least set up at the instigation of central government, or run by technocrats with little regard to political considerations or international obligations. Even though the financial costs for managing protected areas were met by the general public, little or no consideration was given to the interests of the public generally or indigenous peoples in particular.

4.5 The new paradigm for protected area management

There has been a growing change in the classic view of protected area management. This change, now commonly referred to as the 'new paradigm' is more inclusive and outward looking. It contrasts in almost every respect with the classic model for the management of protected areas. It includes social, economic, conservation, recreation, restoration and rehabilitation objectives for protected area management. The new paradigm involves creating protected areas often for scientific, economic and cultural reasons with a more sophisticated rationale. Under this paradigm, protected areas are managed to ensure that local people benefit from, and are not adversely affected by,

³⁰⁸ Ibid.

tourism. It recognises that the so-called wilderness areas are often culturally important areas. Therefore, management often involves local people who in return view the protected area as a community asset as well as a national heritage item.³⁰⁹

Adrian Phillips, the chief proponent of this new paradigm, notes that none of the ideas in the new paradigm are particularly novel. He notes that what is particularly new is that the old ideas have been “turned on their heads” and the result is a revolution in approach to the management of protected areas.³¹⁰

It is clear from the classic model and modern paradigm that protected areas are created for a wide variety of purposes, which include the following:

- preservation of species variety
- preservation of genetic diversity
- preservation of genetic material for human industry
- preservation of ecosystem diversity
- preservation of ecosystem diversity and values, including areas supporting human activity such as watersheds
- economic reasons such as tourism
- research purposes
- preservation of sites of cultural significance

³⁰⁹ Ibid 7.

³¹⁰ Ibid 8.

- preservation of aesthetics.³¹¹

Protected areas represent the heart of the world's political and economic commitment to conserve biodiversity and other natural resources. They are, therefore, a major component of official conservation policy and practice. On the basis of national returns, the *United Nations Environment Programme's World Conservation Monitoring Centre* (UNEP-WCMC) has recently calculated that there are more than 102,000 protected areas throughout the world. Taken together, they cover more than 11.5% of the terrestrial surface of the earth.³¹²

The United Nations International Union for the Conservation of Nature (IUCN) defines a protected area as "an area of land and/or sea especially dedicated to the protection and maintenance of biological diversity; and associated cultural resources, and managed through legal or other effective means". The Convention on Biological Diversity defines a protected area as "a geographically defined area, which is designated, or regulated and managed to achieve specific conservation objectives."

It is important to note that, while the two definitions as given are not in conflict, the IUCN definition is broader covering not only natural resources but also the economic and cultural aspects of conservation.³¹³ The IUCN definition

³¹¹ Michael I. Jeffery, QC, An International Legal Regime for Protected Areas in John Scanlon and Francois Burhenne-Guilmin (Eds.) *International Environmental Governance: An international Regime for Protected Areas* (2004) 12-13.

³¹² It is important to note that protected areas cover only 3.4% of the entire surface, since there are relatively few marine protected areas.

³¹³ For a detailed discussion on the bearing on the differences in definition this has on conservation and protected areas see Grazia Borrini below n 273 chapters 2 and 3.

reflects the new shift in the protected area paradigm, which now includes the sustainable use of natural resources, the preservation of ecosystems and integration with broader social development processes, along with the core role of biodiversity conservation. More attention is now given to respecting cultural values as essential associates of biodiversity and to the need to involve indigenous peoples in management decisions affecting them.³¹⁴

Three main lines of thinking have converged to produce this new understanding of protected areas.³¹⁵

The first has been a broadening of perspectives from the specific protected territory, area or resources to the surrounding context. This line of thinking lays emphasis on:

- Networks of protected areas, and connectivity within the networks.³¹⁶
- The integration of protected areas in the broader landscape/seascape, and within the regional and national economy and policy.³¹⁷
- Protected areas as one of the several components necessary for an effective regional or national conservation strategy.³¹⁸

³¹⁴ Grazia Borrini – Feyerabend, Ashis Kothari and Gonzalo Oviedo, *Indigenous and Local Communities and Protected areas: Towards Equity and Enhanced Conservation*, Best Practice Protected Area Guidelines Series No.11 (2004) 1.

³¹⁵ Reproduced from Grazi Borrini et al above n 314, 2 - 3.

³¹⁶ See Generally Davey; 1998, Bennett, 1998; Boyd, 2004.

³¹⁷ See Forman and Godron, 1986, Lucas, 1992; Bennett, 1998; Baresford and Phillips, 2000; CBD Decision V/6 Ecosystem Approach, Nairobi, 2000; Ramsar Convention Secretariat, 2004.

The second line of thinking has emerged from advances in ecological sciences beyond the concept of equilibrium conditions for ecosystems. It stresses that:

- Ecosystems are open, always subjected to a variety of influences from their surroundings and in a state of flux.³¹⁹
- Disturbances such as grazing from herbivores or periodic fires are extremely important in conservation efforts, and human disturbances that occur within ecological limits can be part of the dynamic pattern of conservation.³²⁰
- Ecosystem management is best understood as an adaptive process, strongly dependent on local biological history and context.³²¹

Finally, a third line of thinking derived from lessons in field practice, recommends:

- Work with, rather than against, indigenous and local communities, NGOs and the private sector, provided that

³¹⁸ IUCN, UNEP and WWF, 1991; CBD, 1992; UNESCO, 1995.

³¹⁹ Whittaker and Levin, 1977; Fiedler and Jain, 1992; In addition, the dynamics of natural communities have multiple persistence requiring multiple habitats. See Generally Pickett and Thompson, 1978; Bormann and Lickens, 1979; Lucken, 1990.

³²⁰ Mc Naughton, 1989; Fiedler and Jain, 1992; ICSU, 2002; Gunderson and Holling, 2002; MEA, 2003.

³²¹ Holling, 1978; www.for.gov.bc.ca/hfp/amhome/introgd/toc.htm; Gunderson and Pritchard, 2002.

all such actors are committed to basic conservation goals.³²²

- Develop management partnerships among social actors benefiting from their complementary capacities and advantages.³²³
- Perceive the conservation of biodiversity as inseparable from its sustainable use and their fair sharing of the benefits arising from utilisation of genetic resources, as reflected in the three main objectives of the CBD.³²⁴

4.6 The rationale underlying the new paradigm for protected area management

4.6.1 The quest for social equity

One of the key elements underlying the new paradigm on protected area conservation is the quest for social equity in protected area conservation.³²⁵

The drivers for social equity are to be found in widely shared ethical and moral concerns about the plight of many communities including some of the world's poorest and marginalised people. This is especially so since many communities, especially those comprising indigenous peoples, have been expelled from newly created areas and involuntarily settled with sometimes

³²² West and Brechin, 1991; CBD Article 8(j), 1992; and subsequent decisions on implementation; Resolution 19.23 on the importance of community based approaches. IUCN General Assembly, 1994; Resolution 1.42 on collaborative management for conservation. World Conservation Congress, 1996; Kothari et.al 1996; Recommendations no. 5.24; 5.26 and 5.27 of the 5th World Park Congress, 2003; CBD, 20004.

³²³ McNeely, 1995; IUCN Resolution 1.4(Montreal, 1996); IUCN Resolution 2.15 (Amman, 2000).

³²⁴ CBD Article 1.

³²⁵ For a detailed discussion on this new paradigm in protected area conservation, see Phillips, Adrian "Turning Ideas on their Head – The New Paradigm for Protected areas", above n 307; See also 2003 United Nations List of Protected Areas, IUCN and UNEP – WCMC (2003).

appalling social, cultural and economic consequences. Some traditionally mobile communities have been forced against their wishes to abandon their nomadic existence and adopt a sedentary lifestyle with disastrous consequences. Communities around the world have been disrupted and impoverished by being forced to abandon the use of resources upon which their livelihoods depend.³²⁶ The case study of the Batwa in Uganda has amply demonstrated how denying indigenous communities the use of resources upon which their livelihoods depend can lead to their decimation.

Equity in protected area conservation emphasises the need for conservation of protected areas to be undertaken without harming human society and, wherever possible, to provide for benefits to the communities and people directly concerned. More broadly, the concern for social equity in protected area conservation covers a range of issues, from human rights to sustainable use of natural resources, from participation of civil society to gender fairness.³²⁷ IUCN ably articulated the equity issues in protected area conservation in its 1991 *Caring for the Earth*, which included:

- citizen involvement in establishing and reviewing national protected area policy
- the effective participation of local communities in the design, management and operation of the individual protected areas

³²⁶ Grazi Borrini et al above n 314, 4.

³²⁷ Ibid, 5 - 6.

- a sustainable economic return from protected areas, making sure that much of this goes to manage the area and support the local communities
- that local communities, especially communities of indigenous peoples, and private organisations should establish and manage protected areas within the national system
- that the protected areas do not become oases, by providing for their integration within policies for the management of surrounding lands and waters.³²⁸

Along with the emergence of equity concerns in conservation, there has been a growing recognition of the unique skills, resources and institutions that indigenous peoples can bring to protected area management. Management practices that engage communities are seen to enhance the long-term effectiveness of protected area conservation.³²⁹

4.6.2 The rights based approach to protected area management

The equity concerns raised above fall squarely within the rights based approach to protected area management. The rights based approach to protected area management involves addressing the current, cumulative and future impacts of

³²⁸ *Caring for the Earth: A Strategy for Sustainable Living*, published by IUCN, WWF AND UNEP, 1991. *Caring for the Earth* calls for participation, raises a number of guiding principles and underlines the importance of community driven processes. Following the UN Conference on the Environment and Development (1992), IUCN General Assembly Recommendation 19.2 urged all states and local authorities to ensure fully the public participation by local people and indigenous peoples in decisions concerning the planning, development and management of national parks and other protected areas, and to provide that their interests are treated equitably and are full respected by all authorities and agencies with responsibility in or impacting on national parks and protected areas.

³²⁹ Grazia Borrini et al, above n 314.

protected areas on the broadest set of rights, including self-determination and the right to collective ownership of land and natural resources.³³⁰ The fact that indigenous peoples are advocating collective rather than individual rights is of great importance for conservation. When applied to land, collective rights are the basis for maintaining the integrity of the territory and avoiding ecological fragmentation, which is a key requirement for meaningful biodiversity conservation. Also, collective rights provide for a strong building and functioning of community institutions, which are indispensable for sound long term land and resource management. Lastly, they strengthen the role of customary law as related to land management, and of traditional knowledge applied to broader territorial and landscape units.³³¹

A rights based perspective is people centred, participatory and compatible with environmental objectives. It involves not just economic growth, but equitable distribution, enhancement of people's capabilities and widening their choices. It gives priority to poverty eradication, self-reliance and self-determination of people and governments and protection of the rights of indigenous peoples.

A human rights perspective is important because it provides a conceptual framework for the process of protected area management, which is normatively based on international human rights standards operationally directed at promoting and protecting human rights. Additionally, it is important because it focuses on raising levels of accountability in protected area management by identifying claim holders and their entitlements and corresponding duty holders

³³⁰ Ibid.

³³¹ Ibid.

and their obligations. This allows for the development of adequate laws, policies, institutions, administrative procedures and practices and mechanisms of redress and accountability that can deliver on the entitlements response to denial and violations and thus ensure accountability.

Taking a rights based approach in protected area management also gives preference to strategies for empowerment. The goal is to give people the power, capacities, capabilities and access needed to change their own lives, improve their own communities and influence their own destinies. Finally, protected area management from a human rights perspective also requires a high degree of participation, including from communities, civil society, minorities, indigenous peoples, women and others.

4.6.3 The rise in environmental ethics

In addition to a rights based approach, the equity concerns of protected area management also fall within the emerging concept of environmental ethics, which seeks to create a balance between the best naturalistic values and good humanistic ones for respecting ecosystems. Accordingly, viewing protected area management from an environmental ethic perspective serves the purpose of extending the emphasis of protected area management from its traditional understanding to take into account ethical issues relating to a wide range of economic, social and cultural importance in order to achieve the ethical values of equity, justice, temperance and wisdom in the choices we make concerning protected area management.³³²

³³² See Patrick Curry: *On Ecological Ethics: A critical Introduction at http://eco.gn.apc.org/pubs/ethics_curry.html* last visited on 26/10/2004.

4.6.4 The intensification in governance norms

Tied in with the social equity concerns of protected area management is the wider understanding of governance. Governance of protected areas has to be considered within the contemporary discourse on governance generally and from the debate on good governance that is being robustly pursued on the international stage. The international dimensions of the discourse on governance are validated by the outcomes of the *World Summit on Sustainable Development*, which in its Johannesburg Plan of Implementation noted that “Good governance within each country and at the international level is essential for sustainable development”.³³³

Good governance basically refers to the means by which society defines goals and priorities and advances cooperation, be it globally or locally. Governance has also been described as fundamentally about power, relationships and accountability, who has influence, who decides and how decision makers are held accountable. Governance covers the rules of decision making including who gets access to information and participates in the decision making process, as well as the decisions themselves.³³⁴

Governance for protected areas is a relatively new concept³³⁵ and its prominence first rose at the World Parks Congress. Governance arrangements are expressed through legal and policy frameworks, strategies and action plans.

³³³ Scanlon John and Burhenne-Guilmin Françoise, (Eds.) Above n 311, 1.

³³⁴ See “Governance Principles for Protected Areas in the 21st Century, Institute on Governance in Collaboration with Parks Canada” (prepared for the Vth IUCN World Parks Congress).

³³⁵ See Graham et.al., 2003; Abrams et.al., 2003; Jaireth and Smyth, 2003; Borrini-Feyerabend, 2003, 2004; CBD, 2004.

They include the organisational arrangements for following up on policies and plans and monitoring performance. Governance is not an end in itself but a means to an end.³³⁶ It is a combination of explicit and implicit policies and institutions that affect public life. In a protected area context, governance covers a broad range of issues – from policy to practice, from behaviour to meaning, from investments to impacts. It is crucially related to the achievement of protected area objectives, determines the sharing of relevant costs and benefits, is the key to preventing or solving social conflicts, and affects the generation and sustenance of public support.³³⁷

This understanding of governance is relevant to the pursuit of equity in protected area conservation and management because modernisation processes occurring throughout the world have undermined indigenous peoples and devalued the roles they play in environmental decision making and natural resources management. Accordingly, the question has arisen as to whether the type of governance in place for protected areas is fair and equitable in light of the historical conditions, customary and legal rights and impact on the relevant indigenous communities.³³⁸ As demonstrated by the case studies in Australia and Uganda, many of the conflicts and the plight suffered by indigenous peoples could have been avoided and replaced by constructive cooperation if indigenous peoples were recognised as rightful managers or co-managers of the natural resources on which they depend for their livelihoods and cultural identity. Accordingly, effective participation of indigenous communities in the

³³⁶ Scanlon John and Burhenne-Guilmin Françoise, (Eds.) Above n 311, 2.

³³⁷ Grazia Borrini et.al above n 314, 17.

³³⁸ Ibid, 21.

governance of the land and resources to be conserved is vital for protected area conservation success.³³⁹

In recognition of the important role governance plays in enhancing the participation of indigenous peoples in the conservation and management of protected areas, the Vth World Parks Congress developed four main protected area governance types to streamline and enhance public participation in environmental decision making and natural resources management. These are:

- i) *Government managed protected areas*: These are the most common type of protected areas which normally feature a government body such a ministry or park agency which holds authority, responsibility and accountability for managing the protected area, determines its conservation objectives and often also owns the protected area's land and related resources. It is important to note though that, following the wave of devolution of environmental decision making and natural resources management in many countries, sub-national and municipal government bodies have also become actively involved in declaring and managing protected areas.
- ii) *Co-managed protected areas*: These types of protected areas have become increasingly common in response to the variety of interlocked entitlements recognised by democratic societies. Complex processes and institutional mechanisms

³³⁹ Ibid, 21 and 23.

are generally employed to share management authority and responsibility among a plurality of actors – from national to sub-national government authorities, from representatives of indigenous peoples to user associations. The actors reorganise the legitimacy of their respective entitlements to manage the protected area and agree to subject it to specific conservation objectives.

iii) ***Private protected areas***: These types of protected areas have their roots in medieval times when kings and aristocrats who often preserved for themselves certain areas of land for the privilege to hunt wildlife. Today, private protected areas include areas under individual, cooperative, corporate for profit and corporate not for profit ownership. Authority for managing the protected area in such cases rests with the land owners, who determine a conservation objective, impose a conservation regime and are responsible for decision making subject to applicable legislation and usually under terms agreed with the respective government. Their accountability to the larger society is usually limited.

iv) ***Community conserved areas***: This governance type usually involves indigenous peoples. It is considered the oldest form of protected area management and is still widespread in several countries around the world. Community conserved areas have developed over thousands of years as human communities shaped their lifestyles and livelihood strategies to respond to the opportunities and challenges presented by

their environment. In so doing, they simultaneously managed and modified and often conserved and enriched their environment. In many cases community interaction with the environment generated a sort of symbiosis, which some refer to as bio-cultural units or cultural landscapes/seascapes. Much of this interaction happened in pursuit of a variety of interlocked objectives and values including spiritual, religious, security and survival, which resulted in the conservation of ecosystems, species and ecosystems, and related services. In this sense, community conserved areas comprise natural and modified ecosystems including significant biodiversity, ecological services and cultural values voluntarily conserved by indigenous peoples through customary laws or other effective means.

In community conserved areas, authority and responsibility rest with the community through a variety of forms of traditional governance or locally agreed organisations and rules. These forms and rules are very diverse and can be extremely complex. In community conserved areas, the community's accountability to the larger society remains usually limited, although it may be defined as part of broader negotiations with the national government and other partners as a counterpart to being assured, for example, of the recognition of collective land rights, the respect for customary practices and the provision of economic

incentives. Such negotiations may result in a joint management arrangement among indigenous, government and other stakeholders thus changing to co-managed protected areas. Some indigenous peoples also form NGOs to manage their resources, which may change the governance type to a private protected area.³⁴⁰

These new governance types for protected areas also fall well within the IUCN category classification that is meant to clarify and enhance public participation in environmental decision making and natural resources management. Although all protected areas must be especially dedicated to the protection and maintenance of biological diversity and natural resources and associated cultural resources, the *IUCN Guidelines for Protected Area Management Categories* recognise a gradation of human intervention.

Thus the detailed guidance on each category accepts that different levels of human intervention, use and presence will occur, although in all cases these must be consistent with conservation and sustainability objectives: Category 1a³⁴¹ should be significantly free of human presence and capable of remaining so. Category 1b³⁴² can be compatible with indigenous human communities living in low density and in balance with available resources. Category 11³⁴³ should take into account the needs of indigenous peoples. Category 111³⁴⁴ is

³⁴⁰ Ibid, 22.

³⁴¹ *Scientific Reserve/Strict Nature Reserve*: managed mainly for science.

³⁴² *Wilderness Area*: managed mainly for Wilderness protection.

³⁴³ *National Park*: managed mainly for ecosystem protection and recreation.

³⁴⁴ *Natural Monument*: managed mainly for conservation of specific natural features.

meant to deliver benefits to any resident population. Category IV³⁴⁵ speaks of delivering benefits to any residents living within the designated area. Category V³⁴⁶ underlines the importance of the continuation of traditional uses, building practices and social and cultural manifestations included to bring benefits and contribute to the welfare of local communities as a specific objective. Category VI³⁴⁷ is meant to conserve biodiversity while meeting community needs through a sustained flow of natural products and services. It requires that two thirds of the area be kept in natural condition, and thus, in practice, limits the actual area in which community needs can be fulfilled to one described as limited areas of modified ecosystems.³⁴⁸

The purpose of the *IUCN Guidelines for Protected Area Management Categories* is to alert governments to the importance of protected areas; to encourage governments to develop systems of protected areas with management aims tailored to national and local circumstances; to reduce the confusion that has arisen from the adoption of many different kinds of protected areas; to provide international standards to help global and regional accounting and comparisons between countries; to provide a framework for collection, handling and dissemination of data about protected areas; and

³⁴⁵ *Habitat/Species Management Area*: managed mainly for conservation through management intervention.

³⁴⁶ *Protected Landscape/Seascape*: managed mainly for landscape/seascape conservation and recreation.

³⁴⁷ *Managed Resource Protected Area*: managed mainly for the sustainable use of natural ecosystems.

³⁴⁸ Grazia Borrini et.al above n 314, 14. It is important to note that the World Parks Congress recommended a revision to these 1994 guidelines to be compiled through an open participatory process.

generally to improve communication and understanding between all engaged in conservation.³⁴⁹

The *Convention on Biological Diversity Conference of Parties* (CBD) at its seventh sitting in response to the growing importance of governance for protected areas, included in its Programme of Work on Protected Areas element two on governance, equity, participation and benefit sharing. This also calls on parties to the CBD to achieve measurable targets by 2012 or earlier.³⁵⁰

The CBD Programme of Work calls for the development of better practices and stronger patterns of accountability. It urges parties to recognise and promote various protected area governance types in national and regional systems and to support community conservation areas through particular policies and legal, financial and community means.

Concerning equity, the Programme of Work establishes that prior informed consent is required before any indigenous community is relocated for the establishment of a protected area. With regard to participation, the Programme of Work calls for participatory planning and the involvement of all stakeholders. It stresses the appreciation of local knowledge and sustainable use of natural resources and the need for better understanding the needs, priorities, practices, and values of indigenous peoples. Regarding benefit sharing, the Programme of Work calls for a more equitable division of the costs and benefits of conservation, in particular for indigenous peoples.³⁵¹

³⁴⁹ IUCN (1994) *Guidelines for Protected Area Management Categories*, CNPPA with the assistance of WCMC, IUCN, Gland, Switzerland and Cambridge, U.K.

³⁵⁰ Grazia Borrini et.al above n 314, 25. For the full text of this programme, see www.biodov.org/decisions/default.aspx?m=COP-07&id=7765&lg=0.

³⁵¹ Ibid, 25 - 26.

4.6.5 International law and policies related to indigenous peoples' rights and protected areas

Along with the quest for equity, environmental ethics, good governance norms and the pursuit of a rights based approach, one of the factors that has brought about the shift towards the new paradigm is political development at the international level. Several broad trends seem to be underway in the world. They include a greater democratisation and devolution of powers from the centre to regional and local tiers that include indigenous peoples. This means that central governments are now involving provincial, municipal and local governments in the management of protected areas. In addition, private individuals are now creating their own protected areas.³⁵²

4.6.6 Advances in technology

Advances in technology have also helped advance the new paradigm on protected area management. Information technology and geographical information mapping now make it possible to handle and share vast amounts of data and information and also create a different set of understanding and expectation among all concerned. In particular, they encourage a belief that boundaries to what is possible are not so much technical as human and political.

4.6.7 Global and local economic forces

Finally, in addition to the human concerns driving the new paradigm, there are economic forces ranging from global to local putting pressure on protected area

³⁵² Adrian Phillips, above n 307,13.

planners and managers. As these pressures have grown, the management of protected areas has been invaded by economic theory. Managers have had to master the language of values and benefits that protected areas represent and to adopt more business-like approaches to these places, including the requirement to prepare business plans. Increasingly, this has included the idea of generating income to supplement government interventions but without jeopardising the interests of the local communities thus calling into play the now popular paradigm of social responsibility in doing business.³⁵³

4.7 The international framework for the participation of indigenous peoples in the conservation and management of protected areas

The participation of indigenous peoples in the management and conservation of protected areas has emerged and gained prominence as a response to several developments at the international level that have guided and inspired the recognition and promotion of the participation of indigenous peoples in environmental decision making.

This aspiration is covered partly by a number of international law standards. Some of these standards apply to peoples generally, some apply to minorities and some apply to indigenous peoples. Most of the relevant international standards represent binding treaty obligations on the states that have accepted them. Some of them are now regarded as having evolved into customary law, to be observed by all states, regardless of formal ratification. Other standards may not be formally binding in the legal sense because they are in the form of

³⁵³ Ibid, 14.

soft law, for example, declarations, General Assembly resolutions or recommendations of world conferences.³⁵⁴

International legal instruments adopted during the first half of the last century did not recognise or provide for indigenous peoples' right to participate in the conservation and management of protected areas. For example, in 1923 when Chief Deskaheh of the Haudennoshaunee nation (the commonly called Mohawks) travelled to Geneva and called on the League of Nations to defend the right of his people to live under their own laws, on their own land and according to their own faith, he was denied access.³⁵⁵

Once again in 1977 the Indians were denied access by the United Nations. However, having denied them a place at the decision making table, the UN convened a special meeting on indigenous peoples under the Human Rights Commission. Since then a process has been set in motion allowing indigenous peoples unparalleled access to the UN to press for recognition of their rights including the right to participate in the conservation and management of protected areas.³⁵⁶

The Indian struggle for the realisation of their rights at international level was complemented by a series of international events, which reinforced their demands and the rights of indigenous peoples worldwide.

³⁵⁴ Garth Nettheim, Gary D Meyer, and Donna Craig, *Indigenous Peoples and Governance Structures: A Comparative Analysis of Land and Resource Management Rights* (2002) 9.

³⁵⁵ Marcus Colchester above n 302, 12.

³⁵⁶ Ibid.

The most significant of them was in 1975 when the IUCN passed the *Kinshasa Resolution* on the protection of traditional ways of life which recognised the value and importance of traditional ways of life and skills, the vulnerability of indigenous peoples and the great significance they attached to land ownership.

The resolution recommended that:

- Governments maintain and encourage traditional methods of living and customs which enable communities, both rural and urban to live in harmony with their environment.
- Educational systems be oriented to emphasise environmental and ecological principles and conservation objectives derived from local cultures and traditions and that these principles and objectives be given wide publicity.
- Governments devise means by which indigenous peoples may bring their lands into conservation areas without relinquishing their ownership, use and tenure rights.
- Governments of countries still inhabited by people belonging to separate indigenous cultures recognise the rights of these people to live on the lands they have traditionally occupied, and take account of their view points
- In the creation of national parks or reserves, indigenous peoples should not normally be displaced from their traditional lands, nor should such reserves anywhere be proclaimed without adequate consultation with

the indigenous peoples most likely to be directly affected by such proclamation.³⁵⁷

The IUCN resolution was recalled in 1982 at the *World Parks Congress* in Bali, Indonesia which affirmed the rights of traditional societies to social, economic, cultural and spiritual self-determination and to participate in decisions affecting the land and natural resources on which they depend. The resolution advocated joint management arrangements between societies which have traditionally managed resources and protected area authorities.³⁵⁸

Important progress has been made since then, especially at the *UN Conference on Environment and Development* (UNCED), and the trend now is towards the recognition and promotion of indigenous rights in international legal instruments as the exposition of the international legal instruments pertaining to indigenous peoples hereunder illustrates.³⁵⁹

4.7.1 The Rio Declaration

One of the key outcomes of the UNCED was the Rio Declaration. The Declaration generally stresses the need for sustainable development and environmental protection, with adequate opportunities for participation of peoples affected by development proposals. Principle 22 states:

³⁵⁷ Ibid, 16.

³⁵⁸ Ibid, 17.

³⁵⁹ Craig Donna and Ponce Nava Diana, *Indigenous Peoples Rights and Environmental Law in UNEP's New Way Forward: Environmental Law and Sustainable Development*, UNEP Publications, Nairobi, (1995) 171-184.

“Indigenous peoples 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.”

4.7.2 Agenda 21

The 1992 Rio Conference went beyond broad principles and produced more specific standards in *Agenda 21: Programme for Action for Sustainable Development* adopted by most nations in the world at the Rio Conference. Chapter 26 of the Agenda is titled *Recognising and strengthening the role of Indigenous peoples and their Communities*: In its programme areas for action, Agenda 21 notes that:

“Indigenous peoples and their communities have an historic relationship with their lands and are generally descendants of the original inhabitants of such lands...their ability 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. In view of the interrelationship between the natural environment and its sustainable development and the cultural, social, economic and physical wellbeing of indigenous peoples, national and international efforts to implement environmentally sound and sustainable development should

recognise, accommodate, promote and strengthen the role of indigenous peoples and their communities.”³⁶⁰

The Agenda also provides³⁶¹ that, in full participation with indigenous peoples and their communities, governments, and where appropriate inter-governmental organisations, should aim at fulfilling the following objectives:

- a) Establishing a process to empower indigenous peoples and their communities through measures that include:
 - (i) adoption or strengthening of appropriate policies and or legal instruments at the national level
 - (ii) recognising that the lands of indigenous peoples and their communities should be protected from activities that are environmentally unsound or that the indigenous peoples concerned consider to be socially and culturally inappropriate
 - (iii) recognising traditional values and knowledge and resource management practices with a view to promoting environmentally sound and sustainable development
 - (iv) recognising that traditional dependence on renewable resources and ecosystems, including sustainable harvesting, continues to be essential to the cultural, economic and physical wellbeing of indigenous peoples and their communities

³⁶⁰ Chapter 26.1.

³⁶¹ See Chapter 26.3.

- (v) developing and strengthening national dispute resolution arrangements in relation to settlement if there are land and resource management concerns
- (vi) supporting alternative environmentally sound means of production to ensure a range of choices on how to improve their quality of life so that they can effectively participate in sustainable development
- (vii) enhancing capacity building for indigenous communities based on the adaptation and exchange of traditional experience, knowledge and resource management practices to ensure their sustainable development

(b) Establishing, where appropriate, arrangements to strengthen the active participation of indigenous peoples and their communities in the national formulation of policies, laws and programmes relating to resource management and other development processes that may affect them, and encouraging their initiation of proposals for such policies and programmes.

(c) Involving indigenous peoples and their communities at the national and local levels in resource management and conservation strategies and other relevant programmes established to support and review sustainable development strategies such as those suggested in other programme areas of Agenda 21.

Agenda 21 further proposes certain measures which governments could take to ensure greater participation of indigenous peoples in the development

decisions affecting them including, where appropriate, participation in the establishment or management of protected areas. The proposed measures that governments can take include ratifying and applying existing international agreements relevant to indigenous peoples and their communities where they have not yet done so and providing support for the adoption, by the General Assembly, of a declaration on indigenous rights. Governments can also 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.³⁶²

Finally, Agenda 21 also requires the governments, in full partnership with indigenous peoples and their communities, should, where appropriate, develop or strengthen national arrangements to consult with indigenous peoples and their communities with a view to reflecting their needs and incorporating their needs, values and traditional and other knowledge and practices in national policies and programmes in the field of natural resource management and conservation and other development programmes affecting them.³⁶³

4.7.3 The Convention on Biological Diversity

One of the most important international instruments to emerge from the Rio Summit (apart from Agenda 21) of relevance to indigenous peoples was the

³⁶² Chapter 26 (4) (a) and (b).

³⁶³ Chapter 26.6.

Convention on Biological Diversity (CBD).³⁶⁴ The CBD describes its main objective as:

“Conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of benefits arising out of the utilisation of genetic resources, including by appropriate access to genetic resources and appropriate transfer of relevant technologies taking into account all rights over those resources and to technologies and appropriate funding.”³⁶⁵

This objective is set within a series of values and important considerations that are set out in the preamble and which includes the recognition of 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.³⁶⁶

The CBD contains several provisions relating to indigenous peoples in the management and conservation of the environment. Article 8 (j) of the Convention provides that:

“Each contracting party shall, as far as possible and as appropriate; subject to its national legislation, respect, preserve and maintain

³⁶⁴ The Convention on Biological Diversity was opened for Signature on 5th June 1992 and came into force on the 29th December 1993.

³⁶⁵ See Article 1.

³⁶⁶ See above n. 364 Preamble to the *Convention on Biological Diversity*.

knowledge, innovations and practice of indigenous and local communities embodying traditional lifestyle 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 benefits arising from the utilisation of such knowledge, innovations and practices.”

The Convention also encourages the use of biological resources in accordance with traditional cultural practices that are compatible with conservation and sustainable use requirements.³⁶⁷ It calls on contracting parties to introduce, where appropriate, procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimising such effects and where appropriate, allow for public participation in such procedures.³⁶⁸

It is important to note that while the *Convention on Biological Diversity* contains several provisions relating to indigenous peoples, it does not contain any specific provisions relating to their specific participation in the conservation and management of biological diversity. However, in its Programme of Work, the Working Group that was set up to address the implementation of the Article 8 (j), includes indigenous peoples as does the Working Group on traditional knowledge.

³⁶⁷ Article 10 (c).

³⁶⁸ Article 14 (a).

In addition to the administrative arrangements catering for the participation of indigenous peoples in the working groups of the CBD, the provisions on environmental impact assessment and monitoring and identification provide an opportunity for indigenous peoples to participate in the management and conservation of biological diversity as do the provisions on requirements by contracting parties to develop national strategies, plans or programmes for the conservation and sustainable use of biodiversity.³⁶⁹

4.7.4 The International Labour Organisation (ILO) Convention 169

There are several other international instruments that provide for the participation of indigenous peoples in the management and conservation of protected areas. Most significant among them is the *ILO Convention 169*.³⁷⁰ The Convention contains several provisions relating to the participation of indigenous peoples in the management of conservation areas. In relation to self-government, Article 2 of the Convention provides that:

1. Governments shall have the responsibility for developing, with the participation of the peoples concerned, coordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity:
2. Such action shall include measures for:.....
 - (b) promoting the full realisation of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions.

³⁶⁹ See Articles 6, 7 and 14 generally.

³⁷⁰ In 1989 the International Labour Organization (ILO) revised *ILO Convention No. 107* (1957) by adopting *ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries*.

The Convention also calls on governments to:

- (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly
- (b) establish means for the full development of these peoples own institutions and initiatives and in appropriate cases provide the resources necessary for this purpose
- (c) consult the peoples concerned in good faith and in a form appropriate for the circumstances, with the objective of achieving agreement or consensus or consent to the proposed measures.³⁷¹

These provisions fell short of the self government aspirations of many indigenous peoples. Many transferred their efforts to the UN Draft Declaration process (UN Draft Declaration on the Rights of Indigenous People).

Article 7 of the Convention provides that the peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual wellbeing and the lands they occupy or otherwise use, and to exercise control, to the fullest extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development, which affect them directly.

³⁷¹ See Article 6.

It also calls for the improvement of the conditions of life and work and levels of health and education of the peoples concerned with their participation and cooperation.³⁷² Governments are required to take measures in cooperation with the peoples concerned to protect and preserve the environment of the territories they inhabit.³⁷³

The ILO 169 provisions on the participation of indigenous peoples in the management and conservation of the environment are extensive. It calls on governments, in applying national laws and regulations to the peoples concerned, to give due regard to their customs and customary laws.³⁷⁴ It also provides that indigenous peoples shall have the right to retain their own customs and institutions³⁷⁵ but that this shall not prevent them from exercising the rights granted to all citizens and from assuming their corresponding duties.³⁷⁶ Furthermore, governments are called upon to respect the special importance for the cultures and spiritual values of indigenous peoples their relationship with the lands³⁷⁷ and territories, or both as applicable, which they occupy or otherwise use and in particular the collective aspects of this relationship.³⁷⁸

In order to give meaning to the right of indigenous peoples to participate in the management and conservation of the environment, the ILO 169 calls for the

³⁷² Article 7(2).

³⁷³ Article 7(4).

³⁷⁴ Article 8 (1).

³⁷⁵ It is important to note however that according to Article 8(2) this can only be exercised where they are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights.

³⁷⁶ Article 8.

³⁷⁷ Article 13(2) provides that the term lands as used shall include the concept of territories, which covers the total environment of the areas which indigenous people occupy or otherwise use.

³⁷⁸ Article 13 (1).

recognition of the rights of ownership and possession of the peoples concerned over the lands, which they traditionally occupy.³⁷⁹ In addition, governments are required to take steps as necessary to identify the lands, which indigenous peoples concerned traditionally occupy, and to guarantee effective protection of their ownership and possessions;³⁸⁰ and to put in place adequate procedures within the national legal system to resolve land claims by the peoples concerned.³⁸¹ The ILO provisions on the rights of indigenous peoples to their land are important and fall well within the general provisions of the *Universal Declaration on Human Rights*,³⁸² which in Article 17 states:

1. Everyone has the right to own property alone as well as in association with others.
2. No one shall be arbitrarily deprived of his [sic] property.

The recognition of the right of indigenous peoples to their land and to participate in decisions affecting it is reiterated in the *International Covenant on the Elimination of Racial Discrimination* (ICERD), which further incorporates the right to inherit.³⁸³

Finally, the ILO requires that the rights of indigenous peoples to the natural resources pertaining to their lands shall be specifically safeguarded. These

³⁷⁹ Article 14 (1). In addition, the section requires measures to be taken in appropriate case to safeguard the right of indigenous people to use land not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.

³⁸⁰ Article 14(2).

³⁸¹ Article 14(3).

³⁸² The UN General Assembly adopted the *Universal Declaration of Human Rights* on the 10th December 1948. Formally, it has only the status of a Declaration or resolution, as distinct from a binding Treaty.

³⁸³ See Article 5 International Covenant on Elimination of Racial Discrimination.

rights include the right of these people to participate in the use, management and conservation of their resources.³⁸⁴ In the cases where the state retains the ownership of minerals or sub-surface resources or rights to other resources pertaining to lands, governments are required to establish or maintain procedures through which they shall consult indigenous peoples, with a view of ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The indigenous peoples concerned wherever possible shall participate in the benefits of such activities and shall receive fair compensation for any damages, which they may sustain as a result of such activities.³⁸⁵

4.7.5 The International Covenants on Civil and Political Rights (ICCPR) and Economic, Social and Cultural Rights (ICESCR)

Within the international body of 'hard law', which has inspired and directed the recognition of the right of indigenous peoples to participate in the management and conservation of protected areas, are the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic Social and Cultural Rights* (ICESCR). Both Covenants recognise the right of people to self-determination together with the principle of equal rights and non-discrimination. The identically worded Article 1 in both Covenants states:

³⁸⁴ Article 15(1).

³⁸⁵ Article 15 (2).

1. All peoples have the right to self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources. In no case may a people be deprived of its own means of subsistence.
3. The state parties to the present Covenant shall promote the realisation of the right of self-determination, and shall respect that right in conformity with the provisions of the Charter of the United Nations.

While this provision has traditionally been applied in relation to political status, especially in the context of decolonisation, it does contain important provisions in Article 1 (1) and (2) which are of particular importance and relevance to issues of resource development on the lands and waters of indigenous peoples. In this regard, the CERD in its 1996 *General Recommendation XXI (48)* on the right to self-determination stressed that the economic, social and cultural aspects represent the internal aspect of the right to self-determination. The committee went on to state in paragraph 10 that:

“Governments should be sensitive towards the rights of persons belonging to ethnic groups (including indigenous peoples), particularly their right to lead lives of dignity, to preserve their culture, to share equitably in the fruits of national growth and to play their part in the Government of the country of which they are citizens.”³⁸⁶

³⁸⁶ See above n 314, 14.

Article 1 of the *Covenant on the Rights of Indigenous Peoples*³⁸⁷ echoes the language of Article 1 of both covenants in relation to indigenous peoples and states that:

“The right to self-determination would itself appear to require the *effective participation* of indigenous peoples in decisions, which affect them, their territories and resources and their cultures. It thus presupposes interaction on such matters between Indigenous peoples and the dominant non-indigenous society, but requires that such interaction be based on proper respect for the rights of indigenous peoples in terms of their own law, traditions and culture.”³⁸⁸

Article 25 of the ICCPR confers a general right of public participation, which traditionally focuses on political participation processes such as election and access to public office but is also potentially important for indigenous peoples in claiming their right to participate in the management and conservation of protected areas.

In Article 27 the ICCPR provides:

“In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right to community with other members of their group, to enjoy their own

³⁸⁷ Currently under submission for consideration by the UN General Assembly.

³⁸⁸ See above n 313, 15.

culture, to profess and practice their own religion and to use their own language.”³⁸⁹

In formulating its views on a number of communications brought to it under the first optional protocol to the *Convention*, the Human Rights Committee has made it clear that Article 27 applies to the use of land and resources by indigenous peoples.³⁹⁰

In a 1995 *General Comment on Article 27*, the Human Rights Committee said:

“Culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples....The enjoyment of these rights may require positive legal means of protection and measures to ensure the *effective participation* (emphasis mine) of members of minority communities in decisions which affect them.”³⁹¹

The reference to effective participation in this general comment is very important for indigenous peoples aspiring to have a voice in decision making in the management and conservation of the environment.

³⁸⁹ The *UN Convention on the Rights of the Child*, ratified by Australia and Uganda contains parallel language specifically for children and extended so far as to expressly include persons of indigenous origin (Art. 30).

³⁹⁰ *Kitok v Sweden* Communication No. 197/1985, UN Doc CCPR/C/33.D97.1985 (1998); *Ominayake v Canada* Communication No. 167/1984, *Report of the Human Rights Committee*, UN Doc. A/45/40 (1994); reproduced in (1996) 1 (1) *Australian Indigenous Reporter* 154; *Hopu and Bessert v France* UN Doc CCPR/C/60/D/549/1993 (1997), reproduced in (1998) 3(1) *Austrian Indigenous Reporter* 144. In 2000 the Human Rights Committee, in considering Australia's periodic reports, expressed its concern about the 1988 amendments to the *Native Title Act 1993*(Cth).

³⁹¹ See above n 329, 13.

4.7.6 The International Covenant on the Elimination of Racial Discrimination (ICERD)

The ICERD monitors compliance by states with ICERD. On 18 August 1987 the Committee published *General Recommendation XXIII (51)* setting out its interpretation of the Covenant in relation to indigenous peoples. Paragraphs 3-5 of the Recommendation state:

“3.The Committee is conscious of the fact that in many regions of the world indigenous peoples have been and are still being discriminated against, deprived of their human rights and fundamental freedoms and in particular that they have lost their land and resources to colonists, commercial companies and state enterprises. Consequently the preservation of their culture and their historical identity has been and still is jeopardised.

4. The Committee calls in particular upon state parties to:

- (a) recognise and respect indigenous distinct culture, history, language and way of life as an enrichment of the states’ cultural identity and to promote its preservation
- (b) ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity
- (c) provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics
- (d) ensure that members of indigenous peoples have equal rights in respect to effective participation in public life, and that no decisions

directly relating to their rights and interests are taken without their informed consent.

(e) ensure that indigenous communities can exercise their right to practice and revitalise their cultural traditions and customs, to preserve and to practise their language.

5. The Committee especially calls upon state parties to recognise and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return these lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.³⁹²

The recognition of the right to effective participation in public life and in decisions directly affecting indigenous peoples in this recommendation is another fundamental development at international level that has inspired and directed the recognition and promotion of the right of indigenous peoples to participate in the management and conservation of protected areas.³⁹³

³⁹² Garth Nettheim, Gary D. Meyer, and Donna Craig, above n 354, 12-13.

³⁹³ It is important to note that Australia has ratified the *International Convention on the Elimination of Racial Discrimination* (ICERD) and implemented most of its obligations in national law through the *Racial Discrimination Act 1975 (Cth)*. It is on this basis that the High Court of Australia in *Mabo v Queensland* held invalid in 1985 the Queensland Act to extinguish native title in the Torres Strait. Also, it is on this basis, that the High Court in *Western Australia v Commonwealth* held invalid Western Australian legislation to extinguish native title and substitute defensible statutory rights of traditional usage.

4.7.7 *The Declaration on the Rights of Indigenous Peoples*

Within the emerging body of international law inspiring and guiding the recognition of the right of indigenous peoples to participate in the management and conservation of protected areas is the *Declaration on the Rights of Indigenous Peoples* which was passed by the UN Human Rights Council on the 29th June 2006.³⁹⁴ The Declaration recognises the right of indigenous peoples to self-determination³⁹⁵ and to maintain and strengthen their distinct political, economic and cultural characteristics and legal systems while retaining their right to participate fully, if they so choose, in the political, economic and social and cultural life of the state.³⁹⁶

The right to self-determination is one of the key aspirations of indigenous peoples and as such, there are several provisions in the Declaration providing for it. The Declaration provides that indigenous peoples as a specific form of exercising their right to self-determination have the right to promote, develop and maintain their institutional structures and distinctive judicial customs, traditions, procedures and practices in accordance with internationally recognised human rights standards.³⁹⁷

³⁹⁴ The Declaration has not yet been adopted by the General Assembly. It was developed over a number of years by the UN Working Group on Indigenous Populations (WGIP) in full consultation with indigenous peoples from around the world. It can be described as the most comprehensive articulation of the aspirations of the world's indigenous peoples. In 1994, the WGIPs parent body, the Sub-Commission on Prevention of Discrimination and Protection of Minorities, adopted the draft as it then was, and referred up the line, to the Commission on Human Rights. The Commission established its own open ended working group to consider the Draft Declaration. On the 23rd June 2006, the Human Rights Council adopted the UN Declaration on the Rights of Indigenous peoples as proposed by the Chairperson-Rapporteur of the working group of the Commission on Human Rights and recommended it to the General Assembly for final approval. Bypassing objections from Canada and Russia, the HRC voted by a margin of 30-2 to approve the Declaration. Twelve countries out of the 47- seat Council abstained from the vote, and three were absent during the session.

³⁹⁵ Article 3.

³⁹⁶ Article 4.

³⁹⁷ Article 33.

Indigenous peoples shall have the right to have access to, and prompt decisions, through mutually acceptable and fair procedures for the resolution of conflicts and disputes with states as well as to effective remedies for all infringements of their individual and collective rights. Such decisions shall take into consideration the customs, traditions, rules and legal systems of indigenous peoples concerned.³⁹⁸ It recognises the right of indigenous peoples to a collective right to determine their own citizenship in accordance with their customs and traditions.³⁹⁹

The Declaration provides that indigenous peoples shall not be forcibly removed from their lands and territories. No relocation shall take place without the free and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation, and, where possible, with the option of return⁴⁰⁰.

Again in relation to their land, the Declaration provides that states shall establish and implement in conjunction with indigenous peoples concerned, a fair, impartial, open, transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems to recognise and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.⁴⁰¹ Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise

³⁹⁸ Article 39.

³⁹⁹ Article 32. It is important to note that this right does not impair the right of indigenous people to obtain citizenship of the states in which they live.

⁴⁰⁰ Article 10.

⁴⁰¹ Article 26.

occupied or used and which have been confiscated, occupied, used or damaged without their free will and informed consent.⁴⁰²

Article 30 of the Declaration provides that 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 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 and other resources.⁴⁰³ Indigenous peoples have a right to the conservation, restoration and protection of the total environment and the productive capacity of their lands, territories and resources, as well as to assistance for this purpose from states and through international cooperation.⁴⁰⁴

The participation of indigenous peoples in the management and conservation of protected areas is reiterated in several other provisions in the Draft Declaration. Article 19 provides that indigenous peoples have a right to participate fully if they so choose at all levels of decision making in matters which may affect their rights, lives and destinies through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision making institutions. Article 20 reiterates this by further providing that states are required to obtain the free informed consent of

⁴⁰² Article 27. Where this is not possible, indigenous people have the right to just and fair compensation. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status.

⁴⁰³ Pursuant to agreement with 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.

⁴⁰⁴ Article 28.

the indigenous peoples concerned before adopting and implementing legislative or administrative measures that may affect indigenous peoples.

While it is yet to be passed by the General Assembly, the Declaration is considered to be the most comprehensive articulation of indigenous peoples' aspirations and as such contains several provisions within it relating to the participation of indigenous peoples in the management and conservation of protected areas.

CHAPTER FIVE

THE LEGAL AND POLICY REGIME FOR PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISION MAKING AND NATURAL RESOURCES MANAGEMENT IN AUSTRALIA

5.1 The commonwealth level

There are many legally established opportunities for public participation in environmental decision making in Australia. They include participation through policy formulation and administration of legislation⁴⁰⁵; rights of notification or access to information; rights to seek review of decisions; rights to force a government agency to take action and the ability to bring court proceedings to prevent contravention of the rights of participation.⁴⁰⁶ Other avenues for public participation in Australia include calls for public comment,

⁴⁰⁵ R. F James, "Public Participation in environmental decision making – New Approaches" (Paper presented at the *National Conference of the Environment Institute of Australia*, 1-3 March 1999).

⁴⁰⁶ Ibid.

inclusion of members of the public in planning groups, surveys of various types and development of friends groups to work in parks.⁴⁰⁷

The participation of indigenous peoples in the management of protected areas in Australia commenced with the enactment of the *National Parks and Wildlife Act* 1975 (Cth) commonly referred to as the NPWC Act. Section 18 (1) of the Act now in the *Environmental Protection and Biodiversity Conservation Act* 1999, provides that:

“the Director may assist and cooperate with Aboriginals in managing land to which this section applies for the purpose of the protection and conservation of wildlife in that land and the protection of the natural features of the land.”⁴⁰⁸

The decision to include the participation of indigenous peoples in the management of protected areas was a monumental one and is attributed to several factors. Most significant was the 1967 referendum in which the people of Australia approved an amendment to the Constitution allowing the Commonwealth Government to make special laws for indigenous Australians. Then in 1971, the High Court handed down its controversial decision in the *Milirrpum v Nabalco Pty Ltd*⁴⁰⁹ which upheld the doctrine of *terra nullius*.⁴¹⁰

⁴⁰⁷ Ibid.

⁴⁰⁸ It is important to note that this section only applied to land already effectively in the hands of the indigenous people.

⁴⁰⁹ (1971) 17 FLR 141.

⁴¹⁰ The word *terra nullius* literally means land of no one. International law in the 18th century recognised three ways of acquiring sovereignty over land. (1) conquest; (2) cession and (3) occupation of land that was *terra nullius*. If land was *terra nullius*, it was regarded as available for acquisition – because no one was there. Under international law, the doctrine also regarded land that was populated by backward peoples as if it was unoccupied as *terra nullius*. If such land was acquired by a new sovereign, the acquisition was treated as if it had been by

This decision, which amounted to a refusal to recognise indigenous customary land title, attracted a lot of criticism and led to a growing demand for Aboriginal customary land by a growing Aboriginal movement, which culminated in the establishment of an Aboriginal tent embassy in front of Parliament House in Canberra in 1972. Following the massive support for the Aboriginal movement for the recognition of Aboriginal customary land titles, the Labor Government adopted a self-determination policy for indigenous Australians. Accordingly, in 1973 and 1974 respectively, the Land Rights Commissioner, Mr Justice Woodward, presented two reports on Aboriginal land rights for the Northern Territory. These reports, together with the growing impetus resulting from the demands of the Aboriginal movement for recognition of Aboriginal customary land, led to the incorporation of the participation of indigenous peoples in the management of protected areas. Consequently, in 1976, the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) (LR(NT) Act)* was enacted. This Act basically enabled indigenous peoples to claim existing national parks and conservation reserves.

The first place to have indigenous peoples participate in the management of protected areas was Kakadu National Park. The designation of Kakadu as a national park to be jointly managed by the Nature Conservation Agency and the Aboriginal traditional owners was set in motion by the Ranger Uranium Environmental Inquiry. In addition to recommending continued mining in the Alligator River Region of the Northern Territory, the inquiry also recommended that a large part of the region be returned to Aboriginal

occupation or settlement to use the common law term rather by conquest. It is important to note that in 1975, the International Court of Justice critically examined the theory of *terra nullis* in a case concerning the Western Sahara. The Court ruled that the doctrine of *terra nullis* should only be applied to territory that was genuinely uninhabited, not to territory that was inhabited.

traditional owners but be leased back to the government and designated as a national park. Following this inquiry and pursuant to the LR(NT) Act, the land in Kakadu was returned to the Kakadu Aboriginal Land Trust (KALT) to hold in trust for the traditional Aboriginal land owners. It was then subsequently leased back to the Commonwealth Director of National Parks and Wildlife.⁴¹¹ Since the Kakadu arrangement, several other national parks have adopted joint management arrangements, including Gurig, Uluru-Kata Tjuta, Nitmiluk Booderee, Mutawinji, and Wijira National Parks.⁴¹²

Since the monumental decision to turn Kakadu into a joint management protected area between the Nature Conservation Agency and the Aboriginal traditional owners, there have been several other policies and initiatives at the commonwealth level that have driven the move for the participation of indigenous peoples in the management of protected areas.

One of the most comprehensive of the initiatives at commonwealth level emphasising the participation of indigenous peoples in the management of protected areas was the *Royal Commission into Aboriginal Deaths in Custody*.⁴¹³ The terms of reference of the Commission required it to investigate the underlying social, cultural and legal issues behind the deaths in custody of 99 Aboriginal people as well as the immediate circumstances surrounding the

⁴¹¹ On the 5th April 1979, pursuant to the NPWC Act, the land held by the KALT and leased to the Director of National Parks and Wildlife was officially declared a national park. The NPWC has since been repealed and replaced by the *Environmental Protection and Biodiversity Act 1999* (Cth) (EPBC Act).

⁴¹² As of 2001, there were a total of nine protected areas under formal joint management arrangements.

⁴¹³ The Commission released its report in 1991.

death deaths.⁴¹⁴ As part of the means to address some of the problems identified, the Commission recommended joint management of national parks.⁴¹⁵ This recommendation basically endorsed recommendations that were first proposed at a conservation and land management meeting held at Millstream in Western Australia. The recommendations were:

- a) to encourage joint management between identified and acknowledged representatives of Aboriginal people and the relevant state agency
- b) involve Aboriginal people in the development of management plans for national parks
- c) extend areas of land within national parks for use by Aboriginal people as living areas
- d) grant 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)
- e) facilitate the control of cultural heritage information by Aboriginal people
- f) establish affirmative action policies which give preference to Aboriginal people in employment as administrators, rangers, and other positions within national parks
- g) negotiate 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 owner

⁴¹⁴ See Whimp K, *Final Report of the Royal Commission into Aboriginal Deaths in Custody – Summary*, Aboriginal Legal Rights Movement, Adelaide (1991) 2. Available from indigenous Law Resources link on the Australian Legal Information Institute website www.astlii.edu.au.

⁴¹⁵ see sections 34.4.49 to 43.4.54 of the report.

- h) charge admission fees for entrance to national parks by tourists
- i) reserve areas of land within national parks to which Aboriginal people have access for ceremonial purposes
- j) establish mechanisms which enable relevant Aboriginal custodians to be in control of protection of and access to sites of significance to them.⁴¹⁶

The second important development to take place at commonwealth level that influenced the participation of indigenous Australians in the management of protected areas was the landmark High Court decision in *Mabo v Queensland (No.2)*.⁴¹⁷ By a majority of six to one, the justices of the High Court overturned the decision on *Milirrpum v Nabalco* putting an end to the legal fiction of *terra nullius* thus finally opening the door to recognising the indigenous system of land tenure that had existed in Australia since before the time of colonisation 200 years ago.

In response to the High Court ruling, the Commonwealth Government enacted the *Native Title Act of 1993* (the NTA). While it was originally contemplated

⁴¹⁶ August 1990.

⁴¹⁷ (1991-2) 175 CLR 1. The Case involved three Murray Islanders – Eddie Mabo, David Passi and James Rice who in 1988 brought an action in the High Court of Australia against the State of Queensland. They claimed that Queensland's sovereignty over the Murray Islands was subject to the land rights of the Murray Islanders also known as the Meriam people based on local custom and traditional life. Essentially, the three Islanders asked the court to declare (1) That the Meriam people are entitled to the Murray Islands (a) as owner; or (b) as possessors; or (c) as occupiers; or (d) as persons entitled to see and enjoy the islands and (2) That the state of Queensland has no power to extinguish the Meriam peoples title. On 3 June 1999, the High Court ruled (1) That the land in the Murray Island is not crown land within the meaning of that term in section 5 of the Land Act 1962 (Queensland) (2) Putting to one side the Island of Duer and Waier and the parcel of land leased to the Trustees of the Australian Board of Missions and those parcels of land if any which have validly been appropriated for administrative purposes the use of which is inconsistent with the continued enjoyment of the rights and privileges of the Meriam people under native title, declare that the Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands. (3) That the title of the Meriam people is subject to the power of Parliament of Queensland and the power of the Governor in Council of Queensland to extinguish that title by valid exercise of their respective powers provided any exercise of those powers is not inconsistent with the laws of the commonwealth.

that this Act would enable the survival of native title as recognised in the *Mabo (No.2)* decision, this was not to be a long lasting solution. As it turned out, native title would not survive the creation of national parks and thus indigenous peoples would not be able to participate in the management of protected areas. This was a result of the decision in *State of Western Australia v Ward*.⁴¹⁸ Under Western Australian legislation, and especially section 33 of the *Land Act 1933* (WA), the vesting of reserves, which includes national parks, was found to extinguish native title. Accordingly, it would seem that in Western Australia, it is no longer possible for indigenous peoples to claim native title rights to manage national parks under the NTA.

However, before the developments of the decisions in *Western Australia v Ward*, the Commonwealth Government undertook several other initiatives to promote the participation of indigenous peoples in the management of protected areas. In December 1992, the Council of Australian Governments endorsed the *National Strategy for Ecological Sustainable Development (ESD)*. Chapter 22 of this strategy was dedicated to elaborating the role of indigenous Australians in ESD. One of the stated objectives of the National Strategy is:

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“To ensure effective mechanisms are put in place to represent Aboriginal and Torres Strait Islander (ATSI) peoples, land, heritage, economic and cultural development concerns in resource allocation process.”

⁴¹⁸ (2002) HCA 28.

⁴¹⁹ Objective 22.1.

In order to achieve this objective, the government committed itself to:

“..have regard to the traditional dependence by ATSI people on the management of renewable resources and ecosystems and encourage greater recognition of Aboriginal people and Torres Strait Islanders’ values, traditional knowledge and resource management practices relevant to ecological sustainable development.”⁴²⁰

In order to strengthen the Commonwealth Government’s commitments, the Council for Aboriginal Reconciliation in 1995 recommended that:

“the Commonwealth develop national model legislation on ownership and management rights for indigenous Australians over existing protected areas of high indigenous cultural value.”⁴²¹

Then in 1996, the Commonwealth Government released the *National Strategy for the Conservation of Australia’s Biological Diversity*, which has been adopted by all the states and territories. Under this strategy, it is noted 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.⁴²² In relation to cooperative arrangements, the strategy further notes that recognising a representative reserve system to conserve biological

⁴²⁰ *National Strategy for Ecologically Sustainable Development*, (Cth) (1992) 82.

⁴²¹ “*Going Forward: Social Justice for the First Australians*”, (A submission to the Commonwealth Government from the Council for Aboriginal Reconciliation, 1995) Recommendation 45).

⁴²² Objective 1.8.

diversity will extend across the boundaries of Aboriginal and other tenure systems and it will assist in negotiating for cooperative arrangements for conservation management that recognise traditional land tenure and land management.⁴²³

The commonwealth initiatives for the involvement of indigenous peoples in the management of protected areas were consolidated in the *Environment Protection and Biodiversity Conservation Act* 1999 (the EPBC Act).⁴²⁴ The EPBC Act is meant to implement Australia's international obligations under Article 8 of the Convention on Biological Diversity as well as a number of other international agreements which Australia has entered into.⁴²⁵ Other objectives of the Act include the promotion of a cooperative approach to the conservation and ecologically sustainable use of Australia's biodiversity, involving governments, the community, landholders and indigenous peoples. It further recognises the role of indigenous peoples in the conservation and ecologically sustainable use of Australia's biodiversity and the promotion of the use of indigenous knowledge with the involvement of, and cooperation with, the owners of such knowledge.⁴²⁶

⁴²³ See Objective 1.8.4.

⁴²⁴ The Act replaced and repealed several Commonwealth Acts relating to the environment and conservation including the NPWC Act 1975, and arguable represents the most significant change to commonwealth environmental laws since they were first introduced.

⁴²⁵ See Ogle, L, *The Environment Protection and Biodiversity Conservation Act 1999 (Cth): How workable is it?* (2000) 17 *EPLJ* 468 AT 1.

⁴²⁶ Garth Netteheim, Gary Meyers and Donna Craig "Indigenous Peoples and Governance Structures: A comparative Analysis of Land and Resource Management Rights (2002) Aboriginal Studies Press at 395

The EPBC Act contains several provisions relating to the joint management of commonwealth-protected areas.⁴²⁷ The Act requires any management board of commonwealth reserves, which are wholly, or partially, on indigenous land to have an Aboriginal majority.⁴²⁸ The Act also includes special rules for the management of commonwealth reserves in the Northern Territory and Jervis Bay territory, including the jointly managed Kakadu, Uluru and Boodere National Parks. These rules create special procedures for involving indigenous peoples in the planning process for the management of these reserves.⁴²⁹

In addition, the Act requires the inclusion of indigenous peoples on the Biological Diversity Advisory Committee⁴³⁰ and also sets up a separate indigenous Advisory Committee⁴³¹ to advise the Minister on the operation of the Act, taking into account the significance of indigenous peoples' knowledge of the land and conservation and sustainable use of biodiversity.⁴³² It is important to note, however, that the committees are advisory only and as such their recommendations are not binding on the Minister.

The Act also further provides for:

⁴²⁷ It is important to note that in spite of the several provisions within the Act providing for joint management of commonwealth protected areas; there was a lot of controversy over the bill when it was introduced into Parliament. The indigenous groups felt that they had not had sufficient opportunity to participate in its formulation, a fact that was illustrated by almost any absence of provisions recognising the role of indigenous people in biodiversity conservation. After much debate in the senate and over 800 different amendments including introduction of new ones relating to the role of indigenous people in biodiversity conservation, the Bill was eventually passed and came into force on the 16th July 1999.

⁴²⁸ See Chapter 5 part 15 division 4 (f) of the EPBC Act.

⁴²⁹ Garth Netteheim, Gary Meyers and Donna Craig *"Indigenous Peoples and Governance Structures: A comparative Analysis of Land and Resource Management Rights"* (2002) Aboriginal Studies Press at 395

⁴³⁰ EPBC Act, section 504(4).

⁴³¹ EPBC Act section 505A.

⁴³² EPBC Act section 505B.

- continued traditional and non commercial hunting, food gathering or ceremonial and religious activities by indigenous persons in commonwealth reserves
- indigenous Australians' interests to be addressed when bilateral agreements, management plans, recovery plans, wildlife conservation plans or threat abatement plans are being developed, and when permits are issued to indigenous Australians permitting them to table listed species
- the continuing operation of the NTA and the Aboriginal Land Rights (Northern Territory) Act 1976(Cth) ; and
- the Minister to enter into conservation agreements with specific indigenous Australians for the protection and conservation of biodiversity on land to which indigenous Australians have usage rights
- consideration of the Australian IUCN reserve management principles as recognised in the EPBC Regulations 2000 so that the IUCN reserve management principles of each IUCN category are the general principles set out in Part 1 of Schedule 8. These principles include: community participation, effective and adaptive management, transparency of decisions relating to a reserve or zone which is wholly or partially owned by Aboriginal people, continuing traditional use of the reserve or zone by resident indigenous peoples, including the maintenance of cultural heritage. Part 2 of Schedule 8 of the EPBC Regulations 2000 contains more provisions reinforcing the participation

of indigenous peoples in the conservation and management of protected areas.⁴³³

5.2 The participation of indigenous peoples in the conservation and management of protected areas in Western Australia

5.2.1 The historical context within which indigenous peoples rights to participate in the conservation and management of protected areas has evolved in Western Australia

Western Australia was founded in 1829, as a settlement of free Englishmen for whom Aboriginal land rights was not an issue.⁴³⁴ The colonial future was foreseen chiefly as a number of agricultural and pastoral estates of varying sizes served by market towns. The ideal colonial society was one with clearly marked classes of land owners, officials, small farmers and the 'lower orders'. There would be plenty of room for coloured families (Aborigines) as servants in the households of the upper class or even as small landholders who would keep their own station and associates.⁴³⁵

The major objective was to develop the land and to recreate a familiar and natural social order. Aboriginal people would be incorporated into the natural order by means of bringing them the benefits of Christianity and civilization,

⁴³³ Garth Netteheim, Gary Meyers and Donna Craig "Indigenous Peoples and Governance Structures: A comparative Analysis of Land and Resource Management Rights (2002) Aboriginal Studies Press at 395-396

⁴³⁴ Susan Woenne- Green, Ross Johnson, Ros Sultan and Arnold Wallis, *Competing Interests: Aboriginal Participation in National Parks and Conservation Reserves in Australia*, (1994) Australian Conservation Foundation at. 173.

⁴³⁵ Ibid, 173-174.

thus affording them the status and rights of British citizens and fully protecting their physical wellbeing. These unexamined assimilation ideals gave way as

they did elsewhere in Australia to the practical realities of defending the *status quo* against the Aborigines who were seen increasingly as a threat to life and property and an impediment to economic advancement of the new colony.

An 1837 Legislative Council memorandum stated, with more than an echo of contemporary attitudes:

“The Council have all along thought that although the amelioration and civilisation of the Aboriginal race was an object highly desirable, yet the protection and security of the lives and property of the British subject was a matter of more urgency and still greater importance and when the funds at their disposal were not sufficient for the attainment of both these objectives, that which was most pressing should be first provided for.....”

Implicit in such a view were the practices of paramouncy and protection. Attempts at the latter were largely abandoned, particularly in frontier areas where “the difficulty of doing anything became an excuse for forgetting that it was ever hoped to do something”.⁴³⁶

Western Australia was the only Australian colony denied the means of administering its Aboriginal inhabitants upon attaining responsible government

⁴³⁶ Ibid, 174.

in 1890. Until 1897, the British Government maintained control via an Aboriginal Protection Board with the power to administer a prescribed one per cent of the gross annual colonial revenue. Debate concerning this affront to the state reflected resentment that, by implication, Western Australia could not be trusted to fairly deal with the natives of the colony unless the natives were placed all together (sic) beyond the control of the Western Australian Parliament. The colonial government was particularly unhappy about the money issue for, as a result of the gold discoveries of the first half of the nineties, colonial revenue reached a level unimaginable in 1886. In 1887, one per cent of gross revenue devoted to the welfare of Aborigines amounted to \$33,912.⁴³⁷

By 1897, when control of Western Australia's Aboriginal affairs was finally relinquished by Britain, the conditions which distinguished the settlers from the Aborigines were well entrenched, together with the social, demographic and attitudinal consequences for Aboriginal people arising from these differences.

Western Australian legislation, as in other Australian colonies, became increasingly protectionist, its practices increasingly more repressive particularly where the requirements for Aboriginal labour were minimal and antagonism on the part of the settlers most forceful. During the early 1900s, considerations of economic and administrative efficiency led to a settlement scheme in the southern regions to centralise the provision of relief for Aborigines in institutes such as Carrolup and the infamous Moore River. They were initially conceived as self-supporting educational and training institutions

⁴³⁷ Ibid.

but they became dumping grounds for every category of Aboriginal adult or child subject to protection and were characterised by shocking living conditions and the harshest of discriminatory controls. During the 1930s, the Aboriginal 'problem' attracted a high level of public debate, which resulted in the appointment of a Royal Commission. The consequence was the passing of the 1936 *Native Administrative Act*, which gave the Department of Native Affairs unprecedented powers over the lives of Aboriginal people - powers made more pervasive by means of 157 regulations gazetted within less than 18 months of the Act's passage. With respect to the southern regions, this Act consolidated the powers of the Department to isolate and control people of Aboriginal descent until they could be assimilated.⁴³⁸

Statutory means of subjugating Aboriginal people and preventing them from forming effective participation and opposition to government control of their lives and identity as Aborigines remained in force for the next 30 years with the further measures of the *Natives (Citizens Rights) Act* which remained in force from 1944 to 1971. Described as one of the strangest enactments ever passed by the Western Australian Parliament, this Act gave Aboriginal people, who had adopted the manner and habits of civilized life, the right to apply for a certificate of citizenship, which exempted them from the provisions of the 1936 Act. A holder of a certificate was deemed to no longer be a native or Aborigine and could have all the rights, privileges and immunities of a natural born or naturalised subject of his majesty.⁴³⁹

⁴³⁸ Ibid.

⁴³⁹ Ibid, 177.

It is important to note that the majority of the overt restrictions on the lives of Aboriginal people were abolished with the passage of the *Native Welfare Act* of 1963. The functions of the Department included a wide range of services available to Aboriginal people, although restraints on government funding limited its functions to purely ameliorative welfare matters.

The 1960s and 1970s saw Western Australia undergo unprecedented expansion due to natural resource exploration, discovery and development.⁴⁴⁰ At the same time, national attention began to focus on the means of protecting areas of land for their inherent scenic and conservation values. In 1958, the Australian Academy of Sciences appointed state sub-committees to recommend a comprehensive system of natural parks and nature reserves throughout the nation. The Western Australian Sub-Committee reported to the Academy in 1962.

It was within the context of identifying lands as part of Western Australia's conservation estate that Aboriginal culture and spiritual interests in the land became formally marginalised and defined as subordinate to the interests of the community. In 1962, the Minister for Native Welfare appointed a panel of experts to advise via the Western Australia Museum; the preservation of Aboriginal sites and relics, which had come under increasing threat from development and to establish a register of such sites. The Academy Sub-

⁴⁴⁰ For example, the embargo on exporting iron ore imposed in 1938 was lifted in 1960 allowing previously discovered iron ore deposits to be developed, accelerating further exploration. The rapid expansion of what became known as the Pilbara Iron Province was to produce eleven new towns and associated infrastructure, supporting and supported by the mining industry. Population in Pilbara grew from 3243 in 1961 to 47, 284 in 1981.

committees recommending policies on national parks and nature reserves were also to inquire into the question of national parks and reserves with respect to Aboriginal relics - the most important of which, it was anticipated, would be declared national or historical monuments. In 1969, an advisory council was appointed in Western Australia to consider protected areas. Aboriginal cultural heritage became peripheral to the definition of the nation's conservation estate when it became the government's right and responsibility to identify, assess and, if possible, preserve protected areas as part of the nation's heritage. These assumptions became further entrenched with the enactment of state legislation in the early 1970s.⁴⁴¹

The first of these was the *Environmental Protection Authority Act* of 1971 (WA) which created the Environmental Protection Authority (EPA). The EPA in 1972 created the Conservation Through Reserves Committee (CTRC) whose main mandate was to review and update the 1969 Reserve Advisory Council recommendations with respect to national parks and nature reserves in the state and, where appropriate, to make any new proposals. While the development of recommendations involved considerable input from the public and government departments, it did not make any allowance for Aboriginal aspirations in land matters. In 1972, the *Aboriginal Heritage Act* formally severed the material aspects of Aboriginal cultural heritage from the fabric of a living culture and provided for the protection of Aboriginal sites on behalf of the Western Australian community as a whole.

⁴⁴¹ Susan Worne above. 434

The Act provided for the declaration of protected status for sites and objects of significance on recommendation of the Trustees of the WA Museum, subject to ministerial direction. A special statutory body, the Aboriginal Cultural Materials Committee (ACMC), a formal analogy to the 1962 panel of experts, was created to administer the Act and evaluate the significance of sites and objects under its provisions. It was an offence under the Act to disturb or destroy an Aboriginal site.⁴⁴²

The election of a new Labor Government in 1972 saw the repeal of the 1963 *Native Welfare Act* and the devolution of specialised welfare services and the enactment of the *Aboriginal Affairs Planning Authority Act 1972* which created the Aboriginal Welfare Affairs Planning Authority (AAPA) to concentrate on consultation, coordination and the fostering of Aboriginal cultural values.⁴⁴³

The Act also created the (all Aboriginal) Aboriginal Advisory Council, the (all Aboriginal) Aboriginal Lands Trust and the inter-agency Aboriginal Affairs Committee. All the land that had been reserved under the *Land Act* of 1933 for the use and benefit of Aboriginal people was vested in the Land Trust, which was to administer it on behalf of the Aboriginal people. The Minister appointed

⁴⁴² An aboriginal site is defined in section 5 of the Act to include (a) Any place where persons of Aboriginal descent have or appear to have left any object natural or artificial, used for or made or adopted or use for any purpose connected with the traditional cultural life of the Aboriginal people past and present.(b) any place including any sacred ritual or ceremonial site which is of importance or of special significance to persons of Aboriginal descent. (c) any place which in the opinion of the Trustees is or was associated with the Aboriginal people which may be of historical, anthropological , archaeological or ethnographic interest.

⁴⁴³ The AAPA functions specify the recognition and support of traditional Aboriginal culture, promotion of involvement in the affairs of the community, provide advice on the adequacy, implementation and coordination of services of services provided form other sources and generally to take, instigate or support such action as is necessary to promote the economic, social and cultural advancement of Aboriginal people in WA.

trust and council members and the recommendations of all the bodies created by the Act were subject to the Minister's discretion.⁴⁴⁴

It is important to note that, in spite of the concerted effort to get Aboriginal people involved in the management of the natural resources base; their interests were not necessarily always taken care of. For example, ill-defined statutory responsibilities of the AAPA with respect to coordination and fostering Aboriginal cultural values more often than not put them in direct conflict with other agency's statutory responsibilities to the extent that one senior Aboriginal staff member is reported to have remarked:

"Now when you have got three government agencies arguing about who is to be included in a joint management plan, at what level of interest, what chance have Aboriginal people got of making sure that their interests are protected".⁴⁴⁵

By 1973, the growing forceful assertion of Aboriginal rights in land resulted in the Commonwealth's Aboriginal Land Rights Commission which, among other issues, considered the accommodation of Aboriginal rights and interests in land within the context of national parks and conservation reserves. Woodward, in a rather contentious environment, proposed the joint management of national parks and conservation areas between the Aboriginal people and the Commonwealth Government. According to Woodward, the joint management would be a formal expression of convergent Aboriginal and conservation

⁴⁴⁴ See Section 7 of the Act.

⁴⁴⁵ Southern Aboriginal Corporation (1991) 16.

interests. He proposed that it could be a scheme of Aboriginal title combined with national park status. Woodward set out the fundamental principles of joint management as:

- Aboriginals, through the Land Council, should be consulted and their views taken into account before any scheme for the development or management of the area is adopted.
- Aboriginals should be well represented by people of their own choice on any board or committee made responsible for the area.
- Others appointed to such a board or committee should be persons who have some understanding of, and sympathy with, the relationship of the Aborigines to their land.
- The clear wishes of Aboriginals on any matters relating to the land should not be able to be overruled without reference to some independent authority that can determine the particular issue in an informed and impartial way.
- Development plans for the area should make allowances for any Aboriginal, and particularly those having traditional claims to that land, who may wish to live there.⁴⁴⁶

The spirit and letter of Woodward's consideration of Aboriginal interests together with conservation interests were supported by Mr Justice Fox in 1977 who recommended that Woodward's guidelines for Aboriginal participation be applied to the planning and management of the whole of any national park

⁴⁴⁶ Susan Woenne – Green et. al above n 434, 179.

which is established in the region, even though part of it may not become Aboriginal land.⁴⁴⁷

In 1980, the Government amended the *Aboriginal Heritage Act* and extended the discretionary powers of the Minister over the Trustees and the CMC. The definition of 'an Aboriginal site' was also narrowed and made contingent on whether it should be preserved because of the importance and significance to the cultural heritage of the state.⁴⁴⁸

It is clear that the Act never met reasonable Aboriginal aspirations of recognition of their special rights and interests in the land, thus ignoring Aboriginal participation in environmental decision making. Seaman has noted in this regard:

"Following the 1980 amendments, the *Aboriginal Heritage Act* has a simple operation in relation to sites. The government of the day can decide in the interest of the broader community that Aboriginal sites should be destroyed or damaged no matter how sacred or special their significance to Aboriginal people may be. Aboriginal people have no right to be heard on the topic."⁴⁴⁹

Perhaps the most important development in relation to Aboriginal participation in the conservation and management of the environment in the 1970s and 1980s was the passing of the *Conservation and Land Management Act*

⁴⁴⁷ Ibid, 180.

⁴⁴⁸ Section 5(c).

⁴⁴⁹ Seaman Paul, *The Aboriginal Land Inquiry* (Perth, June 17th 1984, paragraph 8.16).

(CALM) in 1974. The CALM Act established the Department of Conservation and Land Management with three statutory controlling bodies: the Lands and Forests Commission (LFC), the National Parks and Nature Conservation Authority (NPNCA), and the Forest Production Council.⁴⁵⁰

The NPNCA was established as a 15 member body with four ex officio members - the Executive Director of CALM, and the CALM Directors for Nature Conservation, National Parks and Forest. One of the 15 members is a person representing Aboriginal interests.⁴⁵¹ The NPNCA is responsible for the preparation of management plans with respect to national parks and other conservation parks. These parks are designed to: “fulfill so much of the demand for recreation by members of the public as is consistent with the proper maintenance and restoration of the natural environment, the protection of indigenous flora and fauna and the preservation of any feature of archaeological, historical, or scientific interest.”⁴⁵²

CALM is the statutory manager of the land and water vested in the NPNCA and the LFC and is responsible to the Minister for the Environment.⁴⁵³ CALM has five major objectives and the one relating to the management of the environment simply states: “to protect, restore and enhance the value of resources entrusted to the Department so as to meet as far as possible, the diverse expectations of the community”.⁴⁵⁴

⁴⁵⁰ The CALM Act 1933, Part III, Sections 18-27.

⁴⁵¹ Section 23(1) (viii) added by the 1991 amendment.

⁴⁵² CALM Act, Section 56(1) (c).

⁴⁵³ The CALM Act sections 33 (1) (a) –(g) sets out the functions of CALM.

⁴⁵⁴ Department of Conservation and Land Management, (1991) 11-15.

It is important to note in relation to the CALM Act that it does not provide any definition of Aboriginal special interests in the conservation estate. Except for the 1991 amendment referring to the membership of the NPNCA, Aboriginal interests are not mentioned anywhere. Because of the absence of any accommodation of Aboriginal interests, CALM and NPNCA have found it difficult to develop policies with respect to Aboriginal participation in the conservation estate. Indeed, when the negotiations for joint management of Purnululu commenced, no policies existed which could easily accommodate this conflict.

Recognising the lacuna in the law, in 1987 CALM proposed a draft policy document on a comprehensive range of issues relating to the expansion of Aboriginal opportunities, programs and contracts for their increased participation in CALM's management of the conservation estate. This was incorporated in CALM's Aboriginal employment and training plan and published as a departmental policy statement. Whilst necessarily cast in terms of employment and training, the document reflects the statutory role of CALM as managers. Objective 6 requires CALM to:

“investigate in consultation with CALM personnel and outside key agencies, the possibilities for instigating training programmes that can be offered to Aboriginal people to assist the development of skills and competencies for effective Aboriginal participation and involvement in CALM related consultative and administrative mechanisms like

national park advisory committees and CALM management plan project teams.⁴⁵⁵

The NPNCA has a detailed policy on Aboriginal involvement in national parks and nature conservation. They are:

- to ensure that Aboriginal relationships to land of cultural significance are recognised and maintained
- to recognise that under Aboriginal customary law, traditional Aboriginal custodians have their own cultural rights and responsibilities toward certain areas
- to consult with Aboriginal people having special affiliation to lands vested in the Authority regarding the management of such lands
- to negotiate on a case by case basis with each group of Aborigines having affiliations with conservation lands to resolve such issues as availability of living areas, access for hunting, gathering and other cultural activities and establishment of park councils or similar bodies.
- to acknowledge that the Aboriginal cultural environment is best understood by Aboriginal people and whenever possible the Authority will involve Aborigines in the protection and management of cultural sites on conservation lands
- to undertake to address land management issues of interest to Aboriginal people to ensure equality of all public interest groups

⁴⁵⁵ CALM Policy Statement No.35, *Aboriginal Employment and Training* (December 1991) 6, 30.

whilst carrying out its primary functions for the conservation and appreciation of the natural environment as laid down in the CALM Act (1984) and *Wildlife Conservation Act* 1950.

The period starting with the 1980s saw a renewal of expectations in strengthening Aboriginal participation in the conservation and management of the environment. The impetus was set by the Aboriginal Land Inquiry (The Seaman Inquiry) into issues regarding Aboriginal rights and interests in land and water. The inquiry was principally intended to:

- consider the question of what kinds of Aboriginal relationships to land should be protected and the way in which to satisfy reasonable aspirations of Aboriginal people to rights in relation to land and;⁴⁵⁶
- examine the question of the future implementation of the Environmental Protection Authority's recommendations for conservation reserves to ensure that adequate safeguards exist in the consideration of possible conflicting Aboriginal interests.⁴⁵⁷

Seaman's recommendations on Aboriginal participation in environmental decision making mainly focussed on means by which possible conflicting interests could be made compatible by negotiated agreement on equal terms between Aborigines and Government. Noting that Aborigines were part of the environment, Seaman recommended that the definition of environment in the

⁴⁵⁶ Term of Reference 2.

⁴⁵⁷ Term of Reference 8 added by Government after the initial terms of reference were announced.

Environment Protection Authority Act 1971 be broadened to include social impact on Aboriginal people. Additionally, with respect to Aboriginal heritage legislation, he proposed that a site be included within a broader definition of significant Aboriginal area.⁴⁵⁸

In order to strengthen the role of Aboriginal people in resource development and environmental protection or any other planning context, Seaman recommended that any public authority, when implementing a recommendation in any way, should have an obligation to consult with the regional Aboriginal organisations involved and to have regard to Aboriginal aspirations in relation to the land being the subject of the recommendation.

Seaman's recommendations were abandoned by the WA Government amidst the clamour and political schism associated with the development of uniform national land legislation and the continuing debate of Aboriginal special rights in the context of the mineral resources development. The first major political campaign to be conducted by the mining industry focused on Western Australia and the Seaman Inquiry. The campaign by the WA Chamber of Mines, whilst at no time publicly opposing Aboriginal land rights, cleverly linked the interests of the mines with the state and the community and put these in direct opposition to the land claims of Aboriginal people. The obvious and logical extension was that the interests of Aborigines and everyone else were incompatible.

⁴⁵⁸ The proposed definition was: an area of land within the state or within or beneath waters controlled by the state, or an area of water in the state which is of particular significance to Aborigines in accordance with Aboriginal tradition.

Consequently, Seaman's recommendations were unceremoniously dumped and, on the same day that the Aboriginal Land Inquiry was made public, the Government issued its Statement of Principles which rejected Seaman's assumption of separate Aboriginal interests in land, maintaining instead a government commitment to the pursuit of equality of rights and benefits within the perspective of a continued unity or coincidence of interests between all sections of the community including Aborigines and resource developers.⁴⁵⁹

When the Australian Land Inquiry report sank beneath the controversy over granting Aboriginal people 'superior' rights in land, so too sank the principle of Aborigines having a special or equal right to negotiate control and management of the conservation estate. The failure to confirm the right to participate in the management of the conservation estate by Aboriginal people and the consistent absence of policy directives from successive governments in WA has meant that Aboriginal people have had to engage the attention and cooperation of government agencies on a case by case basis from a position utterly bereft of any bargaining power.⁴⁶⁰

In 1989, there was a change of fortune when the Western Australian Labor Government made a number of commitments relating to Aboriginal involvement and participation in environmental decision making. Labour committed itself to:

⁴⁵⁹ Susan Woenne – Green et.al, above n 434, 182-184.

⁴⁶⁰ Ibid.

- provide for ownership and joint management with effective decision making powers over national parks and conservation reserves by Aboriginal groups having affiliation with those lands
- provide resources to continue and expand the employment and training of Aboriginal people in national parks and conservation reserves, to maintain and enhance their relationship with land of significance
- undertake special programmes to provide recognition of Aboriginal practices for the sustained management of flora and fauna
- provide special access conditions for Aboriginal people to national parks and conservation reserves to enable them to continue practising their lifestyle.⁴⁶¹

These new commitments by the Labor Government gave impetus to Aboriginal groups, which had been increasingly vocal with respect to Aboriginal special interests in land and the conservation estate. The Western Australian (WA) Government agreed to establish a National Parks Research and Policy Unit (NPRPU) within the AAPA at the request of the Premier who was at that time also the Minister for Aboriginal Affairs, to address the issue of Aboriginal interests in national parks and other areas protected for conservation. The unit was established in January 1990 with tasks defined as:

- to formulate policy to support Aboriginal interests in national parks and other protected areas consistent with Labor Party commitments
- to coordinate policy development of other government agencies; and

⁴⁶¹ Ibid, 186.

- to provide advice on policy and Aboriginal interests to the Minister for Aboriginal Affairs.

A major function of the AAPA was to chair an interdepartmental coastal Kimberly National Parks and Reserves Committee (the Gamali Committee)⁴⁶², which had been convened by the Minister for Aboriginal Affairs in late 1989. The terms of reference for the committee included examining all aspects of management options for Aboriginal and conservation lands between Aboriginal owners and CALM. Among a range of difficult issues involving nine existing and proposed protected areas over land and water, the committee endorsed a formal proposal for the creation of the Buccaneer Archipelago National Marine Park which Gulingi Nangga members anticipated would create the framework for the establishment of the first true jointly managed national park in the state. The proposal was based on existing legislation and in summary involved:

- proclaiming most of the islands as Aboriginal reserves with vesting in an Aboriginal landholding body and a leaseback to CALM for management as a national park
- vesting of waters in the NPNCA and leased to the Aboriginal body
- managing the whole area as an Aboriginal Marine Park by a board of management with an Aboriginal majority but with

⁴⁶² The committee consisted of AAPA, the EPA, Department of Aboriginal sites, CALM and the Gulingi Nangga Aboriginal Corporation (based in Derby) which had been recently formed to represent Aboriginal interests in lands and waters in the West Kimberly affected by the existing and proposed national parks and by other competing interests of mining, tourism, commercial fishing and aquaculture.

representation from CALM, the EPA and the Department of Fisheries.

An amendment to the CALM Act was required to provide for a Board of Management to be responsible for a plan of management. Despite the endorsement by CALM, the EPA, the Department of Aboriginal Sites and the AAPA, the proposal lapsed in 1992 due to the absence of a clear direction from government on resolving the competing interests of the pearl oyster and troches industry. That notwithstanding, several conferences over the next two years consolidated and strengthened Aboriginal aspirations to participate in the conservation estate. The conferences afforded an opportunity to exchange information and express concern with government agencies in a public forum. The proceedings and recommendations were to later form part of an AAPA draft policy on Aboriginal interests in the national parks and conservation estate.⁴⁶³

The first of these conferences was the Derby Conference, convened by AAPA and ATSIC with delegates from all over Western Australia to discuss issues of common concern relating to national parks and reserves. Key issues discussed included:

- formal recognition by government of Aboriginal interests and responsibilities in land and waters vested as part of the conservation estate

⁴⁶³ Susan Woenne – Green et.al, above 434, 187.

- the need for a detailed and uniform policy for involvement of Aboriginal land owners in the establishment of parks and reserves
- accommodation of Aboriginal aspirations when expanding any reserve system
- acknowledgement of Aboriginal rights for hunting and gathering.

In June 1990, members of the four Aboriginal organisations most directly impacted by national parks on their traditional lands met at the Derby Leprosarium to resolve the agenda for the proposed major Millstream Meeting.

⁴⁶⁴ The three day conference was funded by the AAPA and ATSIC with considerable logistic organisation and support provided by CALM. Approximately 240 Aboriginal organisations attended. In addition, delegates from 16 government (state and federal) and other organisations attended the meeting.

The conference endorsed several principles or areas for Aboriginal involvement in the conservation estate. They included:

- joint management with Aboriginal people as decision makers
- excision (living areas)
- access for cultural (including subsistence) purposes

⁴⁶⁴ Agenda items included land tenure, park management, hunting, fishing and use of natural resources and tourism.

- ownership and control of Aboriginal cultural heritage including cultural information
- employment
- ownership and leaseback arrangements to involve rental and negotiated percentage of entrance fees
- negotiations with Aboriginal people for any new park proposals
- training and commercial enterprises
- no mining in parks or near Aboriginal communities
- negotiations with Aboriginal people on outside matters which impact on reserved areas.

A year after the Millstream Conference, the Crocodile Hole Conference was convened. The Conference was intended to bring together all Aboriginal communities and authorities throughout the Kimberly to discuss a wide range of issues.

A major focus of the Conference was the need for negotiations between Aboriginal and all interests and organisations of mainstream Australian society with which Aboriginals have to deal in matters relating to the establishment and management of national parks, nature, scientific, cultural and other reserves.

In early 1993, a new government, the Court Liberal/National Coalition Government came to power. This government is considered to have had a

contemptuous attitude towards native title. For example, in *State of Western Australia v Commonwealth*,⁴⁶⁵ the Government of Western Australia challenged the validity of the *Native Title Act* 1993 in the High Court. The WA Government sought to enact its own legislation: *Land (Titles and Traditional Usage) Act* 1993 (WA). However, the High Court upheld the validity of the NTA and ruled that the *Land (Titles and Traditional Usage) Act* 1993 (WA) was inconsistent with the *Racial Discrimination Act* 1975 and the NTA and therefore invalid by reason of s.109 of the Constitution. Also, during the time of the Court Liberal/National Government, negotiations for the cooperative management for Kirijini and Purnululu National Parks limited the involvement of indigenous peoples to an advisory role only.

Notwithstanding the negative attitude of the Court Liberal/National Government toward native title, the impetus for Aboriginal participation in the management of WA's national parks and conservation estate continued. For example, in 1998 the Malimup Communiqué proposed the following as one of the overarching principles in relation to indigenous use of areas reserved or zoned as wilderness:

“Indigenous peoples should be supported in maintaining their cultures through on going association with and management of their country in partnership with land management agencies”.

It outlined a management framework to involve indigenous peoples. This communiqué was subsequently incorporated into CALM's Draft Policy

⁴⁶⁵ (1995)183 CLR 373.

Statement of Identification and Management of Wilderness and Surrounding Areas.⁴⁶⁶

In February 2001, a new Labor Government was elected. The Government appears to have reaffirmed Labor's 1989 policy with regard to joint management of protected areas as is evidenced by the developments that took place during its time in office.

The first of the developments was in June 2001 when CALM put out a revised draft policy statement for comment: *Aboriginal Involvement in Nature Conservation and Land Management*,⁴⁶⁷ which outlined ways in which CALM would, in relation to joint management, put in place a range of mechanisms which afforded Aboriginal people meaningful involvement and participation in the management of conservation reserves.⁴⁶⁸ CALM also undertook a number of regional initiatives during this period. For example, in June 2001, CALM and the Goldfields Land and Seas Council (then the Goldfields Land Council) signed a *Memorandum of Understanding for the Development of Joint Management and use of Conservation Lands in the Goldfields Region of Western Australia*, the first of its kind in the state. Under the MoU, the GLC and CALM agreed to endeavour to develop and implement mechanisms that

⁴⁶⁶ Developed at a meeting of indigenous community representatives, staff of government land management agencies and representatives of non governmental groups at Malimup Spring WA . It was concerned with indigenous people and the management of areas reserved or zoned as wilderness primarily within national parks or other lands reserved for conservation or recreational purposes. See preamble to the Malimup Communique, contained at attachment 3 to: Department of Conservation and Land management, Identification and management of wilderness and surrounding areas, Draft Policy Statement, undated. Public Comment on Draft Policy Statement closed on 10 August 2003.

⁴⁶⁷ CALM Revised Draft Policy Statement, *Aboriginal Involvement in Nature Conservation and Land Management* (June 2001) 1.

⁴⁶⁸ Ibid .

facilitated joint management of CALM managed lands.⁴⁶⁹ In signing the MoU with GLC, CALM was furthering a number of strategies in its regional management plan for the Goldfields, one of which was to “promote opportunities for Aboriginal People to actively participate with CALM in planning and managing CALM managed lands.”⁴⁷⁰

Soon after putting out the revised policy statement for CALM, there was a *Review of the Native Title Claim Process in Western Australia* (the Wand Report) in September 2001. The Review recommended, among other things, that the following principles in relation to conservation lands be addressed:

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- the grant of inalienable freehold over future and existing conservation lands and waters to Aboriginal corporations capable of becoming a registered prescribed body corporate under the *Native Title Act* (with or without a determination of native title)
- arrangements, such as leasing and joint management, to govern the protection and exercise of Aboriginal rights and interests and the conservation of biodiversity and ecological processes of the country.⁴⁷²

⁴⁶⁹ Memorandum of Understanding between the Department of Conservation and Land Management and the Goldfields Land Council for the Development of the Joint Management and use of Conservation Lands in the Goldfields region of Western Australia (June 2001) 3, principle K.

⁴⁷⁰ *Regional Management Plan 1994-2004, Goldfields Region, Department of Conservation and Land Management, Western Australia* (December 1994) 89.

⁴⁷² Wand P. and Athanasiou, C, *Review of the Native Title Claim Process in Western Australia*, (September 2001) 133, para. 9.3.4.

In addition, in September 2002, the WA Government released its *State Sustainability Strategy: Consultation Strategy Draft*, which put forward the following proposed action in relation to sustainability: “promote joint management with Aboriginal people of national parks and an Aboriginal Country Management Program.”⁴⁷³

It is against this complex background of competing interests, the politicisation of Aboriginal land rights at the national level, and the long history of non-consultation and non-recognition and subordination of Aboriginal interests at the state level that, in July 2003, the first steps towards indigenous ownership and joint management of conservation lands was undertaken in Western Australia. The initiative is in the form of a consultation paper entitled *Indigenous Ownership and Joint Management of Conservation Lands in Western Australia*.⁴⁷⁴ Under this paper, the WA Government requested submissions on its proposals to improve the *Conservation and Land Management Act* 1984 (the CALM Act) to enable Aboriginal ownership and joint management of national parks and other conservation lands.⁴⁷⁵

The key objectives of the consultation paper included:

- adherence to the relevant national and international obligations regarding protected area management and a desirability to meet best practice guidelines in relation to indigenous involvement in protected area management

⁴⁷³ Ibid.

⁴⁷⁴ *Department of Conservation and Land Management, Indigenous Ownership and Joint Management of Conservation Lands in Western Australia*, Consultation Paper (July 2003).

⁴⁷⁵ Ibid, 2.

- protected areas must be managed with three objectives: conservation, Aboriginal heritage and recreation (where appropriate)
- traditional owners to be adequately represented on management bodies
- system should be considered statewide and be expressed in legislation
- the CALM Act should reflect Aboriginal aspirations to participate in management of their lands, by including provisions for protection and preservation of Aboriginal heritage; establishing boards of management with a majority of traditional owners and the creation of inalienable freehold title
- expedition of the creation of new conservation lands by agreement with traditional owners
- implementation of joint management through the state⁴⁷⁶

Perhaps the most important proposal in the consultation paper in relation to Aboriginal participation in protected area management is the one related to boards of management and the creation of inalienable freehold title and leaseback arrangements. The WA Government perceived the creation of boards of management as being the single most significant change to the management of the State's conservation lands ever undertaken by any government.⁴⁷⁷ It therefore favoured the involvement of at least a majority of traditional owners

⁴⁷⁶ Ibid, 11-12.

⁴⁷⁷ Ibid, 18.

on these boards of management. The WA Government had already indicated in the consultation paper its preference for aboriginal majorities on boards of management. This would require an amendment to the CALM Act to require, as an absolute minimum, a bare majority of traditional owners on boards of management.

The consultation paper has also expressed partiality towards the creation of inalienable freehold title and leaseback arrangements. Inalienable freehold under the WA proposal means that an Aboriginal Body Corporate (ABC) can hold land in perpetuity but does not have the right to sell it. The WA Government would attach a condition to the title to have the land managed under the provisions of the CALM Act and further that third party rights and interests to access areas under the provisions of other Acts e.g *State Agreement Acts*, *Mining Act*, *Rights in Water and Irrigation Act* may also apply.⁴⁷⁸ The proposal for joint management over land held as inalienable freehold⁴⁷⁹ would generally involve a 99 year lease with an option, by the ABC back to the WA Government, to enable the ABC and CALM to jointly manage the area for purposes defined in the CALM Act e.g national park.⁴⁸⁰ Lease fees would also be payable, such fees being subject to five yearly reviews.⁴⁸¹

Inalienable freehold title as proposed by the WA Government is a restrictive title over which third parties still retain their rights of access. However, this is

⁴⁷⁸ Department of Conservation and Land Management, above n 467,12.

⁴⁷⁹ Ibid, 14. The consultation paper does not envisage that all conservation lands will be held as inalienable freehold. It identifies two other tenures for which alternative joint management arrangements are intended: for non-Aboriginal vested reserves consultative management arrangements are intended and for Aboriginal vested reserves cooperative management is intended.

⁴⁸⁰ Ibid, 15.

⁴⁸¹ Ibid.

not different from other regimes in place in other parts of Australia. This lease arrangement as proposed by the WA Government favoured the lessee substantially over the lessor.

It is important to note however, that in spite of its positive proposals regarding the involvement of indigenous peoples in the management of protected areas, the consultation paper still fell short in some aspects.⁴⁸² For example, the consultation paper did not address the rights of indigenous peoples to the traditional use and occupation of the land. Although one of the objectives of the consulting paper was the desirability (expressed in general terms) of meeting best practice guidelines in relation to indigenous involvement in protected area management,⁴⁸³ which includes among other things, that joint management agreements should be based on the full respect for the rights of indigenous and other traditional peoples to traditional sustainable use of their land,⁴⁸⁴ the WA Government did not specifically list the protection of such usage and occupations as one of the objectives, or as one of the principles guiding the negotiations for joint management. The only traditional rights that appeared to be within the scope of the consultation paper were the rights of indigenous peoples to practise their culture, protect their heritage and share in the economic benefits, such as employment, that are associated with the management of the land. It is therefore important that these rights are

⁴⁸² Ibid, 28-29.

⁴⁸³ Department of Conservation and Land Management, above n 474, 11.

⁴⁸⁴ Beltran, J. (ed), *Indigenous and Traditional Peoples and Protected Areas – Principles, Guidelines and Case Studies*, IUCN, Gland, Switzerland and Cambridge, U.K and WWF International, Gland, Switzerland, (2000) x.

legislatively protected in any proposed joint management arrangements, something that is already in other parts in Australia.⁴⁸⁵

5.3 Implementing the participation of indigenous peoples in the conservation and management of protected areas in Western Australia: the case of Purnululu National Park and Conservation Reserve

5.3.1 Background to Purnululu National Park and Conservation Reserve

Purnululu National Park and Conservation Reserve is a world heritage site⁴⁸⁶ located in the Kimberly region within the Halls Creek Shire approximately 160 km south of Kanumura, 120 km north of Halls Creek and 50 km west of the Northern Territory border. The area of the National Park totals 208,730 ha which includes the Bungle Bungle massif, which covers 45,000ha and the Conservation Reserve which covers 110,600 ha.⁴⁸⁷ The Park is bounded on the north and west by pastoral leases and to the south and east by the Ord River Regeneration Reserve.⁴⁸⁸

Radiocarbon dating of artifacts shows that Aboriginal people have lived in the region for the last 20,000 years and it is possible that further archaeological study will reveal earlier occupation. The present Aboriginal traditional owners

⁴⁸⁵ NPW Act (NSW) s.71 AD (1)(i); EPBC Act s. 358 A.

⁴⁸⁶ *Purnululu National Park Management Plan 1995 – 2005*, Department of Conservation and Land Management for the National Parks and Nature Conservation Authority, Perth, Western Australia, 1995(4).

⁴⁸⁷ Ibid.

⁴⁸⁸ Ibid.

of Purnululu National Park have maintained their continuous responsibility for it. Some were born in the area, which is now a national park; close relatives as well as ancestors are buried there.⁴⁸⁹

Purnululu is viewed as a rich area by the Aboriginal people to which they belong. It is a country to which they have the strongest spiritual and early history ties and personal identity. It is a country to which they pin their hopes to develop communities according to their plans. Their plans include independence, based on creating appropriate educational and health facilities under their own direction and economic enterprises such as tourist-based ventures; these all add up to creating communities in which individuals are healthy and can develop with pride and independence their Aboriginal way of life. Aboriginal society is, like all others, constantly changing in response to changing circumstances.⁴⁹⁰

5.3.2 The gazettement of Purnululu National Park and Conservation Reserve

The developments leading to the gazettement of Purnululu National Park occurred at the turn of the 1980s and gained impetus at the same time partly as a result of the Aboriginal Land Inquiry. The impetus to gazette Purnululu was also partly driven by the growing recognition of the tourist potential of the area.⁴⁹¹

⁴⁸⁹ Ibid, 37.

⁴⁹⁰ Ibid, 38.

⁴⁹¹ As a result, the land in Purnululu was vested in the Department of Agriculture for regeneration from prolonged pastoral use. A senior traditional owner, Raymond Wallaby, had been refused permission to live on his traditional country on the grounds of the area's fragility and its inability to sustain what was seen by government as a conflicting use of the land.

As a result, a multi-agency Bungle Bungle working group was formed by the Environment Protection Authority (EPA) to investigate and make recommendations to Cabinet on the management of Bungle Bungle. The formation of this agency was more the direct result of pressure by the tourist industry to develop the area for tourist access than a desire by the WA Government to promote Aboriginal Land rights in the area. That notwithstanding, when a member of the group, the then Registrar of Aboriginal Sites (WA Museum) was seconded to the Seaman Inquiry, an alternative member was appointed in his place to represent the interests of Aboriginal people in the area. Traditional owners made it clear to the working group that their fundamental aspirations with respect to the land were:

- freehold title with provision for a negotiated leaseback for the purpose of maintaining the land as a national park
- a joint management arrangement between traditional owners and an appropriate national park agency

In the course of 1983 and 84, the working group visited Kakadu and Gurig in the Northern Territory and concluded that such a model for Purnululu would work in a functional manner for both interests. The working group's report to the EPA in 1984 recommended the creation of a national park. It noted that the remoteness and intrinsic wilderness values of the proposed park had captured the public's imagination and that upgrading it for tourist access would, to a degree, diminish these values.⁴⁹² The draft report also made recommendations concerning substantial Aboriginal involvement in the management of the

⁴⁹² Susan Woenne – Green et.al, above n 434, 196.

proposed park but declined to comment on the issue of title. In 1985, the premier announced cautiously that; "...there will be joint management of Bungle Bungle. But we are not saying that there will be ownership of Bungle Bungle jointly vested."⁴⁹³

In 1986, the working group presented its final report⁴⁹⁴ to the EPA for submission to Cabinet. In terms which are reminiscent of both the Woodward Commission and the Seaman Inquiry, the working group recommended that the proposed national park be vested in the NPNCA as an A class reserve and also that the vesting be subject to mechanisms providing secure residence and equitable input to management for Aboriginal traditional owners.⁴⁹⁵ The working group also acknowledged that freehold title in conjunction with joint management was the preference of the Aboriginal traditional owners. The working group asserted the importance of recognising the special relationship of the Aboriginal owners to their land and their right to secure residence and that an equitable role in the management of their traditional lands must be provided for⁴⁹⁶. The working group recommended that, in the absence of legislative provisions, the necessary security required for both parties must be provided by formal mechanisms which would provide a guarantee of equitable input to management decision making⁴⁹⁷.

⁴⁹³ *Western Australian*, 18 June 1985.

⁴⁹⁴ Bungle Bungle Working Group, (May 1986) 3.

⁴⁹⁵ *Ibid*, Recommendation 2.

⁴⁹⁶ *Ibid*, vii.

⁴⁹⁷ Susan Woenne – Green et.al, above n 434, 198.

The working group made several recommendations concerning joint management mechanisms for the proposed Bungle Bungle National Park. They were:

- the proposed national park be jointly managed by CALM and the Aboriginal traditional owners
- a board of management be established with representatives from the national parks agency and an incorporated body representing traditional owners to guarantee equitable input to management decision making for both parties. The board should be primarily a decision making authority with respect to management of the reserve. There were considered to be advantages in a cooperative and collaborative decision making process based on consensus agreement.
- the board should function as a reviewing and ratifying body, considering recommendations on major issues including policy, planning, and budget issues developed by it or referred to it by CALM, the Aboriginal incorporated organisation and other individuals or bodies
- members of the board should have access to independent advice
- there should be some recourse to technically competent and mutually acceptable adjudication should agreement not be possible within the board

- decisions which would affect the sites of significance to Aboriginals should be subject to agreement by the Aboriginal incorporated organisation
- CALM prepare at the earliest possible opportunity and in liaison with the board of management a draft for public comment. The final plan of management be made public following endorsement by the board.⁴⁹⁸

After considering the EPA's report in 1986, Cabinet endorsed the vesting of two reserves in the NPNCA, one including most of the Bungle Bungle massif as a class 'A' national park, the other with existing exploration licences as a conservation reserve.⁴⁹⁹ The Cabinet decision also directed CALM to undertake the preparation of a management plan for the new area, which would ensure:

- the involvement of interested parties in the planning process including Aboriginal people with traditional affiliation with the area, the tourism commission and local government
- the development of a means of meaningful [sic] ongoing management input of Aboriginal people with traditional affiliation with the land in the park
- that employment opportunities be provided for Aboriginals in the management and interpretation of the park
- that proposals be developed for Aboriginals with traditional affiliations to reside in the park

⁴⁹⁸ Department of Conservation and Land Management, (April 1989) 9.

⁴⁹⁹ Both were proclaimed and gazetted in March 1987, although not formally named.

- that an Aboriginal National Park Ranger Training programme be established⁵⁰⁰

In accordance with the direction of the 1986 Cabinet decision, CALM formed a planning team for preparation of the draft management plan consisting of three CALM officers and representatives from the local shire council, the Tourism Commission and PAC. At the same time, PAC proceeded to negotiate terms for the structure, content and process by which meaningful management input by PAC/CALM could be defined, formally acknowledged and expressed in a management plan of the park.

The planning team proceeded to produce draft principles of the management plan. Cabinet endorsed some elements of the model in principle in its 1987 decision, which provided among other things for the establishment of Purnululu Park Council with equal CALM/PAC membership as a ministerial committee with the following functions:

- to prepare and advise on proposals for the draft management for the park for the consideration of the minister
- acknowledging the provisions of the existing Act, in association with CALM and subject to the minister, to participate in the implementation of the management plan as so approved, including the development of policy relating to Aboriginal interests in the park

⁵⁰⁰ See Susan Woenne - Green et.al above, n 434, 66.

- to provide advice to the minister in all matters relating to Aboriginal involvement in the park⁵⁰¹

Cabinet also endorsed the principle of serviced living access within the park subject to lease arrangements between CALM and PAC. Fundamental to the proposed model was a formal agreement between PAC and the minister detailing the structure and functions of Purnululu Park Council. While the Cabinet would create a ministerial committee, the formal agreement would establish the Purnululu Park Council. All the principles endorsed by the Cabinet were to be enumerated in the agreement, pursuant to the final management plan. In the absence of any legislative provisions to underpin the proposed arrangement, the agreement between PAC and government was the lynch pin of the model as it formally established the rights and obligations of both parties.⁵⁰²

It was proposed that the park council as the principal management body for the park would consider and advise the minister on a wide range of issues which included: provision of living areas, community development, control and management of cultural heritage, traditional use of the land, Aboriginal ranger training, provision of Aboriginal employment and encouragement and Aboriginal enterprise, interpretation of the park to the public, research and monitoring, staff selection and induction, fire management, capital works, and planning control of other uses of the park including living area and other leases and any other issues notified by PAC to the park council as being of concern to

⁵⁰¹ Ibid.

⁵⁰² Susan Woenne – Green, above n 434, 200.

Aboriginal interests or involvement in the park. The PAC anticipated that the process by which the park council (PAC and CALM) would consider and advise on all these aspects would be incorporated in the management plan variously as management objectives and strategies for implementation.⁵⁰³

The *Purnululu Draft Management Plan* was released for public comment in mid April 1989.⁵⁰⁴ The plan was a very innovative document because, for the first time in Western Australia, a national park draft plan addressed issues of fundamental social and religious importance to Aboriginal people as issues to be considered by management over and above the requirements for the protection of sites. The draft plan introduced the term 'meaningful management input' for Aboriginal people in park management.⁵⁰⁵ It also provided for the management and protection of Aboriginal cultural resources,⁵⁰⁶ the establishment of living areas⁵⁰⁷ and access for subsistence and ceremonial areas⁵⁰⁸. The proposed plan acknowledged that the Aboriginal cultural environment is best managed by traditional Aboriginal custodians.⁵⁰⁹

The proposed *Purnululu Draft Management Plan* attracted a total of 54 submissions, 11 of which addressed the structure and functions of the proposed

⁵⁰³ Ibid.

⁵⁰⁴ Department of Conservation and Land Management, above n 474. A paste in the title page of the report indicated that it had been prepared by the CALM project team with assistance from representatives of the Halls Creek Shire Council, the WA Tourism Commission and PAC.

⁵⁰⁵ Susan Woenne – Green et.al above, n 434, 202.

⁵⁰⁶ Section 4.1-4.

⁵⁰⁷ Section 6.1 –6.4.

⁵⁰⁸ Section 3.9.

⁵⁰⁹ Section 4.3. The use of the term 'custodians' in the draft plan reflects the 1986 cabinet decision. Agreement could not be reached between PAC and Government on this sensitive issue nor on a wide range of issues associated with what constituted meaningful management in put.

park council. Comments concerning proposed Aboriginal involvement generally indicated there was not enough provided for.

A joint CALM/PAC planning group commenced work on a revision of the existing draft plan. In early 1991, the planning group produced a revised management plan, which they were confident represented a firm basis for a final plan which was consistent with ministerial agreement while recognising a clear decision making role for PAC via the park council.

It is important to note, however, that just before the revised plan for proposed Purnululu national park and conservation area came out, the 1989 published draft plan received international recognition when in February 1991, Western Australia won "the most prestigious international eco-tourism award for the management of Purnululu National Park, home of the Bungle Bungle."⁵¹⁰

The presenter of the award, Dr David Bellamy, is reported to have said that the international eco-tourism award for the Bungle Bungle was particularly outstanding because the authorities created a tourism destination of enormous interest and physical beauty while maintaining the traditional Aboriginal homeland and customs.⁵¹¹

In July 1991 the PAC received a response from the CALM Corporate Executive in the form of a revised draft management plan, which, in the PAC's view, differed so significantly from the position reached in January by the

⁵¹⁰ WA Minister for Tourism, Media Statement, 8/2/91. The award, a category of the Tourism for Tomorrow awards, was presented in London in a ceremony reported to have been broadcast to more than 15 million television viewers.

⁵¹¹ Ibid.

planning group that it constituted in effect a new document. The PAC felt that the revised draft plan reverted to the 1989 published draft plan. Most significantly for Aboriginal people, was the new revision which replaced 'traditional owner' with 'custodian' throughout the document. Following this second revision of the draft management plan, the WA Government won a second overseas award for a tourism project in September 1991, the Silver Otter Award, from the Guild of British Travel Writers.⁵¹²

In 1992, the Minister approved the *Management Plan for Purnululu National Park*. It did not include any specific legal provisions for joint management.

5.4 The participation of Aboriginal people in the decision making process leading to the gazetting of Purnululu National Park: an analysis

The participation of Aboriginal people in the process leading to the gazetting of Purnululu National Park and Conservation Reserve evolved along with the park itself.

During the initial stages of the establishment of the Park, the multi-agency working group had strongly recommended that the Park be vested in the NPNCA as a class A reserve and that the vesting be subject to mechanisms providing secure residence and equitable input to management for Aboriginal traditional owners. However, the 1986 Cabinet decision totally relegated Aboriginal special rights in land along with any semblance of structures that

⁵¹² Ibid. The Minister noted that the Silver Otter Award was a prestigious award from an extremely influential group of people who help establish the travel patterns in one of Western Australia's most important overseas tourist markets.

guaranteed equity. The equitable position of Aboriginal people with respect to CALM in planning and management decision making had been redefined by Cabinet as one of several interested parties from which CALM would seek advice.

Aboriginal traditional owners became Aboriginal people with traditional affiliations in the area. Aboriginal aspirations with respect to management had been reformulated: equitable input to management decision making became meaningful ongoing management input. Aboriginal aspirations for ranger training, employment and living areas in the Park were no longer major planning and policy issues to be considered equally by CALM, they became Aboriginal interests in the Park defined fully within the government prerogative to ensure or to allow for and thus became effectively a separate category subsumed by the overall objectives of park planning and management.

It is therefore clear that the process of ideologically structured non-recognition of Aboriginal special interests in land and in an equitable role in its management was in full expression early on in the evolution of Purnululu National Park and long before negotiations for joint management of the Park had even begun. The result was two quite irreconcilable understandings of what the goals for negotiation were and, indeed, constraints for future negotiations continued to plague both CALM and the Aboriginal people as each tried to modify the others understanding and to create policy decisions to support each stage of compromise.

Following the 1986 Cabinet decision which sidelined Aboriginal special rights in land, traditional owners of land in the Bungle Bungle area convened the Blue Hole Meeting in June 1986 to respond to the Cabinet's decisions. This meeting determined to form a legally incorporated organisation to represent traditional owners' interests in negotiations with government. The Purnululu Aboriginal Corporation (PAC) was subsequently incorporated in December 1986.⁵¹³

The PAC was invited by CALM to be part of the planning team for preparation of the draft management plan. The PAC used this opportunity to commence negotiations for the structure, content and process by which meaningful participation input by PAC could be defined, formally acknowledged and expressed in a management plan for the Park. The 1987 Cabinet decision established the Purnululu Park Council with equal PAC and CALM membership as a ministerial committee.

The Aboriginal people's prompt response to the Cabinet decision of 1986 enabled them to establish the PAC which became a key player in the negotiations and planning leading to the establishment of Purnululu National Park and Conservation Reserve. However, in spite of the active Aboriginal involvement in the process, their aspirations and interests were not always guaranteed. For example, under increasing pressure from the shire and tour operators wishing to expand their operation within the Park, CALM proceeded to prepare a draft plan in advance of a PAC/Government agreement meant to

⁵¹³ Among the many points resolved was the formation of the Purnululu Cultural Heritage Committee (PCHC). The Committee was to be an all Aboriginal body responsible to and acting on behalf of PAC members for the purpose of recording, controlling and managing all aspects of Aboriginal cultural heritage including cultural information.

provide a formal framework describing the rights and obligations of the parties concerning the management of the park. While agreeing that controls on tourist access were badly needed, the PAC was strongly of the view that a plan could not adequately reflect their interests or role in the management of the park until agreement on those details had been reached with the government. The PAC also felt that its role was being pre-empted as one of several other interests equally represented on the planning team. CALM's position was that it was necessary to proceed with the draft plan, which would adequately reflect the principles endorsed by the 1987 Cabinet decision, particularly since the proposed park council was not yet in existence. As a result of disagreements with CALM, the PAC withdrew from the planning team in mid 1987.⁵¹⁴

The participation of Aboriginal people in the decision making process was not smooth and did not always ensure the realisation of their aspirations. For example, the issue of tourist access to certain areas of particular Aboriginal sensitivity within the Park continued to generate a lot of controversy and received national attention when a burial site was reported by the PAC to have been desecrated and human remains stolen, allegedly by tourists in late 1987. The Federal Minister for Aboriginal Affairs became involved, as did the Australian Heritage Commission. This event and the heightened attention it had received prompted the PAC to raise the issue of the Park being closed until a management plan was in place. The PAC and CALM eventually agreed to limit tourist access to certain areas of the Park pending the gazettal of a plan.

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⁵¹⁴ Susan Woenne – Green et.al, above n 434, 200.

⁵¹⁵ Ibid, 201.

When the *Purnululu Draft Management Plan* was released in 1989, the title indicated that it had been prepared with assistance from the PAC. However, the PAC was quick to distance itself from the plan saying it had not actively participated in the process having walked out of the project team early in the process.

While the draft plan dealt with some of the aspirations of the Aboriginal people concerning participation in the park,⁵¹⁶ it did leave out some fundamental concerns. For example, agreement had not yet been reached between the PAC and the WA Government concerning what constituted 'meaningful management input' by Aboriginal people in the management of the Park. Also, Aboriginal interests in the park had been effectively limited to management of living areas within the park, management of domestic pets, hunting and gathering, cultural sites, traditional burning and cross cultural interpretation for visitors.⁵¹⁷

The PAC was also concerned with several other issues. For example, the 1987 Cabinet decision noted that ".....in association with CALM and subject to the Minister, the Purnululu Park Council would participate in the implementation of the management plan, including the development of policy in relation to Aboriginal interests in the park."⁵¹⁸ The PAC was concerned about how such participation would occur. Also, while the PAC was still trying to get government to commit to a formal agreement on the revisions of the draft

⁵¹⁶ Ibid.

⁵¹⁷ Section 8.2 of the draft plan.

⁵¹⁸ Ibid, Section 9.

management plan for the Park concerning Aboriginal participation in its management, the CALM Act was amended in June 1991. The amendment to the CALM Act was basically a result of pressure from the tourist industry, which wanted access to the Park. The immediate issue of interest to the tourist industry was access to the park by licensing of fixed wing aircraft for which there had been increasing demand by the shire and tourist operators. While the PAC was not wholly against air access to the Park, it nevertheless reiterated its call for limitations and strict controls on fixed wing access, expressing the concern of its members that pressure from the tourist industry might compromise responsible and coordinated planning and management, particularly the provision of suitable infrastructure to minimise likely impacts.⁵¹⁹ The PAC's proposal for limited access was accepted by CALM, which then proceeded to license access to the Park by fixed wing aircraft.

In 1991, the PAC received a revised draft management plan for the Park from CALM. In spite of vigorous calls for improved participation of Aboriginal people in the management of the park, the PAC noticed that the revised draft marginalised Aboriginal aspirations in the management of the Park. The revised draft marginalised the role of the Park Council (on which the PAC was a member) to that of a mere specialist advisory committee with only a limited range of matters on which it could advise CALM and the Minister. It also replaced 'traditional owner' with 'custodian' thus permanently alienating Aboriginal interests in the land in the Park. The revised draft further introduced a new structure on which the PAC had not been consulted: the Purnululu National Park Advisory Committee.

⁵¹⁹ Susan Woenne – Green et. al, above n 434, 204.

As a result of the differences in the revised draft, the PAC withdrew from the negotiations. Accordingly, no further negotiations on revisions to the draft plan occurred between CALM and the PAC from July 1991 to May 1992 as agreement could not be reached on which way to proceed.

It is important to note that in addition to the disagreements leading to stalling of the negotiations, the PAC was also facing internal strife that affected its ability to participate effectively in the negotiation process leading to the establishment of Purnululu National Park. The internal strife was sparked off by one of the original members of the PAC who claimed that the PAC was not representative of the real traditional owners of Purnululu and that there was another Aboriginal organisation (not the PAC), which was the appropriate organisation for the government to continue negotiations with.

At the request of the PAC, the Kimberly Land Council convened a number of meetings to facilitate a resolution among the senior traditional owners of Purnululu. The meetings confirmed the PAC's legitimate traditional role with respect to the land of the Park as well as the appropriateness of the PACs' role in negotiations with government. This decision was communicated to government in November 1992. Nevertheless, CALM proceeded to offer both the PAC and its competing Aboriginal interest group a place on the Purnululu Council.

As the PAC continued to resolve its internal differences as well as its differences with government, the NPNCA submitted its final management plan

to the Minister, who approved the document as the *Management Plan for Purnululu National Park* on 18th November 1995.

5.5 Strategies used by Aboriginal people to participate in the process of gazetting Purnululu National Park and Conservation Reserve

An examination of the participation of the Aboriginal people in the process of gazetting Purnululu National Park reveals that they used several strategies to participate effectively in the detailed and lengthy process involved in gazetting the Park. The Aboriginal people of the Bungle Bungle were careful to develop an effective working relationship with government agencies especially CALM. Their efforts allowed them to work as part of a government working group that was charged with developing a management plan for Purnululu National Park and Conservation Reserve. Working with government made it possible for them to communicate with all the parties involved in the process. This included not only government personnel at all levels from on ground managers up to the Minister, and local, regional and state land councils, but also other stakeholders who had an interest in the process. Even though the Aboriginal people eventually withdrew from the process due to misunderstandings with CALM, the attempt to engage in the planning process with the government agencies was an important strategy, which helped put on the planning agenda some of the key aspirations of the Aboriginal people.

In order to enhance their negotiation ability and effectiveness in participating in the planning process leading to the gazetting of Purnululu National Park, the Aboriginal people of the Bungle Bungle also hired a consultant. Hiring a specialist in the management of protected areas as a strategy allowed the

Aboriginal people to access skills and knowledge for articulation of their aspirations, which in turn enhanced their effectiveness in participating in the planning process. They also allied themselves with environmental groups and other non-governmental and civil society organisations, which greatly enhanced their bargaining power and effectiveness in the process leading to the gazetting of Purnululu National Park. Some of the key environmental groups that participated in the process of gazetting Purnululu and also greatly assisted the Aboriginal people in participating in the process were Environs Kimberly and the Australian Conservation Foundation. As previously described, Environs Kimberly played an important role in reconciling the Aboriginal people when they were facing internal strife.

Additional strategies used by the Aboriginal people of the Bungle Bungle involved consultations with other stakeholders through conferences. As already described, there were a series of conferences held that involved Aboriginal participation. These conferences were important because they articulated some of the key aspirations of the Aboriginal people some of which eventually found themselves in the management plan of the Purnululu National Park and Conservation Reserve.

In order to enhance their position, the Aboriginal people also formed a legally incorporated organisation – the PAC, which was able to offer continuity through the lengthy negotiation process that led to the gazetting of Purnululu National Park. The formation of the PAC was a very important strategy not only for the negotiation process but also for promoting good relations and mutual respect between indigenous peoples and government agencies. This

allowed for the adoption of a value based approach to participating in the gazetting of Purnululu National Park. Finally, when the Aboriginal people felt that participation in the process was not effective because their aspirations were not being given due consideration, the Aboriginal people adopted a strategy which involved demonstrating outside Parliament - a move that prompted some positive action from government as previously described.

It is therefore very clear that the Aboriginal people of the Bungle Bungle employed several strategies in the process of participating in gazetting Purnululu National Park. However, it is important to note that the experience and strategies of the Aboriginal people with regard to participation in the process leading to the gazetting of Purnululu National Park and Conservation Reserve need to be viewed in the context of the culture of the management agency (CALM) and WA Government's apathy toward the Aboriginal people.

It is clear from the process pursued by CALM that the effectiveness and nature of Aboriginal participation in the planning process for gazetting Purnululu National Park was largely dependent on the approach CALM chose to pursue. As Dixon⁵²⁰ shows, the WA Government and its bureaucracy has a long held antipathy toward the notion that Aboriginal people have a special interest in land. The attempts by CALM to recognise Aboriginal aspirations in Purnululu National Park extend only to a consultative or advisory capacity. The consultation process was largely dysfunctional due to the departmental culture of CALM. This explains why the PAC at one stage withdrew from the process

⁵²⁰ Dixon, R, In the Shadows of Exclusion: Aborigines and the Ideology of Development in Western Australia in R.A. Dixon and M.C Dillon(eds), *Aborigines and Diamond Mining: The Politics of Resource Development in the East Kimberly, Western Australia* (1990) 155-168.

and engaged in combative strategies that led to demonstrations by Aboriginal people and their supporters outside Parliament.

In addition to antipathy, it would appear that the CALM policy of consultation with Aboriginal people was stymied on the ground by a lack of empathy with Aboriginal people of many CALM personnel. Research has also shown that relations between government management agencies and Aboriginal people depend to a substantial degree on the nature of the personnel deployed at the local level. The training, knowledge and experience of government management agency staff is crucial in this respect. Government management agencies need to review their staff profiles and ensure that they have appropriately trained and knowledgeable personnel deployed at the local level. They also need to employ more Aboriginal people. While CALM has employed a number of Aboriginal people, the department policy of promotion attained via interregional transfer has represented a major barrier to their advancement in the agency. Employed Aboriginal people must either make themselves available for transfer in the hope of returning years later, or stay close to their country but at a relatively junior, and powerless level in the CALM hierarchy.⁵²¹

The strategies for participation by Aboriginal people in the process of gazetting Purnululu National Park and Conservation Reserve were also influenced by CALM's managerialism. CALM has a statutory duty to manage protected areas according to a set management plan. The bureaucratic need to finalise a

⁵²¹ Tony Corbett, Marcus Lane and Chris Clifford, *Achieving Indigenous Involvement in Management of Protected areas: Lessons from recent Australian Experience* (1998) 15.

management plan often induces a sense of urgency in dealing with Aboriginal people and their aspirations. The need for urgency in the case of the Bungle Bungle was further compounded by various land use pressures. These included the growth of mining developments in the surrounding area and the projected increase in tourism. As a result, the aspirations of the Aboriginal people were often placed second in line to the other competing interests that were considered to be more economically viable.⁵²²

A combination of these factors exerted significant pressure on the capacity of the Aboriginal people of the Bungle Bungle to keep pace with the process and to ensure that their aspirations were adequately catered for. It was clear during the process that, as far as CALM was concerned, Aboriginal peoples' aspirations were only one of a number of important issues, which CALM as the responsible body had to address. Another important consideration that has continued to hamper the effective participation of Aboriginal people is the continuing lack of any WA legislation to facilitate Aboriginal ownership and control of protected areas.⁵²³

5.6 Lessons learned from the participation of Aboriginal people in the process of gazetting Purnululu National Park and Conservation Reserve

The participation of Aboriginal people in the decision making process leading to the formation of Purnululu National Park manifests some of the classic problems that indigenous peoples and minorities generally face in trying to get their aspirations across to policy makers. The process is often driven by the

⁵²² Ibid.

⁵²³ Ibid.

government with the indigenous peoples having to work with an agenda and a timetable set by it. This is culturally insensitive and inappropriate and often leaves the indigenous peoples with little room for flexibility or creativity in the process and having to work in a limited way.

The process is also often riddled with accusations and counter accusations between government agencies and indigenous peoples, with each accusing the other of undermining the decision making process. This underlies the age-old question of trust between governments and indigenous peoples be they from developed or developing countries. This is especially important for indigenous peoples for whom the process is not just about the creation of another protected or conservation area but their very survival. The underlying mistrust between government and indigenous peoples ended up in the PAC withdrawing from the negotiations because they felt that their aspirations were not being given the consideration they deserved. This is a common problem for indigenous peoples participating in decision making processes who often feel that their involvement is only meant to be window dressing and mere tokenism without any intention to take their aspirations seriously.

Another important lesson is that many protected areas such as the Bungle Bungle are the traditional country of more than one claimant group. This is a complicating factor, which needs to be considered prior to entering into negotiations. If an effective representative group is not developed for the purpose of pursuing the interests of all the traditional claimant groups, negotiations may become complicated as a result of the disputes among the different Aboriginal groups or they may become distracted and have difficulty

maintaining focus. Alternatively, government may use the diversity of interests among claimant groups as a lever to help achieve an agenda of its own. As we have seen, in the case of the Aboriginal people of the Purnululu area, dealing with this problem meant them having to organise themselves into a legally recognised entity – the PAC and having to hire a consultant to work with CALM on the issues that are most important to them. However, even forming themselves into a legally recognised entity did not entirely protect them from internal fighting as we have seen that towards the end of the negotiations, competing Aboriginal groups challenged the legitimacy of the PAC to represent the various Aboriginal interests in the area. This greatly affected their ability to effectively participate in the last stages of the negotiations as they had to spend some time resolving their disputes with the help of Environs Kimberly. Government used this dispute to its advantage by inviting both groups to sit in on the negotiations as competing interests. This greatly undermined the bargaining power of both competing groups.

The process further shows that, more often than not, whatever gains indigenous peoples may make in the decision making process, may be lost on some of the major issues that form the core of their aspirations. In the case of the Aboriginal people of the Bungle Bungle, when Purnululu was eventually gazetted, they lost title to the land when the Park and Conservation Reserve were vested in the Conservation Commission of Western Australia. In effect, the both are owned by the WA Government and managed by the Department of Conservation and Land Management (CALM). It is important to note, though, that amendments to the *Conservation and Land Management Act* 1984 are currently under negotiation to allow Purnululu Park and Purnululu Conservation Reserve to be vested with a prescribed body corporate. This legal

entity could hold native title on behalf of traditional owners. It would then allow for the conversion of the Park to conditional freehold. A perpetual or term lease could then be granted to CALM to manage the property on behalf of the Purnululu Park Council, a body made up of the representatives of the traditional owners and CALM.⁵²⁴

The participation of indigenous peoples in the gazettal of Purnululu National Park also reveals the need for capacity building for indigenous peoples if they are to effectively participate in the decision making process. Aboriginal people need to understand that negotiations leading to participation in the management of protected areas with government and other stakeholders are often lengthy and detailed. The complexity of the details, a history of difficult relations and colonial experience which often pre-date them make it important that the Aboriginal people learn about the management of protected areas, understand the range of potentially realisable benefits and generally agree among themselves about what they want to achieve. Capacity building in all these areas is important because it provides the Aboriginal people with the ability to work towards shaping realisable, forward looking yet practical aspirations.

Related to the need for capacity building is the need to clearly identify who speaks for country when Aboriginal people participate in such a process as the gazetting of Purnululu National Park and Conservation Reserve. In the case of the Aboriginal people of Purnululu, the in-fighting between the different indigenous groups greatly undermined their effectiveness and thus the ability to

⁵²⁴ Environment Australia, *Nomination of Purnululu National Park by the Government of Australia for Inscription on the World Heritage Site*, (2002) 48.

effectively influence the decision making process in the final stages leading to the gazettal of Purnululu National Park. The consultative or planning process with government is no time for claimant groups to be arguing about objectives or aspirations or, worse still, who is the right person or group to represent Aboriginal interests. It is therefore important that before engaging in any lengthy or detailed negotiations with government such as those leading to gazetting Purnululu National Park that the Aboriginal people clearly and properly identify any areas of potential dispute or disagreement and consensus is reached prior to commencing negotiations with government. This can be a time consuming and costly exercise but it is worth undertaking right from the beginning.⁵²⁵

Overall, the Purnululu case study provides insight into the diverse participation strategies and long term campaign by Aboriginal people. In spite of this huge effort and support by NGOs and researchers, a hostile political environment at the critical times and a culturally insensitive agency (CALM) made it extremely difficult for Aboriginal aspirations to be achieved during the 1980s and 90s.

⁵²⁵ Tony Corbett, Marcus Lane, Chris Clifford, above n 521, 17-20.