Changing the Game: Emerging Law and New Stakeholders in Traditional Energy Markets

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Table of contents

Introduction

In recent years, energy markets have been subject to immense structural and procedural change. Whereas traditionally independent intra-state and inter-state energy markets have experienced convergence in a local setting, energy markets have also expanded and integrated within a global setting.[1] This sometimes arduous, often frictional, process of integration can be seen occurring at regional and international levels across the globe with varying degrees of efficiency and success.[2] At the same time there have been similar developments in law. Energy markets are now subject to a wide range of public and private international law, a growing body of regional law in places such as the EU, and also national law of differing effect in producing and consuming states throughout the world.[3] Accordingly, new rights and obligations have been imposed upon the activities of energy industry traditional stakeholders, namely States and corporations. A number of factors have contributed to these shifts in energy industry paradigms including, *inter alia*:[4]

a) increasing competition in the global economy;
b) policy shift by governments towards privatisation and liberalisation of energy markets;
c) escalating energy demand world-wide together with rising dependency upon existing available resources;
d) depletion of near-to-market resources for many import dependent regions, such as the European Union;
e) imposition of greater legal regulatory control over the activities of operators in energy markets, particularly with respect to environmental protection; and
f) significant changes in the number and *personae* of energy market participants themselves.

Two crucial changes are the emergence of greater regulatory control over the activities of traditional stakeholders and the introduction of new stakeholders into energy markets. New non-state stakeholders such as international organisations, NGO's and community and/or special interest groups are not necessarily motivated by the same objectives as those pursued by traditional market participants. Notably, cost, price or security of supply may not be the main priorities guiding the actions of new market entrants. Rather, preventing environmental harm or protecting the rights of minorities or indigenous people, for instance, may be the driving force behind the actions of new stakeholders. As such, new non-state actors may exert demonstrable influence over energy markets and the activities of traditional stakeholders. Importantly, increasing participation of new stakeholders may transform existing 'concepts, principles and rules which are relevant' to traditional energy activities and stakeholders.[5] As such, this reflects a significant transformation in the relationship between the energy industry and the broader community.[6]

Within this framework of on-going structural and procedural transformation, domestic, regional and international energy markets are presently besieged by a diverse number of geo-political, legal and economic questions concerning the nature of present and future

markets and the *modus operandi* of traditional stakeholders. In this regard, the European Union (the "EU") and its constituent member States are encountering a multitude of contentious, challenging issues surrounding the attempts to successfully liberalise and integrate domestic energy markets within a regulatory, yet competitive orientated regional market framework.[7] Moreover, as highlighted in the Commission of the European Communities' *Green Paper – Towards a European Strategy for the Security of Supply* (the "Green Paper")[8], the EU is facing serious problems concerning security of future energy supply to the region. The EU's current levels of dependency upon external supply are significant and the Green Paper anticipates that this dependence will only continue to rise.[9] At the same time, demand for traditional energy resources from other major consumer regions such as Asia and the United States is also expected to increase.

In such circumstances, it is clearly imperative to address current and future risks to security of supply. Energy markets are exposed to a wide range of risks and uncertainties, all of which have ramifications for costs, prices and ultimately security of supply.[10] The Green Paper clearly identifies a number of existing risks, namely physical, economic, social and environmental hazards.[11] Physical disruptions may arise for a variety of reasons including exhaustion of the natural resources or an inability to access the resource because of geopolitical difficulties or natural disasters.[12] Supply may also diminish or cease in response to changes in world prices. Physical disruptions and/or geopolitical crisis in supply or transit countries are some of the events underlying price fluctuations of this kind. In spite of the positive effects of the EU's internal market and competition, erratic price fluctuations have the potential to cause wide-ranging economic damage to the EU region.[13]

Both physical and economic disruptions are often closely linked to additional risks that take the form of social discord or disharmony.[14] Social risks arise primarily in response to government induced expectations of domestic consumers regarding a particular cost, level or standard of energy supply. When that expectation is not met, whether by changes in levels of production or prices in world markets by example, social conflict may result from the perceived breach of the social contract between domestic consumers and their respective government. Environmental risks can also engender adverse outcomes, primarily in the form of increased regulation of industry practice and activity.[15] Moreover, environmental risks can be said to be inherently related with the other risks by reason of the capacity for this kind of risk to impact adversely on costs, prices, output and ultimately security of supply. As already noted, these disruptions can in turn lead to widespread discord at local and regional levels. Accordingly, effects of this kind are highly undesirable and energy policy must be developed so as ensure appropriate, properly educated choices and options of producers and consumers are made, thereby minimising the potential for adverse outcomes in this regard.

When coupled with escalating energy demand world-wide, rising dependency upon existing available resources and depletion of near-to-market resources, these risk factors place the EU in a precariously vulnerable position *vis-à-vis* continued, secure future supplies of energy

resources. Given that some risks – physical, economic, social and environmental – are already known and incorporated into energy policy, it becomes important to ask whether there are other potential risks that may jeopardise future energy security of supply. In so doing one must inquire as to the likely source of such risks. Once the primary source of a risk is determined, it then becomes possible to examine the nature and magnitude of such potential risks and determine the likelihood that such matters will lead to intermittent or permanent cessation of energy resources supply. The manifest importance of addressing this issue is unmistakable: risks to security of supply, once identified and quantified, fall within the realm of being manageable.

At the outset it is important to properly distinguish between the *primary source* of risk and the *secondary* subsequent manifestations of such underlying hazards. By reason of this distinction it is possible to characterise physical, economic, social and environmental risks as *secondary* in the sense that they result from some underlying state of affairs or adverse event. That being so, one primary source of risk can be described as the *change in law* process taking place in public international law. The conclusion that emerging law can prove a source of significant risk to the energy sector arises out of a number of observations. Legal developments in recent years have already brought about changes in both the number and personae of energy market participants. Not only have these changes introduced new stakeholders, but existing rights and obligations of traditional stakeholders have also altered. Changes in law therefore can be seen bringing a range of new factors and competing interests into the old equation. In some cases, rights, responsibilities and liabilities emanating from existing law have been expanded through subsequent amendment, whilst in other instances, emerging law may have modified and/or diminished the operative scope of existing rules and regulations. With respect to the former, changes in law have sometimes resulted in greater regulation and control of energy markets and activities of traditional stakeholders. One clear example of this is the field of environmental law and the growing body of regulation aimed at protecting the environment.

Put another way, developing or emerging law presents itself as a risk to future energy supply security to the extent that it may lead to physical, economic, social or environmental risks. These secondary risks may assume a variety of forms including increasing costs, fluctuating prices, diminishing economic rents, externalities and/or declining investment in the face of reduced investor confidence. On the demand side, developing laws may also alter consumer behaviour. Growing community awareness of important global issues, such as climate change, has already resulted in demand-side changes. This is reflected by the rising consumer demand for green energy. There is nothing to suggest that as consumer awareness grows in respect of other matters such as human rights and indigenous peoples' rights, changes along similar lines will not continue to occur in the future. In order to address the issue of risks to energy supply security, energy policy options must adequately reflect the choices of both producers and consumers. This necessarily mandates further consideration as to the prevailing conditions in producing nations, especially the existence of

new stakeholders. The ramifications of changing legal rights and obligations of traditional market participants must also be examined.[16]

It is the intention of this paper to commence the discussion of future risks by reference to emerging public international law. The relevance of emerging public international law for the energy sector can be seen in a number of different areas ranging from environmental protection and human rights through to international and internal armed conflicts. These matters must be considered in the context of the international legal order and changes occurring therein, namely, diminishment of State sovereignty and expansion of State and non-State actor responsibility and liability.

In this context, the growing importance of emerging rights and interests in the international arena creates the possibility for significant risk to future energy supply. In addition to the progress at the international level, many rights and interests are developing at domestic levels. In some cases, recognition and enforcement of such rights in various supply countries and regions are having serious impact on the energy sector. Notably, emerging rights and interests of indigenous peoples may have wide ranging consequences in producing regions. Not surprisingly, many places in which indigenous peoples exist are frequently connected to sources of traditional energy resources and as such, these groups of people and their traditional lifestyles have been, and continue to be, threatened by the activities of the energy industry.

Undoubtedly, as the developing rights and interests of indigenous peoples strengthens over time, the potential for conflict between new and traditional stakeholders is portentously high. Here the risk to supply arises primarily as a result of changes in the legal status of indigenous peoples. The main areas of concern for the energy industry are the growing claims for the right to self-determination, traditional lifestyles and customs as well as ownership and access to land and any natural resources found therein. Emerging law in this regard carries with it important considerations for future energy supply, primarily in terms of physical and economic risk. However, it is also important to consider environmental risks, especially since there is a notable inter-dependency emerging between indigenous peoples' rights and environmental law. This arises because areas subject to claims of indigenous ownership are often located in geographic regions of environmental sensitivity and significance. Consequently, in addition to emerging law on indigenous peoples' rights, there is a growing practice amongst different groups to join forces against energy activities that threaten the fulfilment and protection of their claimed rights.[17] As a result, the potential for conflict between new and traditional stakeholders will rise along with increasing world demand for the energy resources.

By reason of above, Part 1 shall discuss the *change in law* process in general terms by briefly outlining the sources of relevant law. Specific attention will be given to the creation of public international law and the distinction between *hard* and *soft* law. The development of international environmental law and its growing application to energy markets and regulation over the activities of traditional stakeholders

shall then be discussed. It is the intention of the writer to use international environmental law in an illustrative sense, in particular to demonstrate the extent to which principles contained in soft law can harden over time into legally binding obligations. The impact of environmental protection on energy policy matters will also be discussed. Following this, recent developments in public international law pertaining to indigenous rights will be outlined. The consequential economic implications for the energy sector will be analysed in the final parts of this chapter.

Part 2 will continue the discussion by presenting a case study examining the strengthening legal position of Australia's indigenous peoples in respect of native title rights and interests. It is intended that this case study will demonstrate the impact *changes in law* have rendered upon energy markets of a producing nation, through two main consequences: (i) introduction of new stakeholders; and (ii) imposition of new rights and obligations on existing stakeholders, namely companies and governments.

1. Changes in Law & Potential Risks to Security of Supply

In order to evaluate properly the propensity of the *change in law* process to generate potential and new risks for the energy sector, it is necessary to consider the relevant law having application to energy matters. Within the context of the main contention of this paper, it is essential to examine the nature of public international law, its sources and creation and the continued erosion in State sovereignty during the past decades. The latter is especially important as it has been, until relatively recently, a central tenet underlying public international law. The *change of law* process witnessed to date in the environmental protection field provides an excellent example of the ramifications emerging legal trends can impose on the energy sector. Accordingly, this will be canvassed in greater detail below, by way of illustration, before the discussion turns to the emerging legal trends in indigenous peoples' rights and the economic ramifications of these developments for the energy industry.

1.1 Traditional Public International Law

The present body of law regulating and influencing energy markets and the activities of energy stakeholders, exists and operates at international, regional and domestic levels.[18] At the international level, public international law is the primary body of law governing and regulating relations between states. In its traditional role, public international law established rules and norms concerning the conduct of sovereign states *vis-à-vis* each other. In this way, a State could consent to a diminution of its sovereignty in certain agreed situations, i.e. by concluding an international convention with other states. Relevantly, public international law historically provided that all activities - including those relating to energy activities - conducted within the territory of a State were subject to the jurisdiction and control of that country. Jurisdiction in this sense refers to the power a State has to 'affect people, property and circumstances and reflects the basic principles of state sovereignty, equality of states and non-interference in domestic affairs'.[19] Hence, for the main part, a State's jurisdiction and control over its territory – land and surrounding seas - and its nationals (including companies) was deemed to be incontestable. Accordingly, decisions made by a sovereign State concerning domestic activities within its jurisdiction and control could not be challenged by other States or non-state parties. As discussed in Part 1.4 below, this premise has undergone significant transformation with regards to certain issues such as the environment.

1.2 Hard Law & Soft Law

Before discussing the changes in public international law and the decline in the supremacy of state sovereignty, it is necessary to have regard to the sources of such law and the manner of its creation. In this way, the impact changes in public international law have had, and may continue to have, upon energy markets and the activities of traditional stakeholders can be more fully understood.

Public international law may be created in three main ways, namely: (a) international conventions/treaties; (b) international customary law;

and (c) general principles of law recognised by *civilised* nations.[20] Judicial decisions and writings of highly qualified publicists may also be considered. However, such materials are not sources of law *per se*, but rather should be viewed as 'subsidiary means for the determination of rules of law'.[21]

Depending on the manner of its creation, public international law will fall into one of two categories: *soft* law or *hard* law. Treaty law, customary international law and general principles of law recognised by *civilised* nations, are all said to be *hard* law in the sense that they impose legally binding obligations upon states.[22] Despite being categorised collectively as *hard* law, these formal sources of international law are distinctly different, not only in the manner of their creation, but also in their operative effect. International treaties require bilateral or multilateral agreements to be secured between state parties. The advantages of securing consensus between sovereign states are self-evident. However, a downside of the treaty process, whose primary objective all too often appears to end up being a procedural achievement,[23] can be the loss of substantive efficacy of the agreement in question. In some cases, this can be further exacerbated by the ever-present problem of reservations to treaties.[24] States often use the procedural avenue of reservations to limit the operative scope of a treaty in their own country, thereby reducing their international obligations accordingly.[25] In passing, it is important to note that direct application of international treaties in a State party's domestic arena will depend upon whether it is a *monist* or a *dualist* state. When monist states become party to an international treaty, there is immediate application of international law as part of that state's domestic legal regime. Conversely, dualist states require the enactment of domestic legislation incorporating international treaty obligations in order for those rights, interests and responsibilities to become part of the domestic law.[26]

By contrast, customary international law is derived from relevant state practice[27] and *opinio juris[28], which* develops over time in response to particular circumstances.[29] Whilst this process may be lengthy, customary international law is often a crucial source of developing international law. This type of law has a distinct advantage primarily because, unlike treaty law, customary international law does not require individual state agreement. Although a state may persistently *opt out* from the application of the customary law, in the absence of such persistent objection, customary international law will be applied to all states.[30] The creation of international law through reference to general principles of law is also important as it helps resolve the legal problem of *non liquet.* The absence of law in a particular area generally results from the lack of an international legislative body and the small amount of international case law existing at the international level. Thus, general principles of international law can be used to fill this gap.[31]

Presently, there are numerous bilateral and multilateral treaties forming the main source of public international law affecting the energy sector. The most notable international conventions of germane application to energy activities include the 1982 United Nations

Convention on the Law of the Sea ("UNCLOS"), the 1992 Framework Convention on Climate Change ("Climate Change Convention"), the 1994 Energy Charter Treaty and a range of investment and trade agreements such as the 1994 WTO/GATT agreements.[32] In addition, a number of international conventions establish international organisations that deal with energy matters, either specifically or more generally as part of a broader operative mandate. Organisations that exist entirely for the special purpose of dealing with energy matters include the International Energy Agency and the International Atomic Energy Agency. Other international institutions such as United Nations, have not been established to deal primarily with energy matters, but may find cause to deal with such issues as part of their broader constitutive functions.[33]

Other bodies of public international law are characterised as *soft* law. This type of law is seen as having a soft nature primarily because it does not impose strict, legally binding obligations upon states. Importantly, breaches of such law cannot be enforced by traditional means. Soft law is usually contained in a number of instruments including resolutions, declarations, principles, guidelines and recommendations of international organisations such as the United Nations. Codes of practice or other 'non-binding instruments and documents or non-binding provisions' in international conventions also fall into the category of soft law.[34] Despite its *soft* character, this kind of law can be applied voluntarily and immediately by any state who wishes to do so. More importantly, whilst its initial nature may be *soft,* such law nevertheless may develop into *hard* law over time.

In other words, although states may not intend such instruments to assume a legally binding nature initially, this kind of soft law can 'solidify through practice and acceptance into legally binding hard law'.[35] This occurs primarily through state practice and the development of international customs and norms that give rise to customary international law or may be codified in an international treaty.[36] An advantage of this kind of law is the ability of non-state parties to be involved in its creation and development. This has been commented on in the following terms:[37]

> [t]he soft law process is more dynamic and democratic than traditional [international] law making, embracing a broader range of actors (including scientific organisations, academic specialists, NGOs and industry) and providing a more direct link with the larger society.

To date, two main areas in which soft law has developed are international economic law and international environmental law.[38] The latter has effected far-reaching repercussions in the energy sector, principally in respect of climate change.

Finally, it is important to note the emergence of a third body of public international law, namely transnational administrative law. This body of law is said to operate 'below the level of hard (i.e. treaty and customary) and soft law' that has application in the energy context. It arises in three main ways: (i) standard setting; (ii) licensing; and (iii) auditing, where the latter is usually the mechanism for ensuring compliance.[39] These kinds of measures can prove highly effective in

regulating conduct of market participants and are increasingly being applied by companies seeking the sizeable economic gains that can result.[40]

1.3 State Sovereignty & Exploitation of Natural Resources

Inherent to a State's sovereignty has been the absolute right to exploit its natural resources in accordance with its own, irrefutable domestic policies and decisions. Traditionally, within the framework of state sovereignty, a State's government and/or sovereign ruler was responsible for establishing the legal regime applicable to energy activities within its territory. Relevantly, domestic law prevailed within a state's territory and governed mining and natural resource activities. Not surprisingly, ownership rights over natural resources were customarily reserved to the sovereign power rather than private groups or individuals. The legal rights of other parties to explore and extract natural resources was also proscribed by the domestic law of the state within which the resources were located. By contrast, trading activities in natural resources frequently involved interaction *between* sovereign states. As such, these kinds of energy activities were governed by relevant public international law. Transportation of resources by sea, by example, has long been subjected to public international law of the sea. This provides, *inter alia*, for the grant of the right of innocent passage by relevant transit coastal states to seafaring vessels of other states.[41]

To a large extent, much of the historical legal perspective concerning State sovereignty remains true for modern circumstances. However, there have been, and continue to be, a number of developments that have some bearing on energy markets and the activities of traditional stakeholders. Central to these changes at the international level has been the steady erosion of the traditional state-centric approach to international law. During the second half of the 20th Century, public international law developed away from the 19th century state-centric legal ideology that had guided inter-state relations. The central legal perspective, that States should not interfere with the internal matters of other sovereign entities, was continually challenged during the last century, principally in response to the atrocities perpetrated against innocent civilians during WWII. The UN Charter itself represents an express indication of States' willingness to surrender sovereignty in respect of certain matters of international concern.[42] Up until the 1970's however, the international community's focus was on the rights of the individual and the process of de-colonisation. Whilst the first issue eroded state sovereignty to a notable degree, the latter in fact had the reverse effect. Central to the de-colonisation process was the assertion by new, post-colonisation nations of a State's exclusive, absolute sovereignty over the exploitation of its natural resources. This was reaffirmed in various instruments including a number of resolutions of the General Assembly of the United Nations that stated that there was an 'inalienable right of States to permanent sovereignty over all their natural resources'.[43] As discussed in the following part, the international community came to realise that absolute sovereignty of this kind could not continue unabated.

1.4 Environmental Protection & Erosion of State Sovereignty

One of the most notable areas in which State sovereignty has been eroded is the environment. Since the early 1970s there has been a proliferation of international treaties/conventions, customary international law and other soft instruments aimed at protecting the environment from harm. Slowly and steadily, some of these developments have had a significant impact on energy markets and the activities of traditional stakeholders. Not only have the rights and obligations of traditional stakeholders such as States altered, but participation by other non-state parties has increased, thereby changing the rules and the playing field of the energy game.

In the early 1970's environmental issues began to receive attention from the international community. The significant changes that transpired concerning environmental protection can be attributed to a number of factors. First, the exponential rise in the human population, coupled with increasing industrialisation of the modern world, began to place enormous strain on the natural resources of the planet. In fact, the current world population of just over six billion people is almost three times the 1950 level of 2.5 billion.[44] Secondly, the rapid increase in human numbers was accompanied by an equivalent epidemic of environmental degradation and resource depletion. Environmental damage is now seen to extend across all areas of the natural and human-made environment including *inter alia,* deforestation, reduction of biological diversity, depletion of the ozone layer and air and water pollution. Climate change and the inter-relationship between consumption of fossil fuels, green house gas emissions and levels of global warming have clearly been an area of growing concern in recent times for States and the energy sector. Thirdly, in response to rising human population and environmental degradation, public awareness and concern over environmental harm started to rise at both national and international levels. Of particular concern was the increasing amount of environmental harm that pays no headence to national boarders. Transboundary harm such as atmospheric and water pollution have proved particularly problematic and demonstrated a need to revise the traditional rules of state sovereignty. By their very nature, transboundary pollutants render States incapable of effectively protecting the environment within their territorial jurisdiction.[45] Greenhouse gas emissions, for example, clearly reveal the mutually dangerous effects of individual conduct that causes environmental harm on a regional and global scale. Management and disposal of hazardous wastes and dangerous or toxic substances has been another area of common concern between nations, especially since such can result in devastating transboundary damage.[46]

By reason of the factors outlined above, during the early 1970s the international community recognised the need to impose limitations on environmentally harmful conduct of states.[47] This was not necessarily an entirely new development. In certain circumstances, it had been understood for some time that sovereign rights of nations are not absolute; that the exercise of such rights is subject to certain restrictions.[48] In general terms, international law restricts state sovereignty by imposing obligations on States to refrain from engaging in acts that will cause injury or harm to other States.[49] In the context

of environmental damage, it can be seen that international law therefore prohibits those acts performed within the jurisdiction or control of a States that result in environmental harm to the territorial jurisdiction of another State/s. At this level, environmental harm assumes a specific transboundary character in the sense that specific acts within the jurisdiction or control of one state result in environmental harm to the territory of another state and thus, the damage violates the territorial integrity of another state. With respect to responsibility of this kind, international environmental law derives much of its current legitimacy from older customary rules concerning the high seas, shared coastal regions and other water resources such as rivers and lakes.[50] These early rules primarily governed bilateral relationships of States in the context of equitable utilisation of shared resources and the prevention of transboundary pollution.

From the early 1970's the international community's concern for the environment steadily increased beyond the limited scope of those early rules. Over time, the international community gradually recognised the existence of 'a wider common interest in the conservation of resources, wildlife, or ecosystems'.[51] By reason of this a second level of environmental obligations are now imposed on States by international environmental treaty law and customary international law. This vast body of law now extends to addressing environmental protection and conservation of stateless areas such as the high seas, Antarctica, outer space, international watercourses and the global commons.[52] This change reveals a significant impact arising out of the development of international environmental law, namely, the emergence of certain environmental obligations *erga omnes*.[53] Protecting common areas such as the high seas have been said to be examples of environmental obligations owed to the international community as a whole.[54] Judicial decisions have endorsed this extension of the traditional *no harm* rule to include a duty of protecting, reducing and controlling environmental harm within a broader, global context.[55]

Thus, within the framework of growing concern over environmental damage, the last three decades witnessed an exceptionally rapid pace of change in this field of law, both nationally and internationally. International environmental law now consists of a vast body of hard law - international treaties – and soft law. Some of the hard law instruments codify existing customary international rules whilst others expand existing rules or create new ones.[56] Environmental considerations also find expression in other sources of *soft* international law including judicial decisions of the ICJ and UN General Assembly resolutions and decisions.[57] Currently, the number of instruments dealing with environmental issues is extensive and a detailed examination is not within the scope of this paper. Suffice to say, a number of important rules and principles have emerged during the last three decades. Some are based on older rules of customary law, some have assumed the status of *lex lata* and others, still in the formative stage, have not yet acquired normative status *per se*. These include, *inter alia*:[58]

1. State responsibility for avoiding causing injury to the environment of another state;
2. Good neighbourliness and international co-operation[59];

3. The Precautionary Principle[60];
4. The Polluter Pays Principle[61];
5. Sustainable Development;
6. Inter-generational Equity (needs of future generations); and
7. Intra-generational Equity (application of equity between States).[62]

Within the energy framework, a number of these developments have had a profound impact on energy activities. One specific consequence of international environmental law has been the direct limitation the international community has imposed upon States' absolute sovereignty over the exploitation of their natural resources in ways that cause environmental harm. It is commonly accepted that the starting point, in public international law terms, for the diminution of a State's exclusive sovereignty over exploitation of its natural resources is Principle 21 of the United Nations' 1972 Stockholm Declaration on the Human Environment.[63] The first part of Principle 21 of the Stockholm Declaration reaffirms the fundamental right of sovereign states to exploit their natural resources 'pursuant to their own environmental policies'. However, the second part of this Principle expressly qualifies this right of Sovereign States by stating that they have 'the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction'.[64] As one commentator has noted, the qualification contained in the second part of Principle 21 reveals the 'international community's growing willingness to recognise the environment as an exception to absolute state sovereignty'.[65]

Since 1972, Principle 21 has assumed a critically important role in the development of international environmental law and state practice. This influence is revealed in various sources including UN resolutions and a wide range of multilateral treaties such as the Geneva Convention on Long-Range Transboundary Air Pollution, the Basel Convention on the Transboundary Movement of Hazardous Wastes and the Ozone Convention.[66] Moreover, various provisions in UNCLOS express the normative status of this principle.[67] Interestingly, twenty years after Stockholm, in 1992, at the UN Conference on the Environment and Development in Rio de Janeiro ("Earth Summit"), five international instruments emerged: two conventions[68] and three non-binding instruments.[69] Principle 21 of the Stockholm declaration was reiterated, albeit in a more modest form. Importantly, Principle 21 is regarded by many states, and the UN General Assembly, as reflecting customary international law.[70]

Further to the need to fetter a State's sovereignty over the exploitation of its natural resources, the international community also started to recognise the need to strike a balance between competing social, economic and environmental interests of the global community. The pressure for globalisation, together with ever increasing problems of population growth and transboundary harm, have placed escalating demands upon the environment. In response, nations of the world began to comprehend what many of the world's indigenous populations had inherently understood for many generations: that human beings cannot wantonly and thoughtlessly destroy their environment without

threatening their own survival.[71] In attempting to define a way to answer this growing global problem the international community turned its collective mind towards the environmentally harmful, economically unsound and unsustainable development practices of the world's nations. Out of this came the principles of sustainable development and inter-generational equity that require current generations to pursue 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.[72]

Whilst it has been recognised by many these are not new concepts,[73] sustainable development and inter-generational equity first attained significant international recognition in the Stockholm Declaration on the Human Environment 1972.[74] This Declaration specifically enjoined States to adopt appropriate policies aimed at assisting the reconciliation of competing present and future social, economic and environmental needs.[75] Twenty years later, at the Earth Summit the principle of sustainable development received almost universal acknowledgement and support from the international community.[76] This has since been reiterated in a number of international agreements on the environment including the 1992 Climate Change Convention and the 1992 Convention on Biodiversity. Furthermore, recognition of the integral balance that must be sought by nations of the world with regard to sustainable development is now reflected in a penumbra of other international fora including its formal incorporation into the WTO Agreements,[77] decisions and resolutions of the General Assembly of the United Nations[78] and in *obiter dictum* of the International Court of Justice.[79] More recently, in September 2002, the international community's commitment to sustainable development was reiterated at the World Conference on Sustainable Development in Johannesburg. Increasing access to energy, developing and utilising renewable energies as well as using existing fossil fuels more efficiently, within the context of reducing environmental damage are notable inclusions in the documents emerging from that conference.[80]

Therefore, since the 1972 Stockholm Declaration there has been a proliferation of international conventions and other instruments aimed at preserving and protecting the environment. Moreover, a wide range of environmental legislation and regulation has been implemented at a domestic and regional levels by many nations.[81] For example, following the creation of the 1992 Framework Convention on Climate Control at the Earth Summit, regulating green house gas emissions to prevent damaging climate change is now an almost universally shared goal of the world's nations. Importantly, this area of environmental law demonstrates how concerns of the international community, reflected in international law, have affected significant response at both regional and domestic levels with significant impacts being felt in energy markets and restrictions imposed on activities of traditional stakeholders.[82] In this regard, it is useful to note that the repercussions have not only been felt through the imposition of greater regulation and control over polluting activities directly, but also through changes in patterns of consumption and fuel mix supporting greater use of renewable forms of energy and/or more efficient usage of fossil fuels.

1.5 Introduction of New Stakeholders

By reason of such changes, as international law has developed and the push for globalisation has gathered pace, the number of non-governmental, non-state entities who are able to participate and be represented on the international stage has increased dramatically. A significant consequence has been the rising number of new stakeholders who are entering energy markets. These include international governmental and supranational organisations, NGO's, corporations, business, minority groups, indigenous peoples and a range of community groups and/or concerned citizens. Importantly, these new participants are often equipped with a legitimate voice on the international stage and can be heard widely and loudly. This development can also be seen, often in an stronger legal sense, taking place in regional and domestic energy sectors.[83]

What is interesting about NGOs and other interest groups is that they are not interested in acquiring for themselves a share of the industry's wealth *per se*. Rather, such parties may be guided by objectives including changing the underlying manner in which business in the energy sector is done in order to protect the environment, or respect and observe fundamental human rights. Of notable importance is the extent to which these new players are growing in their ability to participate in the creation of international treaties, declarations of the international community and regional and domestic laws. Consequently new stakeholders are clearly exerting mounting pressure on the energy sector from many different directions.[84] Also, an increasing number of companies – multinational and otherwise – are becoming proactive in self regulation and standard setting. In so doing, these non-state parties are taking themselves outside the traditional sphere of government dominated control. They are choosing to observe rights and obligations set down by international law, regardless of whether a particular government requires them to do the same.[85] Multinational companies may successfully reap economic benefits through acting responsibly in this way. Taking the first steps may result in the creation of indirect forms of regulation and/or barriers to entry in favour of the company acting in this way. This in turn may generate significant economic rewards for those who actively engage in a *race to the top*, in preference to the undesirable *race to the bottom*. The primary form this assumes, namely standard setting, ethical codes of conduct and bench marking for best practice, appears to be growing in significance as the economic benefits of such behaviour are more widely recognised.[86] Economic benefits of engaging in such practices are all to clear, particularly when one considers the present day importance placed upon preventing environmental degradation.

1.6 Impact of Environmental Law on Energy Policy & Security of Supply

It is essential to consider the impact of international environmental law on the nature and substance of modern energy policy and the perceived risks to security of supply. In respect of the latter, the Green Paper has recognised that 'environmental pressures are starting to bear upon energy production and use and, ultimately on supply decisions'.[87] Nowadays, environmental protection is considered to be a fundamental

part of energy policy world wide. In general, three primary objectives are universally adhered to by (international) authorities, namely:[88]

1. providing energy at the lowest possible costs;[89]
2. ensuring security of supply;[90] and
3. environmental protection objectives.

Each of these requisite elements of modern energy policy cannot be viewed in isolation. Rather, as they are clearly interdependent in their operative effect, it is important to consider them jointly as well as separately. The European Commission has commented to this effect as follows:[91]

The EU's long term strategy for energy supply security policy must be geared to ensuring, for the well-being of its citizens and the proper functioning of the economy, the uninterrupted physical availability of energy products on the market, at a price which is affordable to all consumers (domestic and industrial) while respecting environmental concerns and looking towards sustainable development.

Modern energy policy therefore reflects the need to reach a balance between competing objectives such as meeting domestic political demands, satisfying rising energy needs, securing uninterrupted supply, protecting the environment, encouraging liberalisation and promoting international competitiveness. In other words, modern energy policy requires not only observance of the three basic elements mentioned above, but also further consideration as to the methods of implementing the basis premises and the means or instruments to be employed to do so.[92]

Traditional energy policy has been consistent with the characterisation of future risks in terms of supply costs and prices. As already noted, these two important factors form the basis of energy policy in most countries. The geographic imbalance between demand and supply certainly fuels uncertainties as to future costs of supply of traditional fossil fuels, especially as near-to-market sources for the EU are fully depleted in coming decades.[93] Likewise, the impact of policy decisions of supply producing countries in terms of price and output, upon the circular interaction between future energy prices and supply capacity, may also lead to increasing uncertainty in energy supply.[94]

When considering energy policy choices and options of both producers and consumers, Professor van der Linde has commented, that it is necessary to have regard to all three of the constituent elements of modern energy policy noted above. What is significant in the context of this paper is the inclusion of the environment as one of the mainstays of energy policy worldwide. Undoubtedly, the inclusion of the environment in energy policy can be directly linked to the emergence of hard and soft international law concerning environmental protection. The implications of its inclusion are far reaching in terms of balancing environmental protection against cost, price and supply security objectives. Moreover, inclusion of the environment requires a multitude of choices to be made by market participants, be they governments, companies or domestic consumers. Governments in the EU region, for example, must determine the extent to which they are prepared to actively regulate markets in accordance with their international,

regional and domestic obligations regarding protection of the environment – both territorially and extraterritorial in terms of transboundary harm and the global commons. In so doing, decisions must be taken regarding acceptable levels of environmental pollution, appropriate regulatory instruments to employ in order to ensure these decisions are effective (i.e. impose taxes to encourage domestic changes in fuel mix towards renewable energies) and how the costs of safeguarding the environment are to be met (i.e. who incurs the costs - government, companies or domestic consumers).

Current trends in consumer behaviour also express the need to make suitable choices regarding the supply of alternative energy sources. In many parts of the world, consumers are expressing a growing willingness to incur higher domestic costs for *green* energy in order to satisfy their personal environmental protection and sustainable development objectives. The rising number of high profile new market participants such as NGOs who are not driven by political, economic and/or financial aims, but rather firmly advocate protecting the environment is encouraging this change in consumer behaviour. Energy policy also subjects energy companies to the decision and choice making process. This may include choices as to extent to which companies are prepared to amend their polluting activities or incur additional costs of production to meet environmental regulations and also whether they will pass additional costs on in the form of higher costs, prices and/or lower output.

Undoubtedly, whether a country is importing or exporting energy resources will largely determine the degree to which these factors influence its energy policy. The impact of these different factors upon the fuel mix, particularly for those countries that are import dependent, can be significant. The differentiation within the fuel mix is closely related to the availability of local fuels and also to anticipated risks with respect to guarantee of supply.[95] A further important factor to be accounted for in this context is the interaction between energy policy and macroeconomics policy.[96] Choices as to energy policy and policy implementation instruments are subject to controlling forces operating at the supranational level and must be made at that point accordingly.[97] Moreover, as relevant international law has developed, controlling forces and policy matters at the international level must also be evaluated and accounted for. Thus, as changes in public international law introduce new stakeholders, rights and obligations, modern energy policy will arguably only be effective in securing future supply if it takes emerging legal trends into account. In other words, energy policy options and choices must acknowledge both existing and potential risks, whilst the means and methods of policy implementation must bring about the necessary changes in producer and consumer behaviour based on educated choices and options in due course.

1.7 Indigenous People's Rights

Like environmental protection, issues of human rights have steadily increased in importance in international law throughout the last few decades. In response to the atrocities and humanitarian disaster of WWII, members of the international community commenced a dynamic law making process that effectively laid siege to traditional tenets of

absolute state sovereignty in international law. The resulting erosion of traditional State sovereignty through the promotion of the fundamental rights of individuals has been accomplished primarily through the development of a vast body of international, regional and domestic law relating to human rights.[98] It is of considerable note that a number of substantive human rights are now acknowledged and protected by international, regional and domestic courts and tribunals.[99]

Although indigenous peoples' rights and interests did not receive independent status *per se*, these have been included and developed within the context of human rights law.[100] Effectively, by being recognised as a fundamental part of human rights law, the rights of indigenous peoples have successfully become a legitimate and growing concern of the international community.[101] Arguably, in the same way that environmental issues have assumed critical importance to most governments and companies in the energy industry, so too will indigenous rights grow in stature and effect. This *change of law* may bring considerable consequences for the energy sector, particularly in the context of access and use of traditional lands for exploration, extraction and infrastructure development, i.e. gas pipe lines or electricity transmissions lines.[102] By reason of this, the following part of this paper shall examine the emergence of law pertaining to indigenous people and the economic ramifications of this for the energy sector.

1.7.1 Background

Indigenous peoples can be found in most parts of the globe, with present estimates suggesting that the global indigenous population is in excess of 300 million.[103] In addition to Western Europe and the former Soviet Union,[104] indigenous populations can be found throughout the Middle East, Central Asian countries including India, Bangladesh, Pakistan and Sri Lanka, and also in parts of China and Japan.[105] In the northern regions of the globe, the Inuit and Aleutians peoples inhabit circumpolar regions[106] whilst further south, distinct indigenous populations may be found throughout various African countries, despite some claims to the contrary.[107] Likewise, indigenous or aboriginal peoples comprise part of the populations in most countries in the southern region of Oceania including the Philippines, Indonesia, East Timor, Borneo, Papua New Guinea, Australia and New Zealand and Hawaii.[108] The situation is repeated throughout South America where sizeable indigenous populations can be found in countries such as Mexico, Guatemala, Columbia, Peru, Bolivia, Paraguay, and Brazil.[109]

Indigenous peoples are as different and distinct as the places they inhabit. However, regardless of their geographical location, cultural diversity and ethnic variance, indigenous peoples in most parts of the world have a number of things in common. The main one is that almost without exception, most indigenous populations have all been subjected to control and domination by various foreign conquering or occupying powers, or other types of dominating foreign settlers. The effect of the colonisation process carried out during the last couple of centuries was, in most cases devastating for indigenous populations. Often the colonisation process was carried out in a brutal fashion, in

some cases resulting in near or complete extinction of indigenous populations.[110] In a few rare instances, local populations successfully fought against invading colonising powers and ultimately achieved successful native controlled independence.[111] However, in general, during the lengthy period of colonial and post-colonial domination, rights of indigenous or aboriginal peoples were all too frequently ignored or subjugated to the legal control and authority of the settling, colonising or occupying power and/or its successor. As such, indigenous peoples' rights and interests received no separate and distinct recognition from other rights under consideration and protection of traditional international and national laws. As one commentator has noted:[112]

> The displacement of indigenous peoples is usually the result of an invasion of their territory by an ethnically and culturally different group which then attempts to convert the native population to the conquerors' cultural norms and suppresses the indigenous peoples culture and history. Usually the conqueror believes its culture is materially and spiritually superior to that of the indigenous group. In most cases, the invader is able to establish sufficient control over the territory and society to force the indigenous population to deal with the imposed legal system in attempting to redress the injustice inherent in the process of conquest. Needless to say, the indigenous people lose most legal cases until the dominant society accepts its responsibility to make amends.

Presently, in many countries indigenous populations continue to struggle against dominant, governmental or authoritative regimes that frequently abuse their fundamental rights and threaten their continued existence.[113] Through this continued struggle, it is possible to discern common threads to the actions of the world's indigenous populations, namely the pursuit of the right to self-determination, cultural heritage and ownership and control over their ancestral lands including natural resources located therein.[114]

1.7.2 Indigenous Peoples Rights & Interests in International Law

In recent years the international community's awareness and concern for indigenous people has grown and a body of law relating to indigenous peoples' rights and interest has started to emerge. As noted previously, the rights and interests of indigenous peoples have been continually evolving and developing within the broader framework of international human rights law.[115] It is possible therefore, to draw on a wide range of hard and soft law including international conventions, customary international law, general principles and a variety of other instruments. The primary sources of relevant law can be found, *inter alia*:

- UN Charter 1945 and the Universal Declaration of Human Rights 1948;
- International Convention on Civil and Political Rights 1966 ("ICCPR") & the Racial Discrimination Convention 1966 and the decisions of the UN Human Rights Committee ("UNHRC") and the UN Committee on the Elimination of All Racial Discrimination ("CERD");
- International Labour Organisation Indigenous and Tribal Peoples Convention 1989 (No. 169);
- Draft Declaration on Indigenous Rights;
- International Environmental Law; and

- Other international institutions and sources of soft law.

This body of hard and soft law contains important principles relating to indigenous peoples' rights and further, evidences the emergence of legal norms in this context.

1) UN Charter & Universal Declaration of Human Rights

The starting point for the changes to State obligations and responsibilities resides in the Charter of the United Nations 1945. Two significant concepts are enunciated in Chapter 1 of the Charter, namely:[116]

1. respect for the principle of equal rights and the right to self-determination of peoples;[117] and
2. respect for human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion.[118]

This was the first time the concept of self-determination found itself expressed as part of international law. In the de-colonisation era, new nations were created and old ones ceased to exist. During the years following the creation of the United Nations, the principle of self-determination evolved into a rule of law, forming the 'cornerstone of the General Assembly's de-colonisation policy of the 1960s and early 1970s'[119] and has been held by International Court of Justice to form part of customary international law.[120] Central to this has been the principle that people have a right to decide for themselves how to best run their lives. In so doing, the legitimacy of conquering, occupying and settler regimes has subsequently been examined and questioned.[121] At one level, this principle is of central importance to indigenous peoples. However, it must be noted that the right of self-determination *per se* was originally developed in international law in the context of de-colonisation and the creation of new states. Thus at its inception, this right did not extend to special groups of people or non-state parties, such as indigenous peoples, residing within existing or newly created states. Moreover, it has been clearly noted that recognition of the right to self-determination does not necessarily imply a conferral of sovereign independence.[122] Attention has only been given to the rights of *groups* of people and non-state parties in this regard in recent times.[123]

Subsequently, in 1948 the United Nations Universal Declaration of Human Rights came into existence. Through this declaration, the international community finally provided the rights enumerated in the UN Charter with the necessary legal substance to enable their ensuing development in international and domestic law.[124] However, despite Principle 17 of the Universal Declaration providing for collective ownership of property, the rights expressed at this time were considered to belong to individuals; they were not collective or group rights.[125] Consequently, this Declaration has not been specifically useful for indigenous peoples.

2) ICCPR, RDC & Decisions of the UNHRC & CERD

Hard law that provides more direct recognition of indigenous peoples' rights is contained in two international conventions: (i) ICCPR[126] and (ii) RDC[127]. The application of the ICCPR and RDC, within the jurisdictional territory of State parties is monitored by a number of

United Nations Committees.[128] Under the ICCPR, the UNHRC has been responsible for a number of decisions that have involved the rights and interests of indigenous peoples. Although the ICCPR does not specifically provide for indigenous peoples' rights, there are a number of its provisions that have been claimed to have operative effect in this context.[129] Most jurisprudence concerning indigenous rights in this context has resulted from the willingness of the UNHRC to consider indigenous peoples claims brought pursuant to Article 27 of the ICCPR.[130] The importance of these findings to the development of indigenous peoples rights is unmistakable, particularly with respect to mining activities. As one commentator has stated:[131]

The value of these findings of the Human Rights Committee under the ICCPR for indigenous peoples lies in the recognition of the role that economic and resource activities play in the maintenance of the cultural rights protected by Article 27 and in the possibility of protecting interests in indigenous land through rights such as privacy and family life.

Accordingly, Article 27 is seen as 'inherently collective' and the 'most likely source of rights for indigenous peoples in the future'.[132]

The other major body generating substantial jurisprudence in this field is CERD, the monitoring body under the RDC. In this capacity, CERD is able to receive and consider complaints by indigenous peoples regarding racially discriminating acts. This has proved particularly useful for indigenous peoples in the context of their ability to participate in decisions and consent to activities concerning the access to and use of their traditional lands.[133] CERD has commented that recognition of indigenous peoples' rights includes the rights 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 use without their free and informed consent, to take steps to return those lands and territories.

A recent and relevant example of CERD's willingness to assert indigenous rights in the context of racial discrimination has been its response to Australia's *Native Title Amendment Act* 1998 (Cth). This act amended the former *Native Title Act* 1993 (Cth) in ways that CERD and has alleged is discriminatory against Australia's indigenous peoples' rights and interests, particularly in the context of participatory rights to negotiate in respect of resource developments on their traditional lands. This is discussed further in the case study contained in Part 2 of this paper.

The willingness of international bodies such as UNHRC and CERD to address indigenous rights has proved highly useful to indigenous peoples seeking redress for violations of their rights and interests. It cannot be underestimated that consideration of such matters by international bodies such as these has also raised the international profile of indigenous rights enormously. Actions by international bodies such as the UNHCR and CERD can therefore be seen as making significant contributions to the development of emerging norms of law relating to indigenous peoples.

3) International Labour Organisation

In addition to the United Nations, the International Labour Organisation has also lent great support to the conception and subsequent protection of indigenous people's rights for a long time. This most clearly evidenced by the International Labour Organisation Indigenous and Tribal Peoples Convention 1989 (No. 169) which, unlike the earlier 1957 ILO Convention 107, momentously 'rejected the assimilationist orientation' of past agreements by expounding the contrary view regarding the 'independent nature of the existence of indigenous peoples'.[134] Pursuant to this convention, indigenous peoples rights include the right to control their own development, protect their traditional lands and lifestyle and to be consulted in respect of intended mining activities and exploitation of nature resources located in their traditional lands.[135]

4) Draft Declaration on The Rights of Indigenous People

Interestingly, 1993 was declared to be the United Nations International Year for the World's Indigenous People whilst the decade of 1995 – 2004 has been declared as the International Decade of the World's Indigenous People. One of the objectives of the latter has been to formulate and bring to life a Universal Declaration on the Rights of Indigence Peoples.[136] In its present draft form, this declaration importantly recognises, *inter alia*, the rights of indigenous peoples to self-determination, human rights, freedom from discrimination and their right to their lands and natural resources.[137] Although currently this document is only an expression of relevant principles, it does lend support to this writer's contention that indigenous rights are slowly, but surely emerging from the dark morass of colonisation and assuming an ever important, influential position on the international stage.[138]

5) International Environmental Law

Traditionally, environmental and indigenous peoples' rights have been seen as separate and distinct areas of law. However, in some instances, environmental and indigenous peoples' rights have started to converge, thereby forming new types of interdependency that may affect the energy sector. At the international level, this is expressed in a number of soft and hard law instruments including the Rio Declaration, Agenda 21, the 1992 Biodiversity Convention and the WTO TRIPS Agreement. Domestic Judicial consideration of this emerging intersection has also been made.[139] An interesting example of how environmental law and other bodies of international law can create a significant problem for traditional stakeholders – governments and corporations - in mining activities is the case of the Jabiluka uranium mine in northern Australia. The proposed mine was located within the Kakadu National Park, a sensitive environmental area with World Heritage listing. Additionally, this area has been part of the traditional lands of some of Australia's indigenous peoples for over 50,000 years. In this 1980s it was the subject of land grants to the Aboriginal people in the early 1980s. Contrary to their rights as traditional owners, the indigenous population claimed that they had not been properly consulted about the proposed mining activities on their lands.

In this case civil society comprising environmental groups, indigenous peoples groups and concerned citizens joined forces to prevent the mine proceeding. A point of relevant interest for traditional stakeholders in energy markets arising out of this case, is not only the effect of indigenous peoples' rights, but also the unexpected involvement of the World Heritage Committee without the authority of the Australian government. In any event, this case has taken years to resolve at enormous cost to both the government and the mining companies. It bears witness to the fact that international law can have far-reaching consequences for the energy sector. This case is discussed in greater detail in Annex 2 at the end of Part 2 of this paper.[140]

6) Other International Institutions and Sources of Soft Law

Decisions of the International Court of Justice[141] and regional and domestic courts are also slowly providing positive judicial contributions in this regard.[142] Moreover, in furtherance of the law itself, a number of international institutional structures have been set up to assist indigenous peoples to protect and enforce their rights. Several pre-eminent bodies operate under the mantle of the United Nations Economic and Social Council ("ECOSOC") and deal with indigenous rights. These include the Commission on Human Rights, the Sub-Commission on Prevention of Discrimination and Protection of Minorities and the Working Group on Indigenous Populations ("WGIP"). Formally established in 1982, the WGIP is the most significant group, being the primary UN organisation that deals specifically and directly with indigenous matters. Also, a large number of organisations for indigenous peoples' have had consultative status with the United ECOSOC since 1997. The effect of this consultative status is that these organisations, together with many other individuals and interest groups, are able to actively participate in the development of the relevant law and enhance the status of indigenous peoples in international and inter-governmental forums.

Bodies such as the World Bank and the International Monetary Fund fall under the mantle of other *international organisations*. The World Bank has imposed upon itself a directive concerning the manner in which it operates when its projects come into contact with indigenous peoples. In essence this operative directive requires protection of the rights of indigenous peoples and participation in resource activities on indigenous lands.[143]

Soft law instruments such as declarations, judicial opinions and decisions of international bodies also evidence a growing body of state practice in favour of indigenous peoples' rights. Although these sources of law are not legally binding *per se,* their existence lends support the contention that there is an ever increasing body of customary international law coming into existence with respect to indigenous peoples' rights. Continued development of customary norms may in fact circumvent the need for any formal treaty instrument in this regard.

1.8 Consequences of Indigenous Peoples' Rights Law for the Energy Sector

By reason of the above, it is patently clear that indigenous people's rights are steadily emerging and gaining strength in international law. There has been a steady rise in the number of relevant international conventions, developing customs, declarations and judicial decisions pertaining to indigenous peoples' rights. Moreover, there is a increasing body of state practice at the international and domestic level that is enhancing and strengthening the rights of indigenous people. As a consequence of the legal developments discussed above, the need to resolve competing equities arising in the energy context is becoming ever more apparent. In fact, there can be little doubt that this ongoing *change in law* process is bringing with it a range of consequences for traditional stakeholders in the energy industry. In many countries, exploration, extraction, production and transit activities of traditional stakeholders in the energy sector are steadily encroaching upon the rights of indigenous populations. Consequently, there is an increasing level of conflict emerging between the rights of traditional stakeholders and those of the traditional indigenous landowners. Past practices, which on the whole amounted to simply ignoring the rights of indigenous peoples over their traditional lands, are no longer acceptable under international law. It is necessary to realise that this situation will not disappear; it certainly will not abate and fade. On the contrary, it is abundantly clear that the present legal trend is likely to continue in the direction of strengthening the legal position of indigenous peoples. A number of developments are already potentially quite problematic for those in the energy sector, namely:

1. Self-determination;
2. Exploitation of natural resources;
3. Preservation of cultural traditions; and
4. Compensation for theft of land and property by settler populations.[144]

Many of those involved in the energy industry are particularly vulnerable and overly exposed to these kinds of legal changes. As such rights develop into internationally recognised legal norms, the likelihood of conflict between these new rights, and existing rights of traditional stakeholders will rise. In such cases, traditional stakeholders cannot be sure that their interests will prevail over those of indigenous people. That this situation has to a large extent been self-inflicted has not passed unnoticed. One commentator, for example, draws attention to the fact that conflict of this kind, between competing rights of new and traditional stakeholders, has sometimes resulted from misguided past practices of governments. Indigenous people were often 'forcibly moved' to isolated areas of land that were considered worthless at the time. Later developments often revealed rich deposits of useful natural resources and thus, these areas of land subsequently acquired considerable economic value.[145]

Putting aside the questionable aims of past practices concerning indigenous peoples, a clear example of the emerging dilemma facing the energy industry is revealed in the Declaration of Principles on the Rights of Indigenous Peoples which provides, *inter alia*:[146]

Indigenous Nations and Peoples are entitled to the permanent enjoyment of their aboriginal ancestral-historical territories. This includes air space, surface and *subsurface rights, inland and coastal waters, sea ice, renewable and non-renewable resources, and the economies based on these resources.* [emphasis added]

Although still in the drafting process the economic implications of this statement for States and companies in the energy industry are unequivocally transparent.

1.9 Economic Ramifications of Indigenous Peoples' Rights

The economic consequences of the *change of law* process shall be examined in general terms first before the discussion turns to specific consideration of the economic ramifications arising out of indigenous peoples' rights.

1.9.1 Externalities

With respect to externalities, underlying the *maximisation of the value of output* in a perfectly competitive market is the assumption that producers will seek to maximise profits by producing at a level where marginal costs are equal to price.[147] In practice, this does not always hold true as: [148]

the costs faced by producers may not accurately reflect the costs faced by society. This may be because of ignorance (producers do not know their own costs accurately) or taxes and subsidies on factors of production. It may also be because of externalities – costs or benefits that one economic activity imposes on another, other than via the price mechanism.

For example, production may in fact result in environmental damage and public health problems by way of air/water borne pollutants, the costs of which affect the wider community and thus, social marginal costs exceed private marginal costs.[149] Hence, 'externalities can separate private and social utility'[150] and the discrepancy may be such that the community's demands enforce changes in law, which in turn adversely impacts upon private utility. Other economic societal costs may arise with respect to matters other than the environment including protection and respect for human rights, indigenous peoples' rights to self-determination and *ownership* of their traditional lands, internal and international armed conflict, bribery and corruption. All such factors may alter the costs faced by producers, all those in the supply chain and ultimately the consumer. Further, externalities may be seen as adding to potential uncertainty about future market conditions which may result in loss of investor confidence and investment.

1.9.2 Economic Rents

The impact of the *change of law* process can also be examined in terms of economic rents. This term describes 'that part of the payment to a factor of production which is in excess of the amount required to ensure its supply'.[151] In other words, the rent arising from the ownership of a factor of production is the difference between the unit cost of production and the price received on the market. The owner of natural resources for example, will produce the resource if all his costs, including return on capital and his own work, are covered. Any payment the owner receives in excess of all of his costs is an economic

rent arising from the fact that he owns the resource, i.e. the right to exploit it.

Generally, the prices of factors of production will be determined by supply and demand factors operating in the market to induce an equilibrium level. In some cases, the supply of a particular factor may be fixed and cannot be changed, regardless of price. Accordingly, market prices will depend crucially upon demand and all of the payment made to the factor owner will take the form of economic rent. Relevantly, large economic rents arise from scarcity of the factor of production in question. Scarcity in this sense may arise in a number of ways. First, the factor may be scarce because it naturally existing volume is limited. A clear example of this is land whose scarcity, in economic terms, is proscribed by its defined physical nature. As the supply of land is inherently limited, any payment made to the landowner for its use will assume the form of economic rent. When the land is highly desirable, for reasons such as large deposits of natural resources, demand for it will drive its market price up. Accordingly, the landowner will receive inordinately high economic rents for the use of the land in question. Secondly, scarcity may in fact be induced rather than real in the sense that a factor's availability is limited by government policies, laws or other devices used to limit market entry. In the latter case, economic rents are said to be monopoly rents because the return to protected investors is well in excess of competitive levels. Thus, owners of this kind of factor of production receive windfalls as prices are higher than under perfect competition and corresponding welfare losses accrue to consumers.

1.9.3 Indigenous Peoples' Rights, Externalities and Economic Rents

The dangers of the *change of law* taking place in the field of indigenous peoples' rights can be expressed in terms of the impact upon economic rents and externalities. First, land is undeniably perhaps the most singularly important factor of production in the traditional sectors of national and international energy markets. Acquiring access to, and use of, land has always been a requisite preliminary step in the process of exploration, extraction and production of fossil fuels.[152] The fundamental relationship between traditional stakeholders in the energy industry has been based upon the assumption that land and natural resources are owned by the government, or ruling body of the sovereign state, in which they are situated. While the governing legal regime may change between the various nations of the world, one common factor has usually been this right of ownership.[153] During the previous centuries, the colonising powers of Europe were particularly proficient at ensuring this state of affairs and frequently acquired financial gains in this way. Consequently, such parties, having vested themselves with full ownership rights, have traditionally extracted high economic rents from allowing access to lands for such energy activities.

However, in recent times, international law has started to come to the assistance of many of those who were dispossessed of their traditional lands and lifestyles by the colonisation process. Not surprisingly, a significant consequence of the changing legal perspective regarding indigenous peoples' rights has been a transformation in the assumed nature of the underlying relationship between stakeholders. Relevantly,

payment made for the use of land is perhaps one of the most important examples of economic rent.[154] Traditionally the supply of land has invariably been fixed. Further, the land itself has often been of limited or restricted utility. Hence, in the strict economic theoretical paradigm, owners of land have happily found themselves in the envious position of being able to extract high gains, in the form of economic rents, from allowing their property to be utilised in some form of production or commercial operations.

However, no longer is the issue of land one of fixed supply from a known owner. As claims on ownership rights have changed, so too has the magnitude of the economic rents previously generated by such activities. In an industry characterised by high economic rents, the growing claims to *ownership* of land and/or natural resources are giving rise to a situation where traditional economics rents are being diminished. The ability of traditional stakeholders to generate high economic rents is being challenged by emerging principles and consequential rights recognised by international, regional and domestic law. Thus, as the purposes to which land may be suitably applied changes, whether by way of indigenous ownership or perhaps environmental protection, economic rents to traditional market participants decline accordingly. More specifically, by restricting the use of land, any natural resources (ie. fossil fuels) located therein will no longer be available for use. In turn, this will lead to a reduction in the supply as those fuels are taken out of the market. Instead of becoming more elastic, supply will become even more inelastic as production possibilities diminish. Rents to traditional market participants will simply decline therefore as their cost of exploitation rise, or by reason of not being allowed to produce any more.

A serious scenario arises where the new stakeholders, the indigenous peoples as *traditional* landowners, adopt the traditional view that the factor's supply is in fact inelastic, but do so by characterising the land's utility in terms that are completely at odds with those propounded by traditional stakeholders. In such cases, the result of a change in ownership may in fact lead to a complete loss of economic rents by way of denial of access to land or usage for resource exploitation. Put another way, supply in the traditionally understood sense may in fact be eliminated in its entirety where the new stakeholders (the *traditional* landowners) refuse access to the land for petroleum and mining operations. Future supply in such cases would therefore become non-existent.

In addition to diminishing economic rents, energy activities may be seen as giving rise to externalities. For example, production may violate the rights of indigenous people and create costs that affect the wider community. In this way, as energy activities cause social marginal costs to exceed private marginal costs, community demands may alter and drive changes in the relevant law. This in turn may adversely impact upon private utility by increasing regulation of any offending activities. Thus, as already stated, externalities can increase costs faced by producers, all those in the supply chain and ultimately the consumer.

1.9.4 Other Consequences

Further to diminishing economic rents and externalities, it is worth noting that the introduction of new stakeholders such as indigenous peoples can give rise to other economic and financial consequences. An important consequence of changes in law in this context is the introduction of uncertainty and delay. As illustrated by the case study in Part 2 of this paper, uncertainty may prevail over ownership rights as well as access and usage rights. It may be unclear in some cases when physical supply may be forthcoming. Clearly, resolving such quandaries may involve lengthy delays while parties negotiate an acceptable solution between themselves. Alternatively, answers may be obtained through the courts, in which case delays and uncertainties will be prolonged until a decisive court ruling is made. Consequently, supply of energy resources may be intermittently disrupted until such matters are settled. In such circumstances, investors will obviously be reluctant to finance exploration and extraction activities. As uncertainty and delay continue, the economic attractiveness of particular ventures may decline. Accordingly, as investor confidence falls, so too will the level of investment and the likelihood that supplies will be forthcoming from that particular source.

In essence therefore, consequences in terms of economic rents, externalities and uncertainty may be seen as forcing market participants to make new decisions about their energy activities. It must be noted that the consequences for economic effectiveness of commercial activities when faced with conflicting, competing rights will depend largely on the extent of domestic legal protection afforded to each party. In this context, domestic legal protection often comes as a result of international law and pressure from the international community to ensure that fundamental rights such as those of indigenous people are properly respected and protected.

1.10 Conclusions

The above discussion clearly shows that indigenous peoples' rights are presenting as a significant problem for those involved in the mining of natural resources. Arguably, *changes in law* of this kind have an inherent potential to create adverse repercussions for energy markets, activities of traditional stakeholders and energy policy options and choices of producers and consumers similar to those already brought about by international environmental law. The potential for conflict between competing rights of traditional and new stakeholders arises primarily in the context of traditional lands and activities relating to the mining of natural resources, including infrastructure development such as pipe lines. Clearly, new stakeholders such as indigenous peoples may have very different ideas about access and usage rights of mining companies over traditional indigenous lands. In this way, the indigenous peoples themselves, through the relevant international and domestic law supporting their rights and interests, can exert demonstrable influence over the activities of traditional stakeholders in producing states. Moreover, as civil society has become more aware of the plight of indigenous peoples throughout the world, the likelihood for increasing consumer participation and demand driven changes, similar to the rising green energy demand, are not unlikely.

Ultimately, failure to account for these kinds of *changes in law* may be hazardous to the effectiveness of energy policy, particularly in relation to security of energy supply. As the past decades have shown, international environmental law has emerged from moral, ethical conjecture and non-legally binding principles into customary norms and harder, more direct forms of legal regulation over markets and traditional stakeholders. Environmental protection is now a fundamental element of energy policy and a noted risk to security of supply.[155] Thus, it is important that participants in the energy markets, governments and non-state actors alike, recognise emerging legal trends that may adversely impact upon their decisions and actions if not properly accounted for.

At first blush, many in the EU region may consider indigenous peoples' rights to be a matter of little, or no concern to them. However, given the fact that the EU is an import dependent region, it is imperative to have some level of appreciation for the underlying factors at work in the various supply markets across the globe. As outlined herein, one such factor is the development of indigenous peoples' rights and interests. Of course, indigenous peoples' rights may not yet appear to be an immediately significant issue, especially when compared with other noticeable risks such as climate change. However, there are clear indications in emerging laws that suggest this will not always be the case. In support of this Professor Wälde has commented that in addition to environmental concerns, other issues demanding consideration by the energy sector include recent events involving the 'relationship and social impact of the energy industry (oil in particular) upon indigenous peoples and the relationship the industry has with corrupt political regimes in some countries'.[156]

Moreover, it is not unreasonable to contend that issues such as indigenous peoples' rights should be accounted for in modern energy policy. As one commentator has stated, 'current key issues such as environmental protection which form a significant part of present day strategy and policy decision making for governments and corporations was relatively inconsequential 30 years ago'.[157] In the same way that environmental considerations have entered the energy policy debate, it is likely, particularly in energy supplying regions, the development and emergence of indigenous peoples' rights will also demand inclusion. This is particularly so given that, in the face of declining known resources, the search for new sources is continually being extended. As demand for supply increases, so too does the likelihood of encountering situations that will bring the energy industry into direct conflict with the rights of indigenous peoples. In order to ensure long term security supply, these matters should be met with responsible energy policies that properly account for new stakeholders as well as changing rights and obligations of traditional stakeholders. Accordingly, producers and consumers choices and options must be based on proper understanding of these new and emerging issues so that there is an equitable balance achieved between the legitimate objectives of all stakeholders.

2. Case Study of the Impact of Indigenous People's Rights upon Australia's Mining and Petroleum Industry

2.1 Introduction

In response to international and domestic pressure,[158] significant legal changes have taken place in the last decade with respect to the legal position of the indigenous peoples vis-à-vis the non-indigenous population. It is important to note that such rights are not exclusive or exceptional to the Australian aborigines. The rights of indigenous peoples exist firstly at the universally recognised level of international law and transcend into the domestic arena in a variety of ways in different countries. In so doing, such changes in law have brought some of the rights and interests of Australia's indigenous peoples into direct conflict with mineral and petroleum rights and interests. In this regard, despite some domestic wrangling between the government and the judiciary, different parties in the mining and petroleum industry are developing effective pathways to resolve their differences with local indigenous communities. It must be said that the situation is still far from perfect and has been the subject of ongoing and recent criticism. However this change will hopefully continue in a way so that ensures that the different parties can properly reconcile their competing rights in ways that will be beneficial to all involved.

That being so, the situation in Australia and the legal position of its indigenous peoples shall be used by way of example for a number of reasons. First, with respect to traditional energy resources such as oil, gas, coal and uranium, Australia is extremely well endowed and remains relatively under-explored making its potential for future supply of such resources very high. Secondly, Australia has an indigenous population whose rights have been largely ignored until very recently. By confining consideration of matters in this way, it is intended to provide a clear example of the way in which legal changes can and do create economic consequences for energy industry participants; that the *change of law* process should be seen as giving rise to a range of serious threats to continuity of supply. Accordingly, consideration needs to be given to these and similar issues in any discussion and development of EU energy policy. It is imperative that emerging fundamental rights such as these are properly identified, respected and protected in the quest for EU future energy supply security.

Accordingly, given the history of Australia's indigenous inhabitants and the growing strength of their claims to native title, this case study shall examine the effects of legal changes upon the mining and petroleum industry in Australia. The resources industry and the Indigenous population shall be discussed briefly in Part 2.2, whilst the Australian system of government and its jurisdiction and control over natural resources is the subject of Part 2.3. The effects of British colonisation on the legal system of Australia and the rights of the indigenous population shall be considered in Part 2.4. Following that, the discussion in Parts 2.5 and 2.6 will then turn to the development of Australian law and native title and the seminal decision of the HCA in the case of *Mabo* v. *Queensland (No.2).*[159] The changes this case

represented for the indigenous population of Australia regarding native title rights and interests shall be set out thereafter. Development of these rights and interests in subsequent cases will also be outlined in Part 2.7. The legislative responses of the Australian Government to the developments in case law will be considered in Part 2.8 with particular reference to the obligations and responsibilities of parties with competing rights such as mining leases and licences. The issue of ownership over minerals and petroleum was raised in a recent HCA case that is summarised in Part 2.9. Finally, Part 2.10 will illustrate the financial and economic impact these changes have generated, thereby lending support to the fundamental contention raised in Part 1 of this paper. It is intended to demonstrate that developing indigenous rights contain within them a potential for risk to future energy activities by increasing costs and leading to a change in the fundamental decisions that must be made by participants in energy related activities. As such, it is clearly arguable that indigenous rights must be considered by policy makers to insure against unwanted disruption to future supply and to prevent effective implementation of the wider objectives of energy policy as a whole. This extends to both producing and consuming nations alike.

2.2 Australia's Conundrum: Economic Wealth versus Cultural Riches

Australia, often called the "lucky country", is richly endowed with natural resources and not surprisingly, the mining and petroleum industry is of significant importance to the nation and its people. Australia's natural resources are enormous in both quantity and variety. The world's largest economic demonstrated resources of lead, mineral sands (alluvial ilmenite, rutile and zircon), tantalum, uranium, silver and zinc are located on the Australian continent and the country is presently ranked amongst the top six countries in the world for economic resources of black and brown coal, cobalt, copper, diamonds, gold, iron ore, manganese ore and nickel.[160] Further, over seventy mineral deposits of economic significance are known and over 400 medium size to large mines currently operate in Australia. These mines include world-class deposits in most major mineral commodities.[161]

In terms of energy production, supply and demand, as noted in the recent *Australia's Energy Policy* the Australian market has been dominated by black coal. Over three quarters of Australia's energy production is derived from this source and the country has been the world's largest exporter of black coal since the mid 1980s. It is estimated that the coal reserves will last for the next 250 years. Although Australia has a growing market for renewable energies, it appears that the country will maintain its dependency upon traditional fossil fuels. In addition to the domestic market, more than two thirds of Australia's production of energy carriers is exported. In this regard, Australia is the fifth largest producer of liquefied natural gas (LNG) in the world and the third largest in the Asia-Pacific region.[162] Despite continual discoveries of minerals and petroleum, Australia remains relatively undiscovered, particularly at depths of more than 100 meters.[163]

Clearly, this sector of the economy adds considerably to the wealth of the country as a whole. Export earnings from Australian mineral resources steadily increased in the 1990s and in 1996-97 amounted to an annul figure in the region of A$40b.[164] Although Australian mineral resource export earnings fell to A$38,8b in 1998-99, this was the first reduction since 1994-95 and was largely the result of lower export prices.[165] In 1999-2000, despite the introduction of a Goods and Services Tax and the uncertain state of a number of Asian countries (i.e. Australia's largest export market), national turnover and trading profit increased in the oil and gas extraction industries by 12% to $9.7b and 14% to $7.7b respectively.[166] These increases were driven to a large extent by significant increases in prices being received for oil and gas during 1999-2000.[167] Likewise, the previous upward growth in export earnings returned during 1999-2000 with an increase of $5.0b (13%) to a record high export earnings figure of $43.8b.[168]

The composition of Australian mineral exports is diverse with the main contributors to exports including coal, crude petroleum oil, liquefied natural gas (LNG), gold, iron ore, and aluminia.[169] Black coal remains the largest export earning commodity having a 1998-99 value of A$9.3b[170] and a slightly smaller value of $8.3b in 1999-2000.[171] In addition to the annual contributions by the mining and petroleum industry to Australian exports, the industry also makes substantial contributions to the domestic economy through employment and demand for associated goods and services. In 1998-1999, 80,000 people were directly employed in minerals and petroleum extraction (1% of national employment). In addition 325,000 manufacturing jobs (3.8% of total employment) in areas of metal products, non-metallic mineral products and petroleum, coal and chemical products.[172] During 1999-2000, whilst employment in the oil and gas industry increased by 7%, increased efforts to improve productivity and maintain international competitiveness resulted in a decline in employment in the other industry sectors.[173]

By reason of the above, the economic and financial importance of Australia's mining industry cannot be underestimated. Projections as to future prosperity resulting from the immense opportunities for the mining and petroleum industry are far from being inconsequential. Understandably, ensuring the continued success of mining and petroleum resource activities is an important factor guiding the actions of traditional stakeholders.[174]

At the same time, Australia is endowed with other riches including the history and culture of its indigenous population. The Aboriginal people of Australia are one of the longest surviving cultures in the world. Their continual existence on the continent of Australia can be traced back for more than 40,000 years.[175] Of special interest is their inherently spiritual relationship with the land that has been the source of much conflict with Australia's non-indigenous population. This spiritual relationship involves a concept of land and ownership of property that is distinctly different to that provided for by the feudal-tenure based English common law system that has prevailed in Australia since the first English settlement in 1788. Such a divergence immediately gives rise to the question as to what rights and interests of Australia's

Indigenous population, if any, survived the colonisation process? Until recently, Australia's governments and judiciary had largely ignored this issue. The rights of indigenous people to their native lands, traditions and customs were, in effect, treated as non-existent. However, in 1992 the High Court of Australia, Australia's Supreme Court of Appeal (hereinafter referred to as "HCA"), handed down a landmark judgement in the case of *Mabo* v. *Queensland [No.2]*.[176] In this case the Court recognised the rights of the indigenous population in the form of *native title*, thus changing forever the law of Australia and the nation's treatment of its aboriginal people. The non-indigenous population also felt the effects of this decision and concerns were raised regarding the legal status of the rights of other land users such as farmers and miners.

2.3 Australia's Three Tier System of Government

Australia has a federal system of government where the powers, rights and duties of government are limited and divided, by virtue of *The Constitution* 1901, between the Commonwealth (Federal) Government and the governments of the six States[177] and two Territories[178]. A third level of government exists at the local level. Importantly, at the federal level, the Commonwealth Government assumes a number of responsibilities that may have impact directly upon energy activities such as taxation, international trade and investment. Further, at this federal level, it is the Commonwealth government's key responsibility to ensure that the Country's international treaty obligations are complied with.

According to Australian law, ownership of the country's mineral and petroleum resources is vested directly in either the Commonwealth, State and/or Territory Governments. Given the vast wealth associated with this industry it is perhaps not surprising that Australian mining law has developed such that the various governments have reserved to themselves all rights and interests in any minerals and other resources that may exist under the ground. The different tiers of government have distinct and various roles and responsibilities with respect to exploration and development of Australia's natural resources.[179] For example, while the Commonwealth Government determines policies at the federal or national level, the governments of the States and Territories are considered to be the actual owners of most of the Australian land mass itself and therefore bear the primary responsibility for managing and administering land. This task necessarily includes allocating mineral and petroleum property rights such as exploration licences, mining leases and mining and petroleum titles.[180] It also involves regulating operations and collecting royalties on minerals produced[181] and often requires compliance with environmental regulations. With respect to onshore mineral and petroleum projects, the actual exploration and development of mining and petroleum resources are undertaken by the commercial/private sector, not the governments. This has been the usual status of affairs, historically, for exploration and mining activities in Australia:[182]

The relationship between the industry and government generally has been simple: State governments have granted mining leases (frequently with infrastructure conditions), ensured that the mining laws are observed, and collected royalties; the Commonwealth Government has collected those taxes

to which it is entitled, and has been responsible for petroleum activities in Commonwealth waters.

Each state or territory has a Department of Mines, Minerals and Energy, or a similar governmental department, which is primarily responsible for administering and dealing with mineral and petroleum related activities in the respective State or Territory.[183] In addition to Commonwealth legislation such as the *Native Title Act* 1993 discussed subsequently, each State and Territory has its own legislation governing the activities of the minerals and petroleum industry within their geographical area. In essence, many of these laws are quite similar. Differences do exist however and companies pursuing activities in different parts of the country may be faced with a range of different legal requirements accordingly.[184]

2.4 The Effects of British Colonisation on Australian Law

In 1788 the first English settlement was founded in Sydney on the east coast of Australia. Some *invisible baggage* arrived with those first settlers and convicts, namely the common law of England.[185] The common law dictated that the applicable law having force in the newly discovered and colonised lands depended directly upon the method by which the Crown of England acquired the new lands. On this issue, the common law had recourse to prevailing international law which gave recognition to various methods of acquisition including, *inter alia,* procurement by conquest, cession or settlement or occupation of territory that was *terra nullius,* i.e. deserted or uninhabited lands.[186] Despite the patent meaning of the latter doctrine, customary international law at that time in fact gave a wider interpretation to the concept of *terra nullius*. This concept included lands that the colonising powers of Europe considered to be uninhabited on the basis that *backward* or *uncultivated* peoples inhabited them. This colonisation process has been succinctly described as follows:[187]

As among themselves, the European nations parcelled out the territories newly discovered to the sovereigns of the respective discoverers[188], provided the discovery was confirmed by occupation and provided the Indigenous inhabitants were not organised in a society that was united permanently for political action.[189] To these territories the European colonial nations applied the doctrines relating to acquisition of territory that was *terra nullius*. They recognised the sovereignty of the respective European nations over the territory of "backward peoples" and, by State practice, permitted the acquisition of sovereignty of such territory by occupation rather than by conquest.[190] Various justifications for the acquisition of sovereignty over the territory of "backward peoples" were advanced. The benefits of Christianity and European civilisation had been seen as a sufficient justification from mediaeval times.[191]

The advantages for asserting the extended doctrine of *terra nullius* as the basis of acquisition by the English were significant compared to other types of acquisition, particularly conquest and cession. When acquisition of new territory was by way of conquest or cession, prevailing legal rule dictated that the laws of the conquered country continued until such time as the conquering power sought to alter or amend them.[192] In such cases, 'the Crown had a prerogative power to make new laws for a conquered country although that power was subject to laws enacted by the Imperial Parliament'.[193] Also, a treaty of

cession may limit the prerogative power in certain cases.[194] By contrast, when occupation was of territory said to be *terra nullius,* English settlers brought with them 'so much of the English law as [was] applicable to their own situation and the condition of an infant colony'.[195] In this way the English colonising power ensured that the common law of England prevailed in the newly acquired territory, albeit to the detriment of its Indigenous inhabitants. At this time, it was assumed that the indigenous population of the new land had, *inter alia*, no recognisable form of law and thus, had no proprietary rights to enforce against the colonising power. Specifically, no recognition was provided to the highly developed system of traditional customary law that governed the lives of the aboriginal people and the concept of native title was far from the minds of those imposing the common law:[196]

> The view was taken that, when sovereignty of a territory could be acquired under the enlarged notion of terra nullius, for the purposes of the municipal law that territory (though inhabited) could be treated as a "desert uninhabited" country. The hypothesis being that there was no local law already in existence in the territory[197], the law of England became the law of the territory (and not merely the personal law of the colonists). Colonies of this kind were called "settled colonies". Ex hypothesi, the Indigenous inhabitants of a settled colony had no recognised sovereign, else the territory could have been acquired only by conquest or cession. The Indigenous people of a settled colony were thus taken to be without laws, without a sovereign and primitive in their social organisation.

In accordance with the common law, the feudal based system of tenures had operative effect in Australia. By virtue of England's assumption of sovereignty over a particular part of Australia, the Crown was seen as acquiring a radical title to that part; the Crown was deemed to be the 'universal and absolute beneficial owner of all the lands therein'.[198] Over the years, the entire Australian continent was said to have been *peacefully* annexed to England. In this way the common law was successfully imposed upon the new territories as well as over all its inhabitants, including the Indigenous population. The common law dictated that all rights to, and interests in, all the new lands could only be obtained by way of a grant from the Crown. This position was recognised by Australian courts[199] and subsequently reaffirmed in numerous decisions the following form:

> ...when the territory of a settled colony became part of the Crown's dominions, the law of England so far as applicable to colonial conditions became the law of the colony and, by that law, the Crown acquired the absolute beneficial ownership of all land in the territory so that the colony became the Crown's demesne and no right or interest in any land in the territory could thereafter be possessed by any other person unless granted by the Crown.[200]

The effect on the indigenous population of this colonisation process was devastating. From the outset they were divested of all their lands and stripped of any rights or interests in respect of their native title, traditions and customs. Throughout the ensuing years, the indigenous population was subject to a continuing array of discriminatory and patronising political, social, religious and legal measures. The actions of the non-indigenous population further alienated the indigenous people from their native lands, traditions and customs as well as from each other and the non-indigenous population. Arguably, some of these

measures were well intended and of course, subject to social conditioning of the time. However, many policies such as removing children from their parent's custody were at best, highly destructive, cruel and devoid of any meaning. Such wrongful actions were born of ignorance and arrogance, both of which were founded on a misplaced belief of superiority of civilisation by the colonising powers. As such these erroneous attitudes could not be allowed to continue.

2.5 Development of Australian Law and Native Title

As the above discussion reveals, British colonisation had serious detrimental effects upon the indigenous population. In such circumstances, one can but wonder what possibilities there were for the indigenous inhabitants to assert recognition and protection of their traditional lifestyles and the practice of their customs and culture of the past 30,000 years. Until near the end of the 20th century, Australian courts reaffirmed the broader interpretation of *terra nullius*.[201] During this time, the legal position expounded by the courts and governments concerning the legal status of the indigenous population began to diverge from that held by the Australian community as a whole. The desperate plight of the indigenous population and the need to make significant changes to the laws of the land had been gaining support in the Australian community. This culminated in 1967, when Australia's non-indigenous population voted overwhelmingly in a Constitutional Referendum to change the written Constitution to provide aboriginal people the right to vote. Interestingly, Australians are politically conservative when it comes to amending the country's written Constitution and most referendums have been rejected. Additionally, in order to meet its obligations as a party to the international *Convention on the Elimination of All Forms of Racial Discrimination*, the Commonwealth Government passed the *Racial Discrimination Act 1975 (Cth).* Over a decade later, this was followed by another significant piece of legislation, namely, the *Australia Act 1986* (Cth). By reason of this latter act, Australia's legal ties with the *mother country*, including the appellate jurisdiction of the Privy Council, were finally severed. Consequently Australian courts, while applying the common law and being subject to the doctrine of *stare decisis*,[202] were no longer bound to observe the decisions of Privy Council residing in London.

The effect of these changes were paramount to changing the indigenous people's right to their ancestral lands and paved the way for perhaps the most significant case concerning land rights of Australia's indigenous people, namely *Mabo* v. *Queensland [No.2]*.[203] During the course of his seminal judgement, Brennan J, as his Honour then was, provided one of the clearest statements as to the effects of being released from the shackles of centuries of English legal tradition, expressing this new legal freedom in the following terms:[204]

> Although our law is the prisoner of its history, it is not now bound by decisions of courts in the hierarchy of an Empire then concerned with the development of its colonies. It is not immaterial to the resolution of the present problem that, since the Australia Act 1986 (Cth) came into operation, the law of this country is entirely free of Imperial control. The law that governs Australia is now Australian law. … It is not possible, *a priori*, to distinguish between cases that express a skeletal principle and those which do not, but no

case can command unquestioning adherence if the rule it expresses seriously offends the values of justice and human rights (especially equality before the law) which are aspirations of the contemporary Australian legal system. If a postulated rule of the common law expressed in earlier cases seriously offends those contemporary values, the question arises whether the rule should be maintained and applied. Whenever such a question arises, it is necessary to assess whether the particular rule is an essential doctrine of our legal system and whether, if the rule were to be overturned, the disturbance to be apprehended would be disproportionate to the benefit flowing from the overturning.

2.6 The *Mabo* Case & Native Title

On 20 May, 1982, Eddie Mabo and four other Torres Straight islanders commenced an action for, *inter alia*, a declaration of native title to their traditional lands on the Murray Islands off the far north-east coast of Australia. In 1992, after lengthy and protracted litigation, upon hearing the final appeal in this matter the HCA experienced what can perhaps be described, albeit somewhat cynically, as an attack of conscience for past wrongs. The HCA resolutely rejected the claim that Australia had been settled *terra nullius.* The fundamental presumption underlying the extended *terra nullius* mode of colonisation was denounced by the Court as a fallacy that was of incorrect application to Australia and the country's indigenous people:[205]

> The fiction by which the rights and interests of Indigenous inhabitants in land were treated as non-existent was justified by a policy which has no place in the contemporary law of this country. … Whatever the justification advanced in earlier days for refusing to recognise the rights and interests in land of the Indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people.

In condemning the *terra nullius* justification for the brutal colonisation of Australia the HCA noted that:[206]

> According to the cases, the common law itself took from Indigenous inhabitants any right to occupy their traditional land, exposed them to deprivation of the religious, cultural and economic sustenance which the land provides, vested the land effectively in the control of the Imperial authorities without any right to compensation and made the Indigenous inhabitants intruders in their own homes and mendicants for a place to live. Judged by any civilised standard, such a law is unjust and its claim to be part of the common law to be applied in contemporary Australia must be questioned.

Thus, by unequivocally discarding the contention that colonisation by the British had *ispo facto* expunged all of the rights and interests of Aboriginal people, the court expressly rejected the extended *terra nullius* doctrine and recognised the existence of native title and the rights of Australia's indigenous inhabitants accordingly.

The concept of *native title* was described by the HCA as encompassing interests and rights in land 'possessed under the traditional laws acknowledged by and the traditional customs observed by the Indigenous inhabitants'.[207] Importantly, the majority of the Court held that this right to native title existed at the time of settlement by the British. The Court succinctly summarised its perspective as to the position of the common law in Australia with respect to land rights

(Indigenous and non-Indigenous)[208] and clearly indicated that native title, *prima facie,* survived colonisation and the imposition of the common law.

The Court held that native title would be recognised in situations where the native title claimants could demonstrate a sufficient connection to the land in accordance with their traditional laws and customs. However, native title rights and interests were not held to be unlimited. For example, even when native title could be proved, the Court stipulated that such a right may be extinguished by any *bona fide* exercise of sovereign power that validly created another interest in land which was inconsistent with the native title right.[209] Hence, privately owned properties, being freehold estates granted by the Crown, were deemed to have extinguished native title and thus could not subject to any claim of native title. By contrast, certain other interests such as pastoral and mining leases and licences were not fully examined in this case and questions remained as to the effect such rights may have had, and could continue to have, on native title. Such rights were dealt with by subsequent cases and legislation, the appropriateness and adequacy of which remains a highly contentious issue in Australia.

2.7 Consequential Legal Effects of *Mabo's* Case

Whilst uncertainty initially prevailed as to the future effect of native title on rights other than grants of freehold estate, native title, as first expounded by the HCA in *Mabo's* case has been refined and elaborated upon by the Court in a number of subsequent cases.[210] Although detailed examination of the full legal issues covered by these cases is outside the scope of the present paper, in this context it is important to recognise the distinction between land rights and native title rights. While each of these rights arise out of 'recognition of traditional Indigenous ownership of land and waters, they are legally very different'.[211] Land rights, by their very nature, involve the conferral of ownership, or grant, of lands by a government (Commonwealth, State or Territory) to the indigenous peoples who are said to be the traditional landowners. Such grants may take the form of freehold title or a perpetual lease and are usually held by the community, not a specific person, to be handed on to future generations.[212] By their fundamental proprietary character, such rights are akin to common law property rights and thus, exist within the traditional legal framework. Failure to properly respect such rights can give rise to significant consequences as the Australian government and some mining companies discovered to their disadvantage in the Jabiluka uranium mine case. This is discussed in greater detail in Annex 2 to this case study.

Conversely, the right of native title encompasses the notion of recognition *by* the common law of native title rights and interests in land and waters in accordance with the indigenous peoples' traditional laws and customs. As such native title does not involve a grant of land *per se* in the traditional common law proprietary sense. Consequently, it is not a right *created by* common law, *per se*, but it is merely *recognised by* the common law. Although subsequent legislative recognition was forthcoming in the wake of the HCA's decision in *Mabo's case,*[213] the character of native title was clearly enunciated by

the HCA, in the case of *Fejo* v. *Northern Territory of Australia* as follows:[214]

Native title has its origin in the traditional laws acknowledged and the customs observed by the Indigenous people who possess the native title. Native title is neither an institution of the common law nor a form of common law tenure but it is recognised by the common law.

Native title therefore introduced a new form of stakeholder into the Australian legal system and the mining and petroleum industry. Reconciling and resolving competing rights of the different parties has been achieved primarily through development and application of the concept of *extinguishment*. Extinguishment of native title, the case law reiterates, may occur in a number of situations, *inter alia*:[215]

- by laws or acts which simply extinguish native title;
- by laws or acts which create rights in third parties in respect of an area of land or water subject to native title which are inconsistent with the continued rights to enjoy native title; and
- by laws or acts by which the Crown acquires full beneficial ownership of land previously subject to native title.

The effect of such laws or acts may be either a complete disavowal of any further native title or alternatively, may amount to only partial extinguishment of native title.[216] In any event, the common law clearly provides that the test for extinguishment of native title resulting from the grant of an inconsistent right or interest must be expressed as a 'plain and clear intention'.[217]

In 1996, the case of *The Wik Peoples* v. *State of Queensland*[218] gave rise to significant concern to parties involved in the mining and petroleum industry. This case concerned the leasehold rights of pastoralists and the Crown grants of land under which they conducted their farming activities. The HCA held that while the Crown grants of pastoral leases were valid acts *per se*, they did not have the same effect on native title as that of grants of freehold estates. Thus, extinguishment of native title did not automatically follow, at least in the case of pastoral leases. On the contrary, it was held by the HCA that native title may exist in circumstances where the land is also subject to other valid rights such as non-exclusive pastoral leases. Consequently, by reason of the *Wik People's* case, the HCA recognised that the land may be shared by different parties, Indigenous and non-Indigenous, under the notion of *co-existence*.[219] For example, native title may be successfully claimed over lands which are subject to pastoral or agricultural leases in which case the parties would exercise their rights concurrently and co-operatively with native title holders. The Indigenous people would maintain their right to enter the subject lands and use them in accordance with their traditional laws and customs (i.e. conduct ceremonies or gather foods). The leaseholder must respect this and not seek to prevent the exercise of native title. However, the holders of native title must not interfere with the leaseholder's business or disrupt his/her ability to successfully carry out the usual activities associated with the particular leasehold.

Understandably these legal developments have been a source of great anxiety for many interest groups particularly those with pastoral leases

and various mineral and petroleum related rights and interests. Such interests are generally made over Crown land and do not constitute freehold estates. Given that the Crown land over which many claims for native title have been, and continue to be made, are also the source of many existing and proposed mineral and petroleum developments, the potential for conflict between the different rights and interests is portentously high and uncertainty has largely remained in this regard. The number of cases concerning indigenous rights has steadily increased during the past years and the HCA is constantly being required to reassess and develop the law relating to Australia's indigenous peoples. In one recent case, the HCA appears to have retreated from it early steps in favour of expanding the law pertaining to indigenous peoples' rights. This case has direct relevance to the mining and petroleum industry and is discussed below.

2.8 Government Legislative Response: The Native Title Act

In response to the HCA's decision in *Mabo [No.2]* the Commonwealth Government passed into law the *Native Title Act* 1993 (Cth) ("NTA").[220] The objectives of the Act are listed as follows:[221]

a) to provide for the recognition and protection of native title; and
b) to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings; and
c) to establish a mechanism for determining claims to native title; and
d) to provide for, or permit, the validation of past acts, and intermediate period acts, invalidated because of the existence of native title.

The NTA expressly stipulated that native title includes communal, group or individual rights and interests of Aboriginal peoples that must be recognised, protected[222] and cannot be extinguished unless an act to that effect is allowed for by the legislation.[223] Further to the case law of the HCA, the NTA extended the definition of native title to include waters as well as land.[224] Between the commencement of the NTA in 1994 and the 1996 HCA decision in *The Wik People's* case, a number of State and Territory governments failed to observe the procedures set out in the act when issuing titles to land.[225] This effectively undermined the proper operation of the NTA in those States and Territory.

The NTA was subjected to further controversial legislative changes by the *Native Title Amendment Act* 1998 (Cth) ("the Amendment Act"), the main effects of which where to validate past acts, extinguish native title, upgrade primary production and restrict the right to negotiate.[226] These amendments were implemented by the Commonwealth Government in an attempt to minimise the effects of the HCA's decisions in *Mabo's* case, *The Wik Peoples* v. *State of Queensland*[227] and a number of the provisions of the earlier NTA. The Commonwealth Government's conduct was subjected to considerable criticism from international quarters as discussed later in Part 2.8.5. In any event, as it currently stands, the NTA provides some degree of certainty as to the current perspective of native title and its effects on Indigenous and non-Indigenous parties. The following parts outline the main provisions of the legislation.

2.8.1 Recognition of Native Title: Native Title Claimant Application

Indigenous persons, individually or collectively, who are seeking to have their native title rights recognised can apply to the Federal Court of Australia for a determination as to the existence, or otherwise, of native title. Two other types of claims are possible in addition to a native title application, namely a compensation application and non-claimant application. A compensation application may be made in circumstances where claimants allege impairment of their native title, i.e. loss or some kind of damage.[228] Additionally, non-claimant applications may be brought by a third party who has no claim to native title but seeks a determination as to whether such exists with respect to a particular area. This could prove very useful for companies wanting to undertake exploration activities.

2.8.2 Past Acts and Native Title

The NTA's intention is to provide different regimes for dealing with conflicts between native title rights and interests and any acts which might affect those rights and interests, be they past or future.[229] The NTA outlines procedures for determining whether native title exists and if so, how these rights and interests interact with past or future acts of non-indigenous parties such as mining companies. In this regard, the NTA provides that the validity and effect of future and past acts upon native title are to be considered, and in some circumstances, as noted above, may give rise to compensation.[230]

Certain past acts are validated by the NTA. Relevantly, s.14 of the NTA provides that past acts which can be attributed to the Commonwealth are valid and incontestable. Section 15 continues by providing that in certain cases past acts will be taken as having completely extinguished native title while in others, where past acts are 'partially or wholly inconsistent with continued existence, enjoyment or exercise of the native title rights and interests concerned – the act extinguishes native title to the extent of the inconsistency'.[231] In summary, it can be said that native title cannot exist in areas where it has been extinguished by the existence of validly created rights of other persons such as:[232]

- Lands that are privately owned;
- Residential leases;
- Commercial leases; and
- Lands on which governments have built public utilities including roads and schools.

However, certain past acts are seen as not having extinguished native title. Accordingly, native title rights and interests may be determined to exist in certain areas including:[233]

- Vacant, unallocated or other public or Crown lands;
- Certain lands held by government agencies and lands held for Aboriginal communities;
- Forests, beaches, national parks and public reserves;
- Certain kinds of leases including non-exclusive pastoral and agricultural leases;
- All types of waterways that are not privately owned including seas, reefs, lakes, rivers.

As mentioned above, certain past acts may give rise to compensation. Specifically, section 17 provides that compensation may be paid by the Commonwealth for past acts resulting in extinguishment of native title, and further, in some cases of non-extinguishment.[234]

2.8.3 Future Acts and Native Title

While the NTA seeks to validate certain past acts, it prescribes a specific regime for dealing with future acts that will, or might, affect native title. Indigenous people who have successfully demonstrated the existence of native title rights and interests are vested with the fundamental right to continue to use their land and waters in accordance with their traditional laws and customs. However, s.21 expressly provides that Indigenous people may agree to surrender their rights to native title, in which case it is extinguished. Alternatively, they may authorise future acts that may affect, or be inconsistent with, their native title rights and interests. In certain circumstances they have the right to obtain compensation if the government or any other party desires to acquire the Indigenous people's traditional lands for its own future purpose.[235]

It is worth noting that the 1993 NTA recognised that compensation may be payable for past acts which breach relevant provisions of the *Racial Discrimination Act* 1975 (Cth).[236] However, the 1998 Amendment Act removed this possibility and, as mentioned above, these amendments have given rise to much condemnation by international community.

2.8.4 Effects of Native Title on Other Interested Parties: The Right to Negotiate

The positive onus of asserting native title is placed upon the alleged holders of such rights and interests. However, this is not the only obligation imposed by the NTA. *Prima facie*, where a government intended to create a mining right then the onus is on it to ascertain whether the lands or waters in question are subject to a native title claimant application.[237] If it is, then native rights and interests must be recognised and observed by the government and the mining party. Section 29 of the NTA obliges the Government to notify native title parties about any such proposed future acts. As discussed in the following part, under the NTA, parties with native title rights and interests were granted the right to negotiate. Time restrictions arose from this procedure whereby the native title claimants had two months to answer the government's proposal. Following this, there was a statutory six month period for negotiations, so as to assist the parties reach an agreement.[238] Obviously, mediation or court determination of an application could involve lengthy periods of time, sometimes years. Such is undoubtedly of serious concern to the industry as delays of this kind may prove to be a huge disincentive for investors and developers. Thus, in order to overcome some of these problems the NTA provided for an expedited procedure in certain circumstances. For example, with respect to a mining company that may be desirous of undertaking future acts of development, exploration or mining in a certain area, s.29 of the NTA provided that prior to the government granting an exploration licence or a mining lease to the company it

must take into account any native title that may be affected by such future acts. This section allowed for the issuance of a notice to that effect and requests any interested parties, including native title holders, to notify of any objections to the proposed future act. If no objections were received then the mining activities could proceed. Even in cases where claims for native title were made, this system facilitated a quicker outcome for interested parties. Those parties with conflicting interests, the mining parties and the claimants of native title applications, were able to negotiate in respect of their different interests whilst the native title application is being determined.

2.8.5 Native Title Amendment Act 1998 (Cth): The Right to Negotiate

As mentioned above, pursuant to the NTA, the indigenous population was entitled to be involved in negotiations with the mining and petroleum industry in respect of any proposed explorations and/or developments that may affect lands over which they have native title. This right to negotiate also extended to any lands subject to a claim for native title even if no determination had yet been made. However, as also mentioned previously, the Commonwealth Government sought to amend the NTA to circumscribe, in particular, the effects of the HCA's decision in *The Wik People's* case. The most fundamental changes brought about by the amending act were in respect of the definitions of past acts and also the native title holder's right to negotiate. The procedure to be observed when negotiation was mandated by the Act's enabling provisions and contained in sections 29 to 42 of the NTA.

Prima facie, the amended NTA now provides that certain future acts by Commonwealth, State or Territory governments are permitted including, *inter alia:*[239]

- the creation of a right to mine, whether by the grant of a mining lease or otherwise;
- the variation of such a right, to extend the area to which it relates
- the extension of the period for which such a right has affect, other than under an option or right of extension or renewal created by the lease, contract or other thing whose grant or making created the right to mine.

With respect to such permissible acts, the NTA still includes a requirement that all native title holders concerned must be notified of any such future acts and allowed to participate in negotiations about such acts where they affect the rights and interests of native title holders.[240] However, the amendment act has introduced a further requirement into the negotiation procedures, namely, the need for consultation with native title holders. In effect, rather than increasing the participation of native title claimants, in some instances, this amendment has meant that the loose term of *consultation* has replaced the right to be notified. Arguably, this can be seen as a diminution of the right of native title holders in this regard.[241]

Of greater interest is what the Amendment Act seeks to exclude from the procedural elements of the rights to negotiate. The new changes ensure that the right to negotiate procedures do not apply to certain acts including:

- approved exploration acts;
- approved gold or tin mining acts;
- the renewal, re-granting, re-making; or extension of a term of an earlier right to mine granted before 23 December 1996 (*Wik* decision) where:
  - The areas of land covered by the right to mine is not extended;
  - The term of the renewal is not longer than the original grant.

Further, certain areas are excluded from being subject to the right to negotiate such as mining infrastructure, compulsory government acquisition of native title for granting to a third party developing the aforementioned infrastructure.

These amendments have been seen as removing, or at the very least severely limiting, the unique nature of the indigenous people's right to negotiate. Arguably, these amendments are questionable given the clear expression to the contrary by the series of cases handed down by the HCA.[242] It is not surprising therefore that the amendments have drawn condemnation of the Australia Government's conduct by the international community.[243] On 18 March 1999, the international monitoring body of the RDC, CERD, determined that these amendments discriminated against Australia's indigenous peoples. More specifically, CERD pronounced that the 1998 amendments, particular those noted above, were incompatible with Australia's obligations under the RDC and requested the Australian Government to desist from implementing the new act. In addition to calling for the act's suspension, CERD also encouraged the Government to resolve the potential conflicts and seek appropriate solutions by engaging in further discussions with Australia's indigenous peoples.[244] The Australian Government declined to adopt this path and the Amendment Act was brought into existence, albeit in breach of Australia's international obligations under the RDC.[245]

This issue has been highly contentious and remains on CERD's agenda for future, continual review.[246] The involvement of CERD in this situation can be seen as important step forward for indigenous peoples rights. Involvement of the UN at this level makes it unmistakably clear that indigenous rights are a growing concern for the international community. Although the process may often appear as slow and arduous, the law pertaining to indigenous peoples is definitely slowing gaining strength and hardening into a more formalised body of law. The procedural right of indigenous people to communicate with and seek assistance of international bodies such as CERD supports this contention.[247] As noted already, it would be unwise to suggest that this matter is anything but far from being settled. Hence, given the continuous developments in national and international law concerning indigenous peoples' rights, uncertainty as to the future impact of the rights of indigenous peoples on the mining and petroleum industry in Australia remains a significant issue and potential source of risk, particularly to future energy supply security.

2.8.6 Corresponding State and Territory Legislation

The NTA empowers States and Territories to pass similar legislation, but does not mandate that they must do so. However, as the validation of past acts by the NTA does not extend beyond acts of the Commonwealth to those of the States and Territories, there are obviously persuasive reasons for taking this course of action. Hence, past acts of the States and Territories have likewise been validated by relevant legislation.[248]

It is interesting to note that the legislative consequences of the *Mabo* case, especially the early responses, were not necessarily consistent across the different States and Territories. While the complimentary legislation of NSW and Victoria can be said to be sufficiently concordant with the NTA[249], the same cannot be said for the other states and territories. With respect to Western Australia and the Northern Territory in particular, arguments were raised concerning the significant economic benefit they derived from the mining and petroleum industry. The uncertainty as to the legal status and validity of mining and petroleum rights following *Mabo's* case was deemed sufficient to enable those governments to enact legislation that adequately ensured the profitable continuation of mining activities.[250]

The Northern Territory Government passed several acts including the *Validation of Titles and Actions Act* 1994 (NT), the *Lands Acquisition Amendment Act* 1994 (NT) and the *Mining Amendment Act (No. 2)* 1994 (NT). In other cases it added new provisions to existing acts such as the *Petroleum Act* 1984. Although the *Validation of Titles and Actions Act* 1994 (NT) corresponds to the NTA for the most part, it extended the validation of past acts of the Crown by including every grant of title of land, whether freehold or leasehold.[251] It also excluded the provision for compensation for the effects of validated acts on native title.[252] With respect to the other legislative measures, provisions were included to the effect that compensation may be possible in respect of native title, in a form other than money if so requested.[253] In the case of Western Australia ("WA"), a significant issue was that the majority of the state's land was in fact Crown land. Initial WA legislation seeking to abolish native title was subsequently held to be invalid by the HCA on grounds that it was inconsistent with the NTA and the *Racial Discrimination Act* 1975 (Cth). Subsequent legislation including the *Titles Validation* Act 1995 (Cth) was consistent with the NTA, but also reaffirmed, *inter alia,* the Crown's ownership of natural resources.[254]

Interestingly, a number of states have additional legislation concerning land rights, rather than native title. Much of this legislation precedes the legal developments concerning native title discussed herein. An example such is contained in Annex I at the end of this paper.

2.9 Recent Developments: Ward's Case & the Implications for Petroleum & Mining activities in Australia[255]

From the preceding discussion it is possible to contend that native title case law and legislation in Australia can be seen as introducing new forms of risk into the petroleum and mining industry. This is especially so for future exploration and development activities, but also for those

involved in the related infrastructure surrounding mine sites and transportation of fossil fuels, i.e. pipelines.[256]

In accordance with the provisions of the NTA, interested parties, government and private, are now required to take account of the rights and interests of native title holders where a favourable native title *determination* has been made. In circumstances where a native title *claim* is made, intended activities may not proceed until a is made, favourable or otherwise. Moreover, the NTA enables disgruntled parties to appeal any determination in the Federal Court of Australia. Given that the appellate process of the Australian legal system allows for the HCA to make the ultimate determination in this context, a native title claim may be the start of prolonged litigation and extended delay. Years of delay in this context may be accompanied by serious economic ramifications for parties involved in exploration and extraction activities. In addition to high legal costs, uncertainty as to the future of a proposed activity may result in reduced investor confidence and capital input.

In the mining and petroleum resources context, it is imperative to distinguish between those parties who claim native title in order to maintain their traditional lifestyle by exercising their traditional laws and customs, from those who seek to establish wider claims. The latter may include wider claims which seek to include rights and interests in and over minerals and petroleum resources in the geographic area of the native title claim. The latter type of claim gives rise to an important question: does the *bundle of rights* that amounts to native title include rights and interests over mineral and petroleum resources? This claim is *prima facie* consistent with the proposed rights contained in the Draft Declaration of Principles on the Rights of Indigenous Peoples discussed in Parts 1.7.2 and 1.8 and also with the commentary of CERD as discussed in part 1.7.2 herein. However, at the domestic level, this is in direct conflict with the Australian legal perspective that ownership over all natural resources is vested in the State and Territory governments. In general, despite the recent decision of the HCA discussed below, it is possible to conclude that the exact nature of the rights and interests that can be claimed under native title remains rather unclear and undefined.

This exact issue received the attention of the HCA in recent months. More specifically, the question as to whether mining and petroleum rights are included in the *bundle of rights* constituting native title has been addressed by the HCA in the recent case of *Western Australia; Attorney-General (NT)* v. *Ward; Ningarmara* v. *Northern Territory*.[257] This case also considered the relationship between native title rights and interests, in general, and mining and petroleum rights and interests. Unlike earlier cases such as *Mabo* and *Wik* mentioned above, this case involved the application of the NTA.[258] The indigenous claimants had included in their application for a determination of native title, areas of land over which 52 mining interests had been granted.[259] These leases appeared to have been granted after the commencement of the RDA in 1975, but before the HCA decision in *Wik's* case on 23 December 1996.

The native title claim in this case extended to ownership over minerals and resources located in the claimed area of land. This was loosely based on assertions that throughout the years, the indigenous population had 'dug for and used stones, ochres and minerals on and from the land' and also 'shared, exchanged and/or traded resources derived on or from the land'.[260] By reason of this, the parties to the case sought an answer to the question of whether the *bundle of rights* constituting native title included rights and interests over petroleum and mineral resources. This issue was in addition to fundamental questions concerning extinguishment of native title by other legal interests such as mining and petroleum leases.

Before discussing the recent judgement of the HCA in this case, it is useful to briefly refer to relevant matters raised in the earlier cases leading to this appeal. At first instance, in accordance with the requirements of the NTA[261], the trial judge in the Federal Court of Australia (hereafter "FCA") made a determination in favour of the Indigenous inhabitants' native title claim. The rights and interests included in the claimant's native title were described in the determination as including, *inter alia*:[262]

a) a right to possess, occupy, use and enjoy the determination area;
b) a right to make decisions about the use and enjoyment of the determination area;
c) a right of access to the determination area;
d) a right to control the access of others to the determination area;
e) a right to use and enjoy resources of the determination area;
f) a right to control and use and enjoyment of others of resources of the determination area;
g) a right to trade in resources of the determination area; and
h) a right to receive a portion of any resources taken by others from the determination area; …

Whilst not expressly defining resources to include minerals and petroleum, the trial judge's determination did give rise to a strong contention as to the legitimacy of a claim to that effect.[263] It is of considerable consequence that the determination was made in respect of areas of land over which a number of other legal interests had been created by the Crown including, *inter alia*, interests of:[264]

- lessees under leases granted under the *Mining Act* 1978 (WA);
- licensees under licences issued under the *Mining Act* 1978 (WA);
- holders of tenements under the *Mining Act 1904* (WA); and
- holders of tenements under the *Petroleum Act 1936* (WA) and the *Petroleum Act* 1967 (WA).

The relationship between native title interests and these other rights was considered by the trial judge to be such that whilst native title could be 'regulated, controlled, curtailed, restricted, suspended or postponed' by mining rights and interests, there was no evidence of a 'clear and plain intention by the Crown to extinguish native title' in such circumstances.[265]

Not unexpectedly, the parties holding the mining interests, as well as the State, appealed this decision. On appeal to the Full Court of the FCA, it was argued by the State and the mining companies holding the relevant other interests, that the trial judge had erred in his

determination by failing to recognise the effect of relevant legislative acts that validly extinguished any native title over minerals or petroleum resources:

…by virtue of s 117 of the *Mining Act* 1904 (WA) gold, silver and other precious metals, and all other minerals at or below the surface of any land in the State which was not alienated in fee simple from the Crown before 1 January 1891, are the property of the Crown. Similarly, the State contended that by s 9 of the *Petroleum Act* 1936 (WA) petroleum below the surface of all land in Western Australia is the property of the Crown. **It is contended that by this legislation the Crown appropriated to itself an interest in those minerals, and in petroleum, which amounts to full beneficial ownership, and that accordingly any native title that may have existed in relation to minerals or petroleum has been extinguished.** [emphasis added]

In concurring with these submissions the Full Court of the FCA had recourse to s.3 of the *Western Australian Constitution Act 1890* (Imp),[266] s.117 of the *Mining Act 1904* (WA) and s.9 of the *Petroleum Act 1936* (WA).[267] By virtue of these provisions, the Court concluded that these legislative measures demonstrated a clear intention 'to reserve to the legislature and the Crown the full beneficial ownership of all minerals', royal metal and base minerals such as petroleum.[268] Accordingly, these statutes effectively extinguished, entirely, any native title rights and interests that may have existed in respect of the claimed area prior to the introduction of those measures.[269] No determination for native title could therefore be made.

In 2002 the HCA handed down its decision on the subsequent appeal from the decision of the Full Court. The appeal focused on two issues, namely:[270]

1. Whether there could be partial extinguishment of native title and interests; and
2. What principles should be adopted in determining whether native title and interests have been extinguished in whole or in part.

These questions necessarily carried with them the subsidiary question as to whether mining and petroleum rights and interests could be in included in the *bundle of rights* amounting to native title. At the outset, the HCA rejected the indigenous claimants assertion that mining and petroleum rights formed part of native title rights and interests.[271] In reaffirming the Full Court's decision in this regard, the HCA held that 'no question of extinguishment' arose as there was no 'evidence of any traditional Aboriginal law, custom or use relating to petroleum' or other mineral substances.[272] In reaching its decision, the HCA considered the relationship between mining rights and native title rights and interests. The Court examined the nature of mining leases by reference to common law authorities and relevant legislation.[273] After discussing the various covenants and conditions imposed by the *Mining Act 1978* (WA) upon mining leases (i.e. payment of rents and royalties)[274] and the details of the rights of the holders of mining leases (i.e. entitlement to use, occupation, enjoyment of said land, as well as ownership over all minerals found therein)[275] the Court commented on the exclusive nature of the rights arising out of such mining leases.[276] In particular the Court noted that the holder of a mining lease is entitled, at law, to protection against interference with the exclusive rights arising out of

the lease.[277] In such circumstances, native title rights and interests cannot interfere with the exercise of those rights:[278]

> They cannot be asserted in any way that would interfere with the exercise of inconsistent statutory rights. Thus it was said in *Wik* that, in certain circumstances, native title rights "must yield" to the statutory interests of pastoralists. The same is true in the case of the statutory rights conferred on the holders of mining leases.

However, the Court subjected this to further qualification indicating that *yielding* to mining rights did not necessarily imply complete extinguishment of native title rights and interests.[279] As the majority of the Court noted:[280]

> [I]t cannot be said that the grants of the mining leases are necessarily inconsistent with the continued existence of all native title rights and interests. That some native title rights and interests were extinguished in some areas of the mining leases is not in doubt.

The Court thus rejected the position of the Full Court concerning full extinguishment of native title rights and interests by reason of the *exclusive* nature of mining leases, noting that:[281]

> While so much may be accepted, it does not follow that all native title rights and interests have been extinguished. Whether they have will require much closer identification of the relevant native title rights and interests than has thus far been made. The grant of exclusive possession for mining purposes is directed at preventing others from carrying out mining and related activities on the relevant land. Although the lessee could prevent anyone else seeking to use the land for mining purposes, it does not follow that all others were necessarily excluded from all parts of the lease area. … The holder of a mining lease having a right to exclude for the specified purposes, the holder may exercise that right in a way which would prevent the exercise of some relevant native title right or interest for so long as the holder of the mining lease carries on that activity. Just as the erection by a pastoral lease holder of some shed or other structure on the land may prevent native title holders gathering certain foods in that place, so too the use of land for mining purposes may prevent the exercise of native title rights and interests on some parts (even, in some cases, perhaps the whole) of the leased area. That is not to say, however, that the grant of a mining lease is necessarily inconsistent with all native title.

By reason of the HCA's decision in this case, native title rights and interests are not automatically extinguished, in whole or partially by inconsistency with other interests such as mining leases. Whether such occurs depends on the nature of the rights and interests in question. Unfortunately, in the circumstances of this case, it must be noted that the HCA was unable to elaborate as to the specific rights that were/not extinguished in respect of the claimed areas, on the basis that the determination was cast in terms too general to assist in this regard.[282] The one exception in this regard was a native title right and interest to control access to land. The HCA clearly expressed that such a right would be clearly inconsistent with the grant of a mining lease and the attenuating access rights. In any event, the Court held that such rights would have already been extinguished by earlier *valid* acts of the State.[283] Consequently, most of the earlier orders of the Full Court were overturned and the matter has been remitted to the Full Court of the FCA for further consideration and determination.

2.10 Financial Costs of Indigenous Rights

The financial and economic impact of frequent legal changes legislative and at common law - upon existing and potential operations can be significant. In addition to a direct cost burden imposed by way of internal organisational restructuring to accommodate legislative changes, particularly those that involve mandatory action, a range of other expenditure can result in this context. Such costs range from amendments to business practices to ensure compliance with legislative requirements, payment of legal fees incurred for resolving disputes, participation in negotiations, provision of education, training and employment opportunities as well as payment of compensation to aggrieved or injured parties.[284] While figures are not to hand concerning total internal and external expenditure by participants in all areas of the natural resources industry, the Australian Minerals Council identified and discussed the growing expenditure by its industry participants with respect to indigenous matters in its recent Australian Minerals Industry Report – 2001 *("AMC 2001 Report")*.[285] The combination of legal changes arising out of the recognition of native title and other indigenous issues has resulted in significant financial impositions upon participants in the minerals industry.[286] As demonstrated in the AMI 2001 Report, internal and external expenditure on native title and aboriginal development had increased nearly 20% from the previous year's figures from $A47 million to $A58 million.(Ref: Table below)

Native Title and Aboriginal Development Expenditure	**2000/2001 $ million**	**1999/2000 $million**
Internal		
Expenditure relating to land access [(a)]	14.1	6.0
Expenditure relating to Aboriginal Development [(b)]	18.1	6.5
Total internal expenditure	32.5	12.5
External		
Expenditure relating to land access [(a)]	14.4	25.1
Expenditure relating to Aboriginal Development [(b)]	10.1	10.4
Total external expenditure	24.5	35.5
Total Native Title and Aboriginal Development Expenditure	57.0	48.0

Notes:

a) Land access expenditure includes items such as compliance with the *Native Title Act 1993* and indigenous heritage legislation, legal, representational, negotiation and anthropological studies and compensation (cash or in kind) paid to Aborigines.[287]

b) Aboriginal development expenditure includes items such as special education, training, employment, small business, community development programmes for Aborigines and Aboriginal communities.

Source: Australian Minerals Industry Survey Report 2001, The Minerals Council of Australia, ACT, Australia, at p.29.

While some parties surely hope the matter of indigenous rights will eventually disappear, the AMC Report 2001 states unequivocally that this issue will continue to gain importance. Consequently it anticipates that such expenditure will continue to rise in the future. As such, this

view correlates with the status of indigenous peoples' rights at international law and the growing importance being given to recognising and protecting such rights.

From an economic perspective, a critical issue is the absence of information relating to a variety of additional attenuating costs to the industry by reason of native title and land rights claims. Additional burdens may arise out of the significant delays caused by native title claims, land rights access negotiations, arbitration and/or litigation. Conceivably, in some cases, such claims may result in restricted access to resources or an inability to proceed with mining activities for a long period of time. With respect to native title claims, the mandated legislative procedure itself can involve delays of at least 6 months while disputes concerning permission to access indigenous lands may take a number of years to resolve satisfactorily. An example of this are the activities in the Cooper and Otway Basins in South Australia which are perhaps the most successfully exploited deposits of oil and gas on the Australian continent. With investment to date of more than $10 billion, petroleum production in the region has generated over $16 billion.[288] Current predictions estimate potential new discoveries in the region up to 130 million barrels of oil and additionally 3500 PJ of gas.[289] As such, mining operations have been extensive and with discoveries of substantial new sources in recent years, interest in investing and undertaking further exploration and mining operations in this area has been intense. In addition to oil and gas claims, there are extensive areas of land which have been subject to claims of native title.[290] In October 2001 an 'historic native title agreement, involving unprecedented co-operation between native title claimants and petroleum explorers' was announced.[291] The agreement, made between 'three native title claim groups (the Edward Landers Dieri, Yandruwandha/Yawarrawarrka and Wangkangurru/Yarluyandi Peoples), seven different exploration consortiums and the South Australian Government' allows for extensive exploration and development of any discoveries while at the same time providing for the protection of aboriginal heritage before and during operations and compensation for any interference with the rights of native title holders to enjoy their rights in this regard.[292]

While this is kind of outcome is a commendable achievement that will hopefully become the minimum standard for future agreements, it is important to have regard to the time lag between the date at which the exploration licences were first granted in early 1999, the lodgement of native title claims in the middle of 1999 and final resolution of the matter nearly three years later in October 2001. The negotiations have been lengthy and protracted. Although the details have not been revealed in this case, these complications will certainly have generated sizeable costs for the exploration consortiums and the government which should be factored into the above mentioned expenditure figures.

Although they are not held to be part of native title expenditure, the AMI Report 2001 concludes that such delays have certainly had the effect of 'switching of exploration investment from off-lease exploration in Australia to either on-lease exploration or overseas exploration'.[293] This leads to the need to address the impact upon investment and

investor confidence when market players are being faced with uncertain legal regulatory framework in this regard. The effects such legislative changes may impose upon the industry has been discussed in the context of project finance and economics. A growing concern has been expressed as to the extent to which projects can accommodate the *change in law* risk posed by indigenous peoples rights, in particular native title and land rights legislation.[294] Arguably, such legal uncertainty need not be seen as an impossibility to surmount. This can be overcome in much the same way that environmental matters have been incorporated into business practices in response to the shift from the arena of soft law into hard, regulatory legislative requirements of greater certainty.

Conclusion

The attention given to the security of energy supply in Europe and other major consumer regions such as the United Stated and Asia, will only increase the coming years. As Part 1 of this paper demonstrates, developments in public international law concerning environmental protection have already resulted in serious consequences for regions endowed with supplies of oil, natural gas and coal. These changes in law have also been accompanied by rising consumer awareness and increased participation by non-state actors in the energy sector. International conventions on climate change and other threats to the environmental *global commons* are clear illustrations of the impact these changes are having. Similar outcomes can also be seen occurring at a more local level, especially in relation to mining and drilling activities in ecological sensitive areas. The *change in law* process relating to environmental protection started decades ago with the introduction of so-called soft law. Over time this soft law has broadened and hardened into a growing body of legally binding rights and obligations. It is clear that these changes are far from over.

The emerging law on indigenous people's rights is still mostly soft law. However, as argued in this paper, the expectation is that those rights will develop in hard law in the coming years. The affects of this development on the energy sector will be similar to that of the developments in environmental law in the sense that new stakeholders will take a place at the negotiation table. Importantly, such new parties may be vested with legal rights and different interests to those held by traditional stakeholders. The Australian situation in Part 2 serves as an illustration of the possible consequences of changing the game. Australia is just one country out of many in which the rights of indigenous peoples will affect the myriad of participants in the energy sector. The immediate effect is generally felt by those parties involved in the supply/ production side of the energy sector, but the impact will reverberate along the production chain to the consumer. Generally this will be in the form of increased prices, temporary reduction in supply or in some cases cessation of supply entirely.

While the present member States of the EU may not consider themselves to be directly affected by matters such as protecting natural environments such as the Amazon forests in South America or respecting the rights of indigenous peoples to their traditional lands in places such as Australia, the impact these factors may have on security of supply in coming years must not be overlooked. Arguably, failure to appreciate the impact the *change of law* process may exert upon security of supply has within itself the potential for significant economic ramifications that may seriously undermine any future policy planning by the EU to protect and secure its energy supply in the ensuing decades. This is especially apparent in cases where potential sources of supply may result in being unattractive economically by reason of legislative, regulatory procedures in supply countries regarding such matters. The economic impact of changes in international and domestic law upon the market, particularly with respect to diminished capacity to capture economic rents, rising

financial burdens of various externalities and the imposition of prohibitive costs/taxes, may lead to consumer and investor dissatisfaction and ultimate disinterest. In some cases, changes in law may result in an absolute denial of access to existing or potential sources of energy resources rendering supply non-existent.

The primary responsibility of Governments is to ensure that the risks to security of energy supply, both current and potential, are completely averted, or at the very least minimised in their capacity to adversely impact upon the market. Since a large percentage of the traditional fossil fuels are located in environmentally sensitive areas, the fact that they are also subject to claims by indigenous people merely adds to the necessity of governments to ensure that energy policy and its regulatory instruments adequately takes into account the different claims and interests arising in this context. This can also include recognition of indigenous peoples' fundamental right to determine for themselves the way in which they want to live and the right to decided for themselves about using their lands for natural resource activities.

As a significant importing region, the EU needs to evaluate the nature of its relationship with supplier and transit counties. In so doing, the EU must be fully cognisant of the multitude of future possible risks that may arise out of different social, political and legal regimes operating in those countries. This must not be limited to the ones currently receiving maximum exposure such as climate control, but should extend into all other areas that come into contact with the energy sector. That being said, in addition to governments, companies will also benefit by adopting new business practices. As argued in Part 1, companies will gain from setting ethical and social priorities regarding acceptable kinds of energy activities and deciding the extent to which such activities can, or should, adversely impact upon indigenous rights. Decisions must be taken in light of the growing demand by the international community to respect and protect the rights of indigenous people. Multinationals for example need to appreciate the growing risks posed by the *change of law* process taking place across the globe that may undermine their future financial viability and attractiveness to investors. Although legal regulation is limited in this regard at present, the likelihood of this increasing is high. Thus emerging law regarding indigenous people's rights must be recognised as having consequences for various private companies and other organisations involved in the upstream and downstream activities of the energy market.

While advancements in these areas are often seen to be slow, the incremental change is certainly in the direction of greater protection of the rights of indigenous peoples. In some countries such as Australia, this process of *change of law* is culminating in direct regulation of energy activities in the domestic arena that may adversely impact upon such rights. Despite the large numbers of different indigenous populations on this planet, and the vast array of different circumstances of each separate group, there are nevertheless significant similarities with respect to issues and problems facing these peoples which in turn gives strength to their position at international

law as they start to speak with one voice on matters important to their continued existence.[295]

Accordingly, just as environmental issues have moved from the theoretical paradigm and assumed a direct regulatory form during the last decades of the previous century, so too can human rights and the rights of indigenous peoples be seen as emerging areas of concern. This is not only for the international community *per se*, but more importantly, for domestic consumers. As public opinion regarding the need to observe, protect and respect such rights steadily increases, so too does the likelihood that consumers will include this issue in their energy supply decision making process. Like the environment, there is nothing to suggest that future consumers will not have regard to indigenous rights when making choices and prioritising the competing factors operating on their demand for energy supplies and appropriate fuel mix. In this way, as impact of energy activities upon indigenous people takes a path akin to that of environmental protection, future demand may well be for fuels that are not only green, but also not tarnished by violations of indigenous peoples' rights.

Annex 1 – Land Rights Legislation in South Australia

In addition to native title claims being made pursuant to the *Native Title Act* 1993 (Cth), South Australia has a number of acts specifically designed to attribute freehold tenure to the State's aborigines in respect of certain areas of land: the *Aboriginal Lands Trust Act* 1966, *the Pitjantjatjara Land Rights Act* 1981 and the *Maralinga Tjarutja Land Rights Act* 1984. South Australia has been more proactive – albeit in a relative temporal sense – that other Australian states with respect to the rights of its indigenous population and was the first to legislate and make land grants. Currently, almost 20% of the State's lands are held by the indigenous population. Pursuant to the *Aboriginal Lands Trust Act* 1966 for instance, the government established a Trust to ensure that:[296]

- title to existing Aboriginal reserves remained with Aborigines;[297]
- mineral royalty payments were received, with which more lands could be purchased;
- funds were received to develop lands vested in the Trust.

Interestingly, while the proprietary right to the minerals on these lands remained with the government, it was agreed that the government pay to the Trust an amount equal to the royalties resulting from mineral or petroleum activities on Trust lands.[298] Amendments in 1973 endowed the Trust lands with greater protection against unwanted presence of prospectors, exploration and mining companies. Consent of the aboriginal community must be obtained before such activities may proceed. Terms and conditions relating to, *inter alia*, protection of sacred sites, compensation for land damage and employment and training opportunities from successful mining activities must also be agreed to.[299]

The aboriginal lands, the subject of the *Pitjantjatjara Land Rights Act* 1981 and the *Maralinga Tjarutja Land Rights Act* 1984 differ from those under the lands trust arrangement in that they are held in fee simple (freehold titles) by corporate bodies representing the aboriginal groups. Also royalties from minerals or petroleum are divided equally between the indigenous land owners, the Minister for Aboriginal Affairs (used for benefit of all indigenous people in the State) and the State Revenue. Since the aborigines have freehold title over these lands, as such, the lands cannot be 'sold, compulsorily acquired, resumed or forfeited, nor is land tax payable'.[300] Additionally, access to Pitjantjatjara land and Maralinga Tjarutja lands is severely restricted and permission to enter these lands must be sought from the relevant government minister and the corporate body representing the indigenous population.[301] Permission may be granted unconditionally or refused. Alternatively, certain conditions may be attached to the grant of permission to enter the lands. Such conditions may include compensation for disturbance to traditional lifestyles arising out of the grant of the licence and also which reflect the indigenous population's expectations and requirements as to appropriate management, use and occupation of their lands. Procedures are in place to arbitrate disputes where agreements regarding permission to enter cannot be reached between the parties.

Annex 2 – The Jabiluka Uranium Mine

The case of the Jabiluka uranium mine in the northern reaches of the Australia continent is an excellent example of how changes in law can lead to a collision between conflicting rights and interests of different stakeholders. In this case, the rights and interests of the Australian government, mining companies, indigenous peoples' as traditional landowners and environmentalists collided with spectacularly disastrous results for the traditional stakeholders. As it currently stands, it appears that the Jabiluka mine site, which has been *on hold* for a number of years, will not proceed on both environmental and indigenous rights grounds. In this way, it can be seen that delays caused by this kind of conflict can lead to intermittent, and ultimately permanent cessation of supply of energy resources.

Background

Uranium mining activities have been taking place in Australia since the middle of last century. In the early 1970s two uranium deposits of significant size were discovered in the Alligator Rivers region in the Northern Territory.[302] A third site, the disputed Jabiluka uranium site, is located in the same region as the first two sites and falls within the Kakadu National Park in the Northern Territory. Indigenous populations have continuously occupied this Park, first established in 1978, for nearly 50,000 years. Important indigenous sites such as the Ubirr rock art sites are located within this area. In 1976, the *Aboriginal Land Rights (Northern Territory) Act* came in to force.[303] The traditional owners of this area, the Mirrar-Gundjehmi peoples, were granted lands in 1982. The area of land included the Jabiluka site and surrounding area as part of the Jabiluka Aboriginal Land Trust. According to the grant, the lands are held by a Lands Trust on behalf of, and for the benefit of, the Mirrar-Gundjehmi peoples.[304] Furthermore, the *Aboriginal Land Rights Act* provides participatory rights to the Indigenous owners in respect of any proposed developments on their traditional lands. These participatory rights include the right of the indigenous owners to be consulted about any proposed resource developments on their traditional lands as well as the right to enter into negotiations with governments and mining companies with respect to such projects. Given the environmental importance and cultural significance of this area to the international community as a whole, Kakadu has been given *listed* status pursuant to UNESCO's World Heritage Convention.[305]

In 1982, the Northern Territory Government granted a mining lease to Pan Continental Mining Ltd., thereby authorising future mining at the Jabiluka site in the Kakadu National Park. The corporation, Pan Continental Mining Ltd., had already obtained an environmental impact statement[306] and reached agreement with the indigenous traditional land owners through their representative, the Northern Lands Council ("NLC"). Although this agreement included the payment of royalties and rents to the indigenous peoples for the use of their lands for the uranium mining purposes,[307] it is highly contentious. The present indigenous peoples contend in fact that this agreement is

incorrect; that they do not want any further mining to take place on their traditional lands.[308]

A number of significant changes occurred in subsequent years, namely:

1. A new Federal Government was elected in 1983. The new government introduced a 'three mines policy' that resulted in the refusal of an export license and also, prevented the grant of any further uranium mining leases. This effectively put an end to the deal organised arranged in 1982;
2. In 1991, Pan Continental Mining Ltd., sold the lease to Energy Resources Australia Ltd.
3. A further change in the Federal government ensured that Energy Resources Australia Ltd., was able to proceed with mining at the site.

Resulting Conflict between Stakeholders

Energy Resources Australia Ltd., changed the intended mining project. The previously agreed construction of the extraction plant and tailings dam at the Jabiluka site would not go ahead. Rather, the mining company intended to transport the uranium ore by truck to its existing facility at the Ranger site. The traditional landowners, whose consent was required by the relevant law, rejected this proposed change. They were concerned with a number of water and tailings disposal problems at the Ranger site. Accordingly, their representative, the NLC, refused to consent to the mining company's attempt to change the intended mining project. However, a committee established under the earlier 1982 agreement to resolve matters where the parties could not agree, decided to accept the proposed changes. Subsequently, in 1997, a new environmental impact statement was provided by Energy Resources Australia Ltd. The indigenous landowners did not participate in this process and started to wage a campaign against the mining company and the government to stop the uranium mine going ahead. The traditional owners were joined in their fight by a wide range of other interested parties including international bodies such as UNESCO, the World Heritage Committee, numerous NGOs – environmental and indigenous rights, the media and a vast array of other concern parties.[309]

Claims by the Indigenous Peoples

Central to the claims of the indigenous owners is the contention that they were not properly consulted and did not consent to the extended mining operations in their traditional lands. A number of provisions of the *Aboriginal Land Rights (Northern Territory) Act* weakened their position, in particular s.40(b) and s.48(d)3). The first provision diminishes their power of veto over proposed developments by allowing for the government to override such a decision when it is in the 'national interests'. The second provision refers to the actions of the indigenous landowners' representative, the NLC. The effect of this section is that a failure of the NLC to consult with the indigenous landowners is not a basis for invalidating any agreement the Council has entered into on their behalf.[310]

Senate Committee Inquiry

In 1999 the Commonwealth government established the Senate Environment, Communications, Information Technology and the Arts References Committee to inquire into the Jabiluka problem. In their report the Committee was unequivocal in their view that the indigenous peoples' had been treated improperly and that the 1982 agreement had been 'negotiated unconscionably' and that the NLC had failed to fulfil its legal obligations by not properly consulting with the traditional owners.[311] Moreover the Senate Committee recognised this right to consult as fundamental to human rights in this context[312] and stated that the indigenous peoples had been 'callously and systematically marginalised and their fundamental rights ignored in the negotiations and development of the Jabiluka project'.[313] In its 24 recommendations, the Senate Committee stated that, *inter alia*:

- the ERA seek a new mining agreement from the Northern Land Council and the Mirrar/Gundjehmi before further construction or operation of the Jabiluka mine occurs;[314]
- sections s.40(b) and 48D(3) of the *Aboriginal Land Rights (Northern Territory) Act* 1976 be repealed;[315]
- there be further reform of the Aboriginal Land Rights (Northern Territory) Act 1976 in order to ensure that the rights of traditional owners are protected during negotiations, and to ensure that their agreement to substantial changes in scope is required;[316]
- the Jabiluka uranium mine should not proceed because it is irreconcilable with the outstanding natural and cultural values of Kakadu National Park. Every effort must be made to ensure that these values are protected.[317]

UNESCO and The World Heritage Committee

The UNESCO World Heritage Committee ("WHC") became involved in this matter adding an international dimension to the situation. The WHC visited Kakadu National Park and assessed the impact of the proposed Jabiluka uranium mining in October 1998. It subsequently presented its report at the 22nd session of the WHC in Kyoto on 29 November 1998 and condemned the proposed mine on the basis that it threatened the world heritage values of Kakadu National Park. Although it considered listing the park as *endangered*, in response to attempts by the Australian government to meet the WHC's recommendations, the WHC subsequently declined to follow this course of action. The action of the WHC was controversial for the Australian government, particularly since it refused to co-operate in this regard, but more so because this avenue of redressing the issue was unexpected.[318]

Resolution of the Case

Legal avenues, pursued by the traditional landowners, have finally been exhausted without success. In an interesting turn of events, it appears that the mining company has decided to discontinue its activities at the Jabiluka site. The important message from this case for the mining industry, and the energy sector as well, is that domestic matters may be elevated to the international stage. Actions of governments and companies can no longer be considered safe from scrutiny of international bodies and the international community at large. This

case clearly shows how new stakeholders can effectively bring about fundamental changes in the way the game is played.

Endnotes

1 See discussion by Prof. T. W. Wälde, *International Energy Law: Concepts, Context and Players*, Jean Monnet Chair for EU Economic and Energy Law, Centre for Energy, Petroleum & Mineral Law & Policy, University of Dundee, Scotland, UK, September 2001.

2 As to the various industry segments of the energy market, namely oil, gas, coal, electricity and nuclear, the writer notes that oil markets have had an international character and been heavily regulated for many years. The relevant energy law developed in the 1970s and 1980s was primarily with respect to oil (and later gas). In referring to D. Yergin, *The Prize: The Epic Quest for Oil, Money and Power, Simon & Schuster Ltd, London 1991*, Prof. Wälde, *op.cit.,* notes in particular that 'oil was the only exception as it has to be shipped from far away producing countries, with the ownership link between extraction on one side and shipping, refining and marketing in the consumer countries being broken' at p.2.

3 The development and globalisation of national energy markets and the law relating to national and subsequent development of international energy law is succinctly canvassed by Prof. T. W. Wälde, *op.cit.* See also C. Redgwell *et al* (eds.), *Energy Law in Europe, National, EU and International Law and Institutions,* Oxford University Press, 2002.

4 For detailed discussion on these matters see Prof. T. W. Wälde, *op.cit.;* Also the EU Commission, *Green Paper, Towards a European Strategy for the Security of Energy Supply*, 29.11.2000, COM (2000) 769 final, in particular Annex 1.

5 See for example the many environmental groups who have successfully pushed environmental protection issues into the forefront of the policy decision-making agenda. Also, for further discussion see Prof. T. W. Wälde, *op.cit.,* at p.10 *et seq.*

6 Prof. T. W. Wälde, *op.cit.*

7 See for example the discussion by Prof. T. W. Wälde where he notes that the EU is now one of the most 'highly developed laboratories of international regulation' and clearly demonstrates the regional challenges that arise out of 'tensions between narrow state centric, national self-interests' and those of the wider EU region as a whole, *op.cit.,* at p. 9. Also see the ongoing issues surrounding the implementation of the EU Electricity and Gas Directives as discussed in C. Redgwell *et al* (eds.), *op.cit.,* at pp. 213 *et seq.*

8 Green Paper*, op.cit.*

9 *Ibid.*, at p.9 *et seq.*

10 Green Paper, *op.cit.*, at p.64 *et seq.*

11 *Supra.*

12 *Supra.*

13 *Supra.*

14 Green Paper, *ibid.,* at p.65 where reference is made to the strikes resulting from the rise in oil prices during the autumn of 2000.

15 For example, regulating the level of polluting emissions, restricting access to resources situated in environmentally sensitive areas or assigning responsibility and liability for accidental environmental damage such as oil slicks fall into this category of risk.

16 See discussion by Professor Dr. C. van der Linde, *Nota: Een visie op Energie en Milieu,* Instituut Clingendael, Den Haag, (CIEP 02/2002) at www.clingendael.nl/ciep.

[17] See for example the attempts to protect the Amazon; also the Jabiluka uranium mining case in Australia where environmental and indigenous groups have successfully prevented the continuation of the mine.

[18] Discussion of all relevant energy law is clearly outside the scope this paper. However, see for example Prof. T. W. Wälde, *op.cit.* and in C. Redgwell *et al* (eds.), *op.cit.*

[19] M. N. Shaw, *International Law,* 4th ed., Cambridge University Press, 1999, at p 452.

[20] See Art 38(1), sub-paragraphs (a)-(c) of the *Statute of the International Court of Justice.* See also discussion in D. J. Harris, *Cases and Materials on International Law,* 5th ed., Sweet & Maxwell, London, 1998, at pp.21-22 where he discusses the exclusivity posed by these formal law-making processes which excludes other sources of law such as natural law, moral postulates or doctrine.

[21] Article 38(1), sub-paragraph (d) of the *Statute of the International Court of Justice.*

[22] C. Redgwell *et al* (eds.), *op.cit.,* at p.17 *et seq.*

[23] The writer is referring to procedural in the sense of matters such as the number of signatures obtained.

[24] See *Vienna Convention on the Law of Treaties*, Vienna, 23 May 1969, entry into force 27 January 1980, Part II, Section 2 – Reservations (Articles 19 to 23).

[25] *Supra.*

[26] See C. Redgwell *et al* (eds.), *op.cit.*, at pp.19-20.

[27] See M. N. Shaw, *op.cit.,* who notes that state practice refers to the activities/behaviour of States. This may be evidenced by a variety of means including a government's statements/comments on certain matters, official manuals, opinions of national legal advisors and resolutions in the General Assembly of the UN, at pp.6-66.

[28] *Ibid.,* where *opinio juris* is defined as the 'belief that a state activity is legally obligatory'; 'that states will act a certain way because they are convinced that it is legally binding upon them to do so', at pp.66-70, esp. 67.

[29] For further discussion of what constitutes state practice and opinio juris for the purposes of customary international law, *see* D. J. Harris, *op.cit.,* at pp.23-45*;* M. N. Shaw, *op.cit.,* at pp.56-73 and C. Redgwell *et al* (eds.), *op.cit.,* at pp. 20-21.

[30] *Supra.*

[31] See discussion in M. Shaw, op.cit., at p.77 *et seq*. With regards to the development of analogous principles in national laws, it is worth noting that there is a growing body of regional and domestic law that endeavours to control and direct the activities of energy markets and the various participants in producing and consuming nations throughout the world. EU energy law is a prime example of such law in that it aims to govern energy related activities of member states *vis-à-vis* each other, private commercial operators and domestic consumers, i.e., the recent Gas & Electricity Directives and EU Competition Law. Also see the *Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters* (Aarhus Treaty, 1998) which demonstrates the growing ability for direct participation by civil society. This ever-enlarging body of regional law clearly demonstrates some of the complex developments taking place in EU energy markets at the present time. Note: a detailed discussion of regional and domestic law is outside the scope of this paper, however, for further discussion of EU Energy Law, see C. Redgwell *et al* (eds.), *op.cit.*; also Prof. T. W. Wälde, *op.cit.*

[32] For further discussion as to the wide range of treaties forming part of international energy law see C. Redgwell *et al* (eds.), *op.cit.,* at pp.17-20.

[33] *Ibid.,* at p.18 and discussion in Chapter 2.

[34] M. Shaw, *op.cit.,* at pp.92-93.

[35] G. R. Pring & S. Y. Noé, *The Emerging International Law of Public Participation Affecting Global Mining, Energy and Resources Development,* in D. N. Zillman, A. R. Lucas & G. R. Pring (eds.), *Human Rights in Natural Resource Development,* OUP, 2002, at p.27.

[36] See for example the development of the law of the sea and the UNCLOS convention.

[37] M. Shaw, *op.cit.,* at pp.92-93.

[38] *Supra.*

[39] *Ibid.*, at p.21.

[40] For example, being the standard setter can create effective market barriers to competitors.

[41] With respect to rights of passage over the territory of another State, the rights of innocent passage through the territorial seas of the coastal state are governed by the international law of the sea (now codified by the 1982 UNCLOS). In other instances, land and air passage will be subject to the transit State's domestic law regulating such activities.

[42] See for example other post WWII treaties such as the Four 1949 Geneva Conventions, the International Convention on Civil and Political Rights (1966) and the International Convention on the Elimination of All Forms of Racial Discrimination (1966).

[43] See discussion in G. Triggs, *Indigenous Peoples and Resource Depletion,* in D. N. Zillman, A. R. Lucas & G. R. Pring (eds.), *Human Rights in Natural Resource Development,* OUP 2002, at p. 123 et seq.

[44] H. Nordstrom & S. Vaughan, *Trade and Environment*, Special Studies 4, WTO, 1999, www.wto.org, at p.1.

[45] L. Henkin et al, *International Law,* 2nd ed., West Publishing Co, 1987 at p.1373.

[46] A prime example of this are nuclear activities. The extent to which environmental damage can result is illustrated by the Chernobyl nuclear power plant accident. Far reaching damaging effects, to humans and the environment, were felt across Europe and consequently, this disaster generated a number of changes in public international law relating to the environment including a number of provisions in conventions, and some bilateral agreements regarding the provision of information in the case of nuclear accidents: se for example Principle 20 Stockholm Declaration; Principle 9 Rio Declaration; also discussion in M. Shaw, *op. cit.,* at pp. 621-622, in particular fn.222 and 223.

[47] This has more recently extended to obligations and responsibilities of other parties such as corporations and business enterprises.

[48] See for example the Charter of the United Nations and the prohibition against war as a means of resolving disputes between sovereign states.

[49] See for example: Trail Smelter Case (US. v. Canada) 35 AJIL 1941 716; 9 ILR 317.; Corfu Channel Case 1949 ICJ 23; See also the discussion in P. W. Birnie and A. E. Boyle, International Law and the Environment, Oxford, 1992, at p.82 *et seq.*; M. N. Shaw, *op.cit.,* at p.590.

[50] See L. Henkin, *op.cit.*, at p.1373. In 1929 the Permanent Court of International Justice lent judicial weight to the proposition that international watercourses conferred common rights, of perfect equality, on all riparian states in the *International Commission on the River Oder* (PCIJ, Series A, No 23 (1929); 5 ILR, p.83; see also M. N. Shaw, *op. cit.*, citing the case of *Island of Palmas* 2 RIAA, pp.829, 839, at p.591). Over the years, these rights and interests in common resources have been developed and extended in the face of growing environmental transboundary harm. As Henkin points out, although these rules originally related to the navigational rights of states over international waters, claims as to the equitable use of such common resources (Lac *Lanoux Case (France v. Spain)* 24 ILR (1957) 101) and protection against

transboundary pollution (*Trail Smelter Case*, *op.cit.*) have assumed an equal importance in more recent times (L. Henkin, *op.cit.*, at p.1350). Notably, in 1941, the landmark decision of the *Trail Smelter Case (US. v. Canada)* (35 AJIL 1941 p.716; 9 ILR p.317; 3 UN Rep.Int.Arb.Awards 1911 (1941) at 1963 et. seq, esp. 1965) gave formally recognition to the need to protect against transboundary harm to neighbouring states arising out of atmospheric pollution. Further judicial support can be found in the 1949 *Corfu Channel* case where the ICJ noted that every State was obliged 'not to allow knowingly its territory to be used for acts contrary to the rights of other states' (ICJ Reports 1949 pp.4, 22; 16 ILR pp.155, 158). It is also useful to note that the body of law relating to the high seas was predominately customary law until its first major codification by the International Law Commission in 1958. This was subsequently re-examined, revised and reproduced as the United Nations Convention on the Law of the Sea 1982 (UNCLOS). Relevantly, UNCLOS recognises the need to protect the marine environment from devastation and irreversible harm – see Article 194.

51 *Ibid.*, at p.83.

52 The global commons includes bio-diversity, climate and the ozone layer.

53 An obligation *erga omnes* is an obligation owed to the international community as a whole.

54 P. W. Birnie and A. E. Boyle, *op.cit.*, at p.85.

55 In 1995, for example, in the *Nuclear Tests Case* the ICJ noted that its conclusion regarding French nuclear testing was without 'prejudice to the obligations of states to respect and protect the environment'.[55] Moreover, in its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* the court stated that 'the existence of the general obligation of states to ensure that their activities within their jurisdiction and control respect the environment of other states or areas beyond national control is now part of the corpus of international law relating to the environment', ICJ Reports 1995 pp.288, 306.

56 See for example the discussions in L. Henkin et al, *op.cit.,* at p.1231 *et. seq*; M. N. Shaw, *International Law*, 1999, 4th ed., CUP, at p.590; customary law of the sea and the provisions of UNCLOS.

57 See for example: *UN GA Resolution: World Charter for Nature UN Doc. A/RES/37/8, (1982)* where it states that 'nature shall be secured against degradation caused by warfare or other hostile activities' at para 5 and further that 'military activities damaging to nature shall be avoided'. Moreover, as stated by N. A. F Popovic, *op.cit*, although this is a resolution and not a binding treaty, it does use obligatory language and contends in its preamble that it is the reference point 'by which all human conduct affecting nature is to be guided and judged', at p.84; UN GA Decision 46/417, Exploitation of the Environment as a Weapon in Times of Armed Conflict and the Taking of Practical Measures to Prevent Such Exploitation; see also the Report of Secretary General to GA, Protection of the Environment in Times of Armed Conflict, UN Doc A/47/328, para 1, 1992.

58 P. Sands, *International Law in the Field of Sustainable Development*, in Lang (ed.) *Sustainable Development and International Law*, London, 1995 at p.336.

59 Article 74 of the UN Charter sets forth the principle of good neighbourliness. This has found subsequent reiteration in the Earth Summit documents, along with the associated concept of international co-operation (See for example Principles 7 and 13 of the Rio Declaration 1992. This had been noted earlier by Principle 24 of the 1972 Stockholm Declaration). This latter concept can be seen as the basis for much of modern international environmental law which, as mentioned above, places co-operation at the forefront of its attempts to change the way

traditional state-centric international law of state responsibility rules apply with respect to environmental considerations. Amongst the various duties which have emerged in this regard, states are obliged to inform other states of possible hazards and are also subject to an obligation to negotiate in certain circumstances. These duties were first raised in the *Corfu Channel* case, *op.cit.*, and *Lac Lanoux case*, *op.cit.*, respectively. Since then they have received subsequent endorsement in many international instruments including: Principles 18 & 19, Rio Declaration 1992; Article 198, UNCLOS 1982; Article 13, Basel Convention on Control of Transboundary Movement of Hazardous Wastes 1989; Article 5 of Long-Range Transboundary Air Pollution Convention 1979. Further to the co-operative spirit, states are also required in certain cases to perform environmental impact assessments and to consult with relevant parties (See discussion in M. N. Shaw, op.cit., at pp,602-604).

60 International environmental law has adopted a different approach to dealing with environmental harm than that of the traditional international law rules of state responsibility. By placing greater emphasis on control and regulation of conduct that may cause undesirable environmental harm, the principle of precaution has assumed an important status in recent decades. Ultimately this principle evolved out of the debate surrounding the accuracy of scientific evaluation of environmental damage. As Sands notes:

> the precautionary principle began to appear in international legal instruments in the mid-1980s as a technique to guide decision makers. The principle is amongst the most far reaching endorsed at UNCED, since it potentially shifts the burden of proof away from the person wishing to stop an activity (traditional approach) onto the person wishing to carry out an activity to show that it will not cause harm (precautionary approach): See discussion in P. Sands, op.cit., at p.346-47.

Thus, this principle informs of a shift of the law's focus away from responsibility for actual harm to one of prevention of the harm. The normative status of this principle is debatable, but it has been incorporated into a number of international instruments: See for example: the preambles to the Vienna Convention on the Ozone Layer 1985 and the Montreal Protocol thereto; The Bergen Ministerial Declaration on Sustainable Development 1990; Principle 15, of the Rio Declaration 1992; Article 3(3) of the Climate Change Convention 1992; and Article 2(5) of Convention on the Protection and Use of Transboundary Watercourses and International Lakes 1992. See also further discussions in P. W. Birnie and A. E. Boyle, *op.cit.*, at pp.95 *et seq.*; M. N. Shaw, op.cit., at pp.604-605. This principle also received judicial recognition by the ICJ: See Judge Weeramantry's dissenting judgement in Request for Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgement in the 1974 Nuclear Tests Case, ICJ Reports, 1995, pp.288,342.

61 An addition to the precautionary principle is the polluter paying for the costs associated with polluting. Although the polluter pays principle has largely been recognised as a measure for implementation at the national level, it is worth considering its application at the international level regarding damage to common areas such as the high seas. More specifically, it is interesting to consider its application in international law, particularly in light of Iraq's position post the Gulf War and the international community's condemnation of the environmental harm it caused and the subsequent ease with which the polluter was held to be liable for the costs associated with such harm (See work of the UNCC which is currently working on the environmental claims arising out of the Gulf War; Security Council Resolution 687 April 3, 1991).

62 P. Sands, *op.cit.,* at p.338.

63 For further discussion see G. R. Pring & S. Y. Noé, *op.cit.,* at p.26 *et seq*.

64 See Principle 21, 1972 Stockholm Declaration. For further deliberation of this principle see G. R. Pring & S. Y. Noé, *op.cit.,* at pp.26-27.

65 G. R. Pring & S. Y. Noé, *ibid.,* at p.26.

66 P. W. Birnie and A. E. Boyle, op.cit., at p.91.

67 See Articles 192-194; P. W. Birnie and A. E. Boyle, *ibid.,* at p.91.

68 These were the Convention on Climate Change and the Convention on Biodiversity.

69 Rio Declaration, Agenda 21 and the Forest Principles. For an in depth analysis and discussion of the UNCED and the instruments which emerged from it, see P. Sands, op.cit at p.319 et. seq.

70 P. W. Birnie and A. E. Boyle, *op.cit.,* at p.90.

71 Clearly this assertion does not suggest that indigenous peoples have been consciously aware of global environmental problems facing the current international community. However, there are numerous examples of environmentally sound, sustainable practices that many of the world's indigenous people have practised for generations. These range from highly developed systems of water irrigation through to 'traditional agro-forestry' Many of these traditional kinds of practices are discussed in D. Suzuki & H. Dressel, *Good News for a Change: Hope for a Troubled Planet*, Allen & Unwin, 2002. See also separate judgement of Vice President Weeramantry in *Gabickovo-Nagymaros Project Case*, ICJ Reports, 1997 where His Honour provides an excellent historical perspective on the sustainable development practices of indigenous peoples.

72 See the Brundtland Commission, World Commission on Environment and Development (WCED), *Our Common Future*, (Oxford 1987), p.43.

73 *See* for example the separate judgement of Vice President Weeramantry in *Gabickovo-Nagymaros Project Case*, ICJ Reports, 1997 where His Honour provides an excellent historical perspective on this "new" idea; also refer to writings of indigenous cultures such as the Speech by Chief Seattle in 1854 to the "Great White Chief in Washington" who had made an offer to buy a large section of Indian Land in return for a reservation for the Indian People.

74 Principle 2 of the *Stockholm Declaration on the Human Environment* 1972 enunciated this in the following terms:
The natural resources of the earth including the air, water, land, flora and fauna and especially representative samples of natural ecosystems must be safeguarded for the benefit of the present and future generations through careful planning or management, as appropriate.

75 *See for example*: Principle 11 of the *Stockholm Declaration on the Human Environment* 1972.

76 Article 3 & 4.

77 During the 1994 Uruguay Trade Rounds in Marrakech, the concept of sustainable development was formally incorporated into the GATT/WTO Agreements. WTO members undertook to commence a comprehensive programme aimed towards promoting this concept within the WTO framework.

78 *See* for example the *Charter of Economic Rights and Duties* adopted by the General Assembly in 1974.

79 ICJ Reports, 1997, para 140, p.67 where it was stated that:
Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects on the environment. Owing to new scientific insights and to a growing awareness of the risks of mankind – for future and present generations – of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such

new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile development with protection of the environment is aptly expressed in the concept of sustainable development.

80 See for example the *Plan of Implementation.*

81 See for example the relevant EU law discussed in C. Redgwell *et al* (eds.), *op.cit.* Also discussion of the treaties of the EU and the specific environmental provisions in P. Craig & G. de Burca, *EU Law: Text, Cases and Materials*, 2nd ed., OUP,1998.

82 See for example the discussion of climate change issues for the EU in the Green Paper, *op.cit.,* esp. at p. 46 *et seq.*

83 See for example the EU, its constituent member states and the applicable regional and domestic law.

84 *Ibid.,* at pp.30 *et seq.*

85 See for example the recent publication by D. Suzuki & H. Dressel, *op.cit.,* which provides extensive detail on the growing changes in corporate conduct towards sustainable methods of business that respect the environment.

86 See for example Prof. T. W. Wälde, *op.cit.,* at p.10 *et seq.*

87 *Ibid.*, Annex 1, at p.80 *et seq.*

88 Professor Dr. C. van der Linde, *Nota: Een visie op Energie en Milieu,* Clingendael Institute, Den Haag, CIEP 02/2002.

89 For example, limiting the costs of delivering energy. See Professor Dr. C. van der Linde, *ibid.*

90 For example, an uninterrupted supply of energy by increasing the number of supplying regions and a spreading of the risks by differentiating in the number sources of energy (oil, gas, coal, nuclear, renewables). See Professor Dr. C. van der Linde*, ibid.*

91 See EU Commission, ibid , Annex 1 at p.2.

92 Professor C. van der Linde, *op.cit.*, succinctly summarises this by stating that the way one attempts to implement these basic policy premises implies choices with respect to the ratio of energy produced within the country and imported energy, the type of energy carriers, the balance between different technologies and the balance between energy costs and national safety considerations. Subsequently, a choice must be made as to which instruments of energy policy, such as taxes, market regulations, etc. the authorities wish to rely on in order to implement the basic premises. Clearly, while countries may universally adhere to the same fundament elements in their energy policies, variations will exist between policy choices and the instruments used to implement those decisions. A number of factors contribute to these variations and may be:

   a) Technical, natural or institutional, i.e., organisation of the economy and of the energy sector, traditions and culture and the spheres of influence of different national pressure groups; or
   b) Economic, i.e., differences in the internal availability of economically exploitable sources of energy, the structure of the economy, the structure and the value of the per capita energy consumption, and the geographical location.

93 IEA World Energy Outlook 2001, *Executive Summary,* at p.13.

94 *Supra.*

95 For example, Professor C. van der Linde, *op.cit.*, comments that the Netherlands occupies a somewhat unusual position within the EU as an energy producing nation. The presence of large natural gas reserves in The Netherlands therefore significantly influence the composition of the energy supply in that country. By contrast, other European countries are highly dependent upon imported fossil energy supplies. In the past, small national availability of natural resources encouraged some European governments to pursue nuclear energy options in order to reduce

dependency upon foreign supply and minimise risks to energy supply security.

96 *Supra*, where Prof. C. van der Linde comments that by reason of participation in the EMU, EU member states are limited in the extent to which they can vary their national energy policies. Energy policy clearly influences national government earnings and spending and also the state of the balance of payments. This is particularly so for those countries such as The Netherlands which are deriving revenue from domestic natural resources. Moreover, in this context, energy costs are an important factor in price setting (inflation) and in the competitiveness of national economy. By reason of these factors, Prof. Van der Linde indicates that as the European market makes it difficulty to compensate higher energy costs, this is likely to weaken the competitive position.

97 *Supra.*

98 In some parts of the world, certain rights of the individual are now judicially protected by international and regional conventions such as the *European Convention on Human Rights,* Inter-American Convention on Human Rights and the African Charter of Human Rights. Consequently, many human rights are now acknowledged and protected by international and regional courts and tribunals including the ICTY, ICTR and the forthcoming ICC.

99 *Supra.*

100 For further in depth discussion of developments in international law pertaining to indigenous peoples see for example G. Triggs, *op.cit.*

101 *Ibid.,* at p.2.

102 The competition between indigenous peoples' rights and interests and the development of infrastructure facilities additional to mining operations is discussed in detail in the Australian context in D. E. Fisher, *Indigenous Interests and Infrastructure Development in Queensland*, Journal of Energy & Natural Resources Law, Vol 18, No. 1 2000 at p.67 *et seq.*

103 J. P. Kastrup, *The Internationalisation of Indigenous Rights from the Environment and Human Rights Perspectives,* Texas International Law Journal [Vol. 32:97 1997] 97 at p103 *et seq.*

104 See S. C. Perkins, *Researching Indigenous People's Rights under International Law*, at pp.2-3 where he lists the Celtic people of the British Isles, Brittany in France and Galacia in Spain; the Basque peoples of France, Portugal and Spain; the Sami or Lapp people of Greenland, Norway, Sweden and Finland and the former Soviet Union.

105 See S. C. Perkins, *ibid.,* at p.3 where he discusses the hill and tribal peoples in Central Asia such as the Chittagong people of Bangladesh, China and the Ainu peoples in Japan.

106 Office of the High Commissioner for Human Rights, *Fact Sheet No.9 (rev.1), The Rights of Indigenous Peoples*, http://www.unhchr.ch.

107 See S. C. Perkins, *op.cit.* at p.3 notes that most Asian and African countries deny that they have indigenous peoples within their countries.

108 For example the Aboriginal peoples in Australia and the Maori peoples in New Zealand noted in S. C. Perkins, *op.cit.*

109 For example the Mayas of Guatemala and Aymaras of Bolivia. See S.C. Perkins, *op.cit.* Also see the Office of the High Commissioner for Human Rights website, *op.cit.,* for further discussions on the various indigenous populations existing around the world.

110 S. C. Perkins, *op.cit.*, at p.2 who discusses for example the destructive, violent conduct of Anglo-American, Spanish and Portuguese in the South Americas and the British in Australia and New Zealand. Perkins makes mention also of the problem of diseases which readily threaten the lives of indigenous peoples.

[111] See for example S. C. Perkins, *ibid.,* who notes the failure of the French in Indo-China, the English and Portuguese in India and the French and Belgians in Africa to displace indigenous populations.

[112] S. C. Perkins, *ibid.*, at p.3.

[113] See for example the Office of the High Commissioner for Human Rights, *ibid.;* J. P. Kastrup, *op.cit.*, at p103 *et seq.*

[114] This has been noted by the UNHCR who commented that 'there are striking similarities between the problems grievances and interests of the various indigenous peoples and therefore in their presentations to international forums', *ibid.*

[115] For further in-depth discussion of developments in international law pertaining to indigenous peoples see for example G. Triggs, *Australia's Indigenous Peoples and International Law: Validity of the Native Title Amendment Act 1998* (Cth), Melbourne University Law Report, 1999.

[116] For further discussions on these issues see for example A. Quentin-Baxter, *op.cit.;* G. Triggs, *op.cit.* at pp.3 *et seq.*

[117] Article 1(2).

[118] Article 1(3).

[119] D. J. Harris, *op.cit,* at p.113 and later at pp.114 *et seq.* where the author discussed the *Declaration on the Granting of Independence to Colonial Territories and Peoples,* GA Resn. 1514 (XV) December 14, 1960, G.A.O.R. 15th Sess., Supp. 16, p.66 and the Advisory Opinion of the ICJ in the Western Sahara Case, ICJ Reports 1975, p.12.

[120] See Advisory opinion of the ICJ in the Western Sahara Case, *ibid.*

[121] *Supra.*

[122] See discussion in G. Triggs, *Indigenous Peoples and Resource Depletion, op.cit.,* at p.126.

[123] See discussion in G. Triggs, *ibid.,* at p.123 *et seq.*

[124] General Assembly of the United Nations, GA Resolution 217A, 2 UN GAOR (183rd plen. Mtg), UN Doc A/Res/217A (1948) – Art 27.

[125] See Section 17 which provides, *inter alia*, that all persons have the right to own property solely or collectively and that as such, persons shall not be arbitrarily deprived of his/her property.

[126] Entered into force on 23 March 1976. The International Convention on Economic Social and Cultural rights would also provide great assistance to indigenous peoples, particularly in the context of participation in decisions concerning resource development on indigenous lands. However, the provisions of this convention have not made their way into domestic law of most state parties and thus, despite its appeal, at present this convention is of limited use: See discussion in G. Triggs, *Indigenous Peoples and Resource Depletion, op.cit.*, at p.129.

[127] Entered into force on 4 January 1969. Under this convention, state parties condemn all racial discrimination and agree to refrain from participating in any act or practice of racial discrimination against individuals or groups: see for example Article 2(1).

[128] For example the UN Committee on the Elimination of Racial Discrimination, The UN Human Rights Committee and the Working Group on Indigenous Populations.

[129] Articles 1, 26 & 27. Triggs notes that Article 1 has prima facie importance to indigenous peoples in the context of mining of natural resources. Activities that threaten the 'capacity of indigenous peoples to pursue economic, social and cultural development' would fall foul of this provision. However there has been continued debate about its application in this context. This is discussed in further detail in G. Triggs, *Indigenous Peoples and Resource Depletion, op.cit.*, at p.126-127.

[130] See for example the cases discussed in G. Triggs, *Indigenous Peoples and Resource Depletion, op.cit.*, at pp.127-129 including *Ivan Kitok* v. *Sweden* UNHRC, Report of the HRC, Communication No. 197/1985, UN Doc.

CCPR/C/33/D/197/1985 (1988); *Ominayak* v. *Canada*, UNHRC, Report of the HRC, Communication No. 167/1984, UN Doc. A/45/40, vol.2 at 1 (1990); *Lansman* v. *Finland* UNHRC, Report of the HRC, Communication No. 511/1992, UN Doc. CCPR/C/52/0/511/1992 (1993); *Lovelace* v. *Canada* UNHRC, Report of the HRC, Communication No. 24/1977, UN Doc.A/36/40, Annex 18 (1977); *Hopu* v. *France* UNHRC, Report of the HRC, Communication No. 549/1993, UN Doc. CCPR/C.60/D/549/1993/Rev.1 (1997).

131 G. Triggs, *ibid.*, at p.129.

132 G. Triggs, *ibid.*, at p.127.

133 *Ibid.,* at p.130 and discussion at pp.129 -131.

134 S. C. Perkins, *op.cit.,* at p.6.

135 See relevantly Articles 4, 6, 7, 13, 14 & 15; also discussion in G. Triggs, *Indigenous Peoples and Resource Depletion, op.cit.*, at p.132-33.

136 See UN Human Rights Committee and the Working Group on Indigenous Populations and discussion by the Special Rapporteur at UNHCR website, *op.cit.*

137 See for example A. Quentin-Baxter, *op.cit.*, esp. pp.86-92; C, E, Foster, *Articulating Self-determination in the Draft Declaration on the Rights of Indigenous Peoples,* EJIL 12 (2001) 141-157.

138 The author notes that although outside the ambit of the present discussion, a salient matter that has received some attention with respect to the Draft Declaration is the problem of properly defining who exact are indigenous peoples. The inability to agree on a singular definition of *indigenous people* is seen by some commentators as a serious limitation on the law's effectiveness to properly deal with indigenous rights. However, it is equally possible to contend that failure to achieve consensus on the definition is not entirely fatal to the development of indigenous rights law. In fact, customary international law is perhaps more effective at dealing with these kinds of issues. Legal developments should perhaps be pursued through this kind of law rather than with an international treaty. In any event, arguably a looser, rather than stricter definition is perhaps warranted in this context to ensure long term success for indigenous peoples and the observance of their rights throughout the world. For further discussion on the Draft Declaration and indigenous peoples rights see J. Debeljak, *Barriers to the Recognition of Indigenous Peoples' Human Rights at the United Nations,* (2000) 26 Monash University Law Review 159-194 and J. Debeljak, *Indigenous Rights: Recent Developments in International Law* (2000) 28 International Journal of Legal Information 266-310.

139 See the Jabiluka Uranium case summarised in Annex 2 at the end of Part Two of this paper. Also see G. Triggs, *op.cit.*, for discussion of this case within the international context, at p.145 *et seq.*

140 See Annex 2 at the end of Part Two and also further detailed discussion of this case by G. Triggs, *op.cit.*, at pp.145-154.

141 See for example M. Reisman, *Protecting Indigenous Rights in International Adjudication*, 89 AM.J.INT'L. L. 350 (1995).

142 See for example judgements of the Supreme Court of Canada, the High Court of Australia and the Inter-American Court of Human Rights.

143 Operative Directive 4.20; see discussion in G. Triggs, *op.cit.* at p.136; this must however be considered in the light of the World Bank's conduct in failing to following its own guidelines in respect of the Chad pipeline project. Parties from neighbouring Cameroon have petitioned the Bank to reconsider its earlier rejection of a request for review of this project by interested parties within Chad: see www.cameroon.net for further information on this issue.

144 S. C. Perkins, *op.cit.*

[145] J. P. Kastrup, *The Internationalisation of Indigenous Rights from the Environmental and Human Rights Perspective,* Texas International Law Journal, Vol.32:97, 1997 at p.104.

[146] Article 4.

[147] L. A. Winters, *International Economics,* 3rd ed., Allen & Unwin, London, 1985 at p.56-57.

[148] *Ibid.,* at p.57.

[149] See for example R. Cantley-Smith and F. Tito, *Public Health Regulation and Environmental Protection laws – Convergence or Divergence,* in *Public Health Law in Australia: New Perspectives*, The Australian Institute of Health Law and Ethics, Commonwealth of Australia, 1998.

[150] L. A. Winters, *op.cit.,* at p.57.

[151] C. Terry & K. Forde, *Microeconomics*, Prentice-Hall, Australia, at pp.165-166. The authors provide a further description of economic rents whereby the payment to factors of production is said to be divided into two parts: (i) transfer earnings and (ii) economic rents. The first, transfer earnings, is defined as the price a factor of production must earn in its present use to ensure that it is prevented from changing to the next best alternative use. Any excess paid to the factor over and above this amount is considered to be payment of economic rent to the factor owner, at p.166-169.

[152] Access to land not only involves exploration and extraction but also includes access to land for development of infrastructure for surrounding community and also to lands and seas for transportation (i.e. pipelines and a State's territorial waters).

[153] An exception here is that of the American Indians.

[154] C. Terry & K. Forde, *op.cit.,* at p.165.

[155] It is important to note that environmental policies such as the promotion of renewable energy sources and energy saving are making significant contribution to security of supply.

[156] Prof. T. W. Wälde, *op.cit.,* at p.17.

[157] *Ibid.*, at p.17.

[158] For example, the Australian Federal Government's treatment of indigenous peoples has been the subject of recent condemnation by the UN Human Rights Committee. For further discussion see G. Triggs, *Australia's Indigenous Peoples and International Law: Validity of the Native Title Amendment Act 1998 (Cth)*, Melbourne University Law Report, 1999.

[159] (1992) 175 CLR 1.

[160] See *www.mining.gov.au*; B. MacKay, I. Lambert and Miyazaki, S., *The Australian Mining Industry: From Settlement to 2000,* Australian Mining Industry, 1998-99, ABS Catalogue No. 8414.0 which also discusses these details.

[161] *Ibid.*

[162] Stockall and Associates Pty Ltd, *Australian Energy Policy*, prepared for New Energy and Industrial Technology Development Organisation, Canberra, January 2001 at p.7 *et seq.*

[163] *Ibid.*

[164] Australian Bureau of Statistics, *Mining- Exports*, at www.abs.gov.au/ausstats..

[165] According to the Australian Bureau of Statistics, this fall in prices was partly offset by a depreciation in the A$ against the US$ of 8%. For more detailed summary of Mining Exports 1998-99 see Australian Bureau of Statistics, *ibid.,* www.abs.gov.au/ausstats.

[166] Australian Bureau of Statistics, *ibid.*

[167] Export contracts are usually written in US$ and therefore the weakening A$ actually assisted exporters earn higher revenues during this period. See Australian Bureau of Statistics, *8415.0 Mining Operations in Australia,* 29/08/2001 at www.abs.gov.au/ausstats.

[168] Australian Bureau of Statistics, *Mining- Exports*, 04/01/2002, at www.abs.gov.au/ausstats.
[169] Australian Bureau of Statistics, *Mining-Exports - The Composition of Australian Mineral Exports 1996/97* at www.abs.gov.au/ausstats.
[170] Australian Bureau of Statistics, *Mining- Exports*, 04/01/2002, at www.abs.gov.au/ausstats.
[171] *Ibid.*
[172] B., MacKay, I., Lambert & S., Miyazaki, *op.cit*, at p.7.
[173] Australian Bureau of Statistics, *8415.0 Mining Operations in Australia,* 29/08/2001 atwww.abs.gov.au/ausstats.
[174] See for example the discussions by Stockall and Associates Pty Ltd in *Australian Energy Policy*, *op.cit.* and Australian Minerals Council, *Australian Minerals Industry Report*, 2001.
[175] See for example UN International Human Rights Instruments, *Core Document Forming Part of the Reports of States Parties – Australia*, 19 April 1994, pp.8, 26, 27. Also *State of Western Australia* v. *Ward & Ors* [2000] FCA 191 in which the history of the Indigenous people is discussed in detail.
[176] (1992) 175 CLR 1 (HC).
[177] New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia.
[178] Northern Territory and Australian Capital Territory.
[179] See www.mining.gov.au
[180] *Supra*.
[181] *Supra.*
[182] B. MacKay, I. Lambert & S. Miyazaki, *op.cit*. at p.1.
[183] See www.mining.gov.au.
[184] For the purposes of this paper, the fundamental issues shall be addressed in general terms to the extent to which they are common to all parts of the country.
[185] See discussion of Justice Blackburn in the Gove land Rights case, *Milirrupum and Ors* v. *Nabalco Pty Ltd and the Commonwealth of Australia* (1971) 17 FLR 141.
[186] See *Mabo* v. *Queensland (No.2)* (1992) 175 CLR 1 (HC), per Brennan J at para.33 *et seq.*
[187] *Ibid.*
[188] *Worcester* v. *Georgia* (1832) 6 Pet 515, at pp 543-544 (31 US 350, at p 369) as cited in *Mabo* v. *Queensland (No.2), ibid.*
[189] Lindley, *The Acquisition and Government of Backward Territory in International Law*, (1926), Chs III and IV as cited in *Mabo* v. *Queensland (No.2), ibid.*
[190] See Lindley, *ibid.*, p 47 as cited in *Mabo* v. *Queensland (No.2), ibid.*
[191] See Williams, The American Indian in Western Legal Thought, (1990), pp. 78 ff; and *Johnson* v. *McIntosh* (1823) 8 Wheat 543, at p 573 (21 US 240, at p 253) as cited in *Mabo* v. *Queensland (No.2), ibid.*
[192] *Blankard* v. *Galdy* (1693) Holt KB 341 (90 ER 1089); *Campbell* v. *Hall* (1774) Lofft 655, at p 741 (98 ER 848, at pp 895-896); *Beaumont* v. *Barrett* (1836) 1 Moo PC 59 (12 ER 733) as cited in *Mabo* v. *Queensland (No.2), ibid.*
[193] Campbell v. Hall, (1774) Lofft, at pp 741, 742 (98 ER, at pp 895, 896) as cited in *Mabo* v. *Queensland (No.2), ibid.*
[194] See *Mabo* v. *Queensland (No.2)* (1992) 175 CLR 1 (HC) at para. 35 where His Honour refers to the discussion in Roberts-Wray, *Commonwealth and Colonial Law*, (1966), pp 214ff; *Sammut* v. *Strickland* (1938) AC 678; *Blankard* v. *Galdy* (1693) 2 Salk 411 (91 ER 356); *Buchanan* v. *The Commonwealth* (1913) 16 CLR 315, at p.334.
[195] See *Mabo* v. *Queensland (No.2)* (1992) 175 CLR 1 (HC), per Brennan J at para. 35 where His Honour refers to the Commentaries, Bk I, ch 4, p 107;

State Government Insurance Commission v. *Trigwell* (1979) 142 CLR 617, at pp 625, 634.

196 See *Mabo* v. *Queensland (No.2)* (1992) 175 CLR 1 (HC), per Brennan J at para.36.

197 *Lyons (Mayor of*) v. *East India Co.* (1836) 1 Moo PC 175, at pp 272-273 (12 ER 782, at p 818); *Cooper* v. *Stuart* (1889) 14 App Cas ; *The Lauderdale Peerage* (1885) 10 App Cas 692, at production possibilities 744-745; *Kielley* v. *Carson* (1842) 4 Moo PC 63, at pp 84-85 (13 ER 225, at p 233).

198 See*: Mabo* v. *Queensland (No.2)* (1992) 175 CLR 1 (HC), per Brennan J at para.25 *et seq*., in particular para.28.

199 See*: Attorney-General* v. *Brown* (1847) 1 Legge 312, at p 316.

200 See*:* for example: *Attorney-General v. Brown* (1847) 1 Legge 312, at p 316; *Randwick Corporation* v. *Rutledge* (1959) 102 CLR 54, at p 71; *Wade* v. *New South Wales Rutile Mining Co. Pty. Ltd.* (1969) 121 CLR 177, at p 194; *New South Wales* v. *The Commonwealth* (1975) 135 CLR 337, at pp 438-439.

201 See for example the case of *Milirrpum and Ors v. Nabalco Pty Ltd and the Commonwealth of Australia* (1971) 17 FLR 141.

202 This concept is defined as the 'sacred principle English law by which precedents are authoritative and binding, and must be followed': See R. Bird, *Osbourne's Concise Law Dictionary*, 7th ed., 1983, at p.310.

203 *(No.2)* (1992) 175 CLR 1 (HC).

204 *Mabo* v. *Queensland [No.2] (No.2)* (1992) 175 CLR 1 (HC) at para.29.

205 *Ibid.,* per Brennan J at para.42.

206 *Ibid.,* per Brennan J at para.28.

207 *Ibid.,*, per Brennan J at para.57; *State of Western Australia* v. *Ward & Ors* [2000] FCA 191 at 55.

208 See *Mabo* v. *Queensland (No.2)* (1992) 175 CLR 1 (HC), per Brennan J at para.83.

209 *Ibid.,* per Brennan J at para.69.

210 See *for example*: *Western Australia* v. *The Commonwealth* (1995) 183 CLR 373; *North Ganalanja Aboriginal Corporation* v. *Queensland* (1996) 185 CLR 595; *The Wik Peoples* v. *State of Queensland* (1996) 187 CLR 1; *Fejo* v. *Northern Territory of Australia* (1998) 195 CLR 96; *Yanner* v. *Eaton* (1999) 166 ALR 258; *Commonwealth of Australia* v. *Yarmirr & Ors* (1999) 168 ALR 426; See*:* also decision of the Full Federal Court in *State of Western Australia* v. *Ward & Ors* [2000] FCA 191.

211 See: National Native Title Tribunal, *Native Title Facts: What is Native Title*, at http://www.nntt.gov.au/ntf_html.

212 *Ibid.*

213 See Native Title Act 1993 (Cth).

214 (1998) 195 CLR 96 at 128; See also *State of Western Australia* v. *Ward & Ors* [2000] FCA 191 at para.57.

215 See *State of Western Australia* v. *Ward & Ors* [2000] FCA 191at para.111.

216 *Ibid.*

217 See *Mabo* v. *Queensland (No.2)* (1992) 175 CLR 1 (HC) per Brennan J at 64, Deane and Gaudron JJ at 111 and Toohey J at 195. Also see *Western Australia* v. *The Commonwealth* (1995) 183 CLR 373; *The Wik Peoples* v. *State of Queensland* (1996) 187 CLR 1 where this test was examined and explained in further detail and held that such intention could be manifested implicitly or by necessary implication.

218 (1996) 187 CLR 1.

219 For further discussion of this see for example: National Native Title Tribunal, *Native Title Facts: What is Native Title*, at http://www.nntt.gov.au/ntf_html.

220 Most provisions of this act became operative on 1 January 1994.

221 See Section 3.

222 See Section 10.

223 See Section 11.

224 See Section 223 which provides:

1) The expression native title, or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Straight Islanders in relation to lands or waters, where:
   i) The rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Straight Islanders; and
   ii) The rights and interests are recognised by the common law of Australia.
2) Without limiting subsection (1), rights and interests in that subsection includes hunting, gathering, or fishing rights and interests.

225 See for example discussion in G., Netteim, *Wik: On invasion, Legal Fictions, Myths and Rational Responses,* UNSW Law Journal, where it is stated that 4600 mining tenures were issues in Queensland between 1 January 1994 and 23 December 1996 (date of decision in the *Wik* case). These acts were subsequently validated by the later amendments to the NTA in 1998 and are termed intermediate acts.

226 For further in-depth discussion of the validity of the Native Title Amendment Act 1998 (Cth), see G. Triggs, *op.cit.*

227 (1996) 187 CLR 1 of the HCA. In this case the Court held that the pastoral leases, the subject of the litigation, did not amount to a grant of exclusive possession to the leaseholder. Thus, pastoral leases could not be said to be inconsistent with the continued existence of native title *per se*. Native title was therefore not extinguished by the creation of pastoral leases. Rather, the two separate rights were deemed to continue alongside each other. However, in the case of any inconsistency of use between the leaseholder and the native titleholder, the matter would be resolved in favour of the pastoral leaseholder.

228 Sections 4 and 17.

229 Also note Section 4(5) which deals with Intermediate period acts and provides that such acts are to be treated as if they are past acts. This section was in response to the decision of the HCA in *The Wik Peoples* v. *State of Queensland* (1996) 187 CLR 1 which would have had the effect of invalidating intermediate period acts (after the *Mabo* decision but before *Wik* decision) that would have failed the future acts test.

230 See Section 4 generally and Section 17 with respect to compensation.

231 See Section 19 for equivalent provision validating past acts of a State or Territory.

232 National Native Title Tribunal, *Native Title Facts: What is Native Title*, at http://www.nntt.gov.au/ntf_html.

233 *Ibid.*

234 See Section 20 for equivalent provision providing for compensation to be paid by a State or Territory.

235 See Section 23.

236 See*:* Section 45 NTA referring to section 50 of the *Racial Discrimination Act* 1975.

237 See Sections 26-44 of the NTA 1993.

238 See Sections 28 and 31 of NTA 1993.

239 See Section 26.

240 See Section 26 *et seq.*, especially Section 29 – Notification of Parties affected.

241 See G. Triggs, *Australia's Indigenous Peoples and International Law,* MULR 1999; www.austlii.edu.au/au/journals.

242 *Ibid.,* in particular at p.18. Also for a full discussion of the effects of amendments see the discussion by G. Triggs, *ibid.,* at p.22 *et seq.*

243 *Ibid.*

[244] *Ibid.*,at p.2.
[245] See discussion by G. Triggs, *ibid., at p.2 et seq.*
[246] *Supra*
[247] For further discussion see G. Triggs, *ibid.,* at p.2 *et seq.*
[248] See Section 19, 15 & 16 of the NTA.
[249] See discussion of different legislation in *Native Title: State and Territory Legislation*, [1996] AILR 22; at p.3.
[250] See for example the *McArthur River Project Agreement Ratification Amendment Act* 1993 (NT).
[251] Part 4, section 10.
[252] Part 2 of that act; See also discussion in *Native Title: State and Territory Legislation*, [1996] AILR 22 at p.4.
[253] See discussion of different legislation in *Native Title: State and Territory Legislation*, [1996] AILR 22 at p.4.
[254] *Ibid.,* at p.8.
[255] It is noted that this discussion is limited to the discussion of mining and petroleum rights on land and does not extend to Australia's territorial seas. However, for discussion on native title rights in relation to the sea see case of *The Commonwealth* v *Yarmirr; Yarmirr* v *Northern Territory* [2001] HCA 56 (11 October 2001).
[256] See discussion in D. E. Fisher, *op.cit.*
[257] [2002] HCA 28 (8 August 2002).
[258] *Supra.*
[259] Those interests included leases granted and licences issued under the *Mining Act 1978* (WA), interests of holders of tenements under *Mining Act 1904* (WA) and interests of holders of tenements under the *Petroleum Act 1967* (WA); See of *State of Western Australia & Ors* v. *Ben Ward & Ors* [2000] FCA 191 at para.518 and the Third Schedule referred to therein.
[260] *State of Western Australia & Ors* v. *Ben Ward & Ors* [2000] FCA 191 at para.514.
[261] See section 225(b).
[262] *State of Western Australia & Ors* v. *Ben Ward & Ors* [2000] FCA 191 at para.516 where paragraph 3 of the determination is discussed.
[263] This was noted subsequently by the HCA in its judgement on the appeal. See [2002] HCA 28, *op. cit.,* at para 376.
[264] *Ibid.,* at para.518 and Third Schedule listing those other interests.
[265] (1998) 159 ALR 483 at 580.
[266] Section 3 provided that:

> The entire management and control of the waste lands of the Crown in the colony of Western Australia, and of the proceeds of the sale, letting, and disposal thereof, including all royalties, mines, and minerals, shall be vested in the legislature of that colony.

[267] Further to the power contained in s.3 above, the WA legislature enacted the Mining Act 1904 where s 117 stated:

> SUBJECT to the provisions of this Act and the regulations -
> 1) Gold, silver and other precious metals on or below the surface of all land in Western Australia, whether alienated from the Crown, and if alienated, whensoever alienated, are the property of the Crown.
> 2) All other minerals on or below the surface of any land in Western Australia which was not alienated in fee simple from the Crown before the first day of January, One thousand eight hundred and ninety-nine, are the property of the Crown.

It is worth noting that a similar provision was made by s 9 of the *Petroleum Act* 1936 (WA) which provided that:

> Notwithstanding anything to the contrary contained in any Act, or in any grant, lease or other instrument of title, whether made or issued before or after the commencement of this Act, all petroleum on or below the surface of all land within this State, whether alienated in

fee simple or not so alienated from the Crown is and shall be deemed always to have been the property of the Crown.

268 [2000] 99 FCR 316 at 452.

269 *State of Western Australia & Ors* v. *Ben Ward & Ors* [2000] FCA 191 at para.541 and also discussion at 527.

270 *Western Australia; Attorney-General (NT)* v. *Ward; Ningarmara* v. *Northern Territory* [2002] HCA 28 (8 August 2002) at para.1.

271 *Ibid*, at para 382.

272 *Supra.*

273 See paras 282 *et seq.*

274 *Ibid.,* at para 289.

275 *Ibid.,* at para 290.

276 *Ibid.,* at para 290 *et seq*

277 *Ibid.,* at para 291.

278 *Supra.*

279 See discussion at paras 296 *et seq* for the Court's reasons underlying this conclusion.

280 *Ibid.,* at para 296.

281 *Ibid.,* at para 308; See also para 306 *et seq* for further discussion on extinguishment.

282 See for example para 296 and 308 *et seq*.

283 *Ibid.,* at para 309.

284 Australian Minerals Council, *Australian Minerals Industry Report*, 2001 at p.29.

285 The Council define the minerals industry as including exploration for, and extradition and primary processing of, minerals in Australia. Post first pouring processing stages, oil and gas and iron and steel industries are not included in the survey.

286 It is imperative to appreciate that such expenditure is not limited to just those parties actively engaged in the minerals industry. All sectors of the natural resources sector are subject to the same legislative and common law legal changes in their rights *vis-à-vis* Australia's indigenous peoples.

287 Internal expenditure on land access relates to the statutory requirements of the Native Title Act 1993, especially the provisions relating to future acts and also the mandatory requirement that mining companies must be respondents to any native title claims over lands involving mining exploration and development interests. See the AMI Report 2001 at p.29.

288 PIRSA Petroleum, Minerals & Energy Resources – Petroleum Group, *About PRISA Petroleum*, at www.pir.sa.gov.au.

289 *Ibid.*

290 See Annex 1 which summarises the land rights situation under SA state land rights legislation. This is different to the issue of native title and as such, is outside the scope of this discussion.

291 Media Release, Hon Wayne Matthew MP, Minister for Minerals & Energy, Minister assisting the Deputy Premier, Government of South Australia, Monday 21 October 2001.

292 *Ibid.*

293 AMI Report 2001 at p.29.

294 AMPLA, Journal 1999 - Conference 1999, Editorial - *Project Economics rated highly at Conference*.

295 See for example discussion by Office of the High Commissioner for Human Rights, *op.cit.*

296 PIRSA Petroleum, Minerals & Energy Resources – Petroleum Group, *Aboriginal Issues,* at www.pir.sa.gov.au.

297 Note: the lands vested in the Trust are leased back to the aboriginal communities for a nominal fee but, with Ministerial agreement, the Trust may lease or mortgage the lands. Sale may also take place but only with consent of both Houses of Parliament.

298 PRISA, i*bid.*
299 *Supra.*
300 *Supra.*
301 For example any companies wishing to undertake exploration operations must obtain permission from the Minster for Primary Industries, Natural Resources and Regional Development. Once ministerial consent if given a further application must be made to the corporate body representing the aborigines who have 120 days from the date of receiving the application to determine whether permission will be given.
302 These sites were discovered by Pan Continental Mining Ltd in 1971 and 1973 and called Jabiluka 1 and 2 respectively.
303 This Act provides, *inter alia*, for grants of unalienated land to Aboriginal people in the Northern Territory and gives a number of participatory rights to indigenous landowners. Moreover, the act provides for the creation of Land Councils. These bodies are intended to act on behalf of the indigenous traditional landowners and to represent their interests. For further discussion of this Act in this case see for example G. Triggs, *Indigenous Peoples and Resource Development, op.cit.* at pp.148-49 and Report of the Senate Environment, Communications, Information Technology and the Arts References Committee, *Jabiluka: The Undermining of Process - Inquiry into the Jabiluka Uranium Mine Project*, 30 June 1999.
304 See discussion in G. Triggs, *Indigenous Peoples and Resource Development, op.cit.* at pp.148-49.
305 Kakadu is considered as a 'place of national and international cultural and environmental significance': See Report of the Senate Environment, Communications, Information Technology and the Arts References Committee, *Jabiluka: The Undermining of Process - Inquiry into the Jabiluka Uranium Mine Project*, 30 June 1999, at 3.3 Executive Summary.
306 This was required under the *Environment Protection (Impact of Proposals)* Act 1974 (Cth).
307 For further discussion see G. Triggs, *Indigenous Peoples and Resource Development, op.cit.* at pp.147-49.
308 See G. Triggs, ibid., at p.145; Report of the Senate Environment, Communications, Information Technology and the Arts References Committee, *Jabiluka: The Undermining of Process - Inquiry into the Jabiluka Uranium Mine Project*, 30 June 1999.
309 The environmental lobby was particularly angered by this case. As noted in the Report of the Senate Environment, Communications, *ibid.,* where it noted that there were major 'concerns raised in relation to the project, and which the assessment process was to address' including (i) potential damage to the ecology of the Park from contaminated water from the mine site; (ii) disposal of tailings and the leaching of uranium from the tailings into the water system of the Park; (iii) threats to the health of workers and the local population from radiation; (iv) threats to the cultural heritage of the Aboriginal population, including possible damage to significant art, archaeological and sacred sites; and (iv) potential for damaging social impacts on Aboriginal people and culture. It continued stating that the 'Committee found serious flaws in the EIA process applied to the Jabiluka project. These related to the quality of the environmental impact statements prepared by Energy Resources of Australia (ERA), their assessment by government agencies, and the level of assessment applied to the consideration of continuing scientific and project uncertainties. The Committee also found serious flaws in the consideration of the social and cultural impacts of the project on Aboriginal communities, and in the protection of the World Heritage values of Kakadu National Park. Most disturbing to the Committee was a consistent pattern of rushed and premature ministerial approvals given to the construction of the mine

while outstanding concerns about tailings disposal, radiological protection, project design and cultural heritage protection remained unresolved'.

310 See discussion in G. Triggs, *op.cit*, at p.149.

311 See The Report of the Senate Environment, Communications, *op.cit.*; see also extended discussion of this report in G. Triggs, *op.cit.*, at pp149-50.

312 G. Triggs, *op.cit.*, at p.150.

313 See The Report of the Senate Environment, Communications, *op.cit.,* at para 5.59; see further discussion in G. Triggs *supra*.

314 Recommendation 11

315 Recommendation 12 & Recommendation 13

316 Recommendation 14

317 Recommendation 24

318 See G. Tiggs, *op.cit.,* at p.154.

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