

## WHAT LEGAL RECOURSE DO NON-STATE ISLANDS HAVE TO OBTAIN RESOURCES TO ADAPT TO CLIMATE CHANGE?

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*This paper uses a series of case studies to draw parallels between non-state islands attached to major nations. We do so in order to discuss the issue of liability for the impacts of climate change, and consequently, the responsibility to pay for adaptation activities on them. This approach is taken because the impacts from climate change on island communities have not been sufficiently addressed during the most recent international climate negotiations, despite these communities being identified as vulnerable. This paper uses Mer Island in the Torres Strait, Australia, as the main case study to consider these questions. We then extend this discussion to consider other non-state islands including: French Polynesia, Wallis and Futuna Islands, France; Guam and the Northern Mariana Islands, United States; and Niue, Tokelau and Cook Islands, New Zealand. Through this discussion, we find that the analysis of law, particularly customary land law that may assist Mer Islanders could likewise assist other non-state islands throughout the Pacific. We present this analysis due to the limited nature of existing legal research on how these non-state islands could use existing laws to assist them.*

### I INTRODUCTION

The Intergovernmental Panel on Climate Change (IPCC) has long acknowledged that small island states are disproportionately impacted by climate change due to their susceptibility to rising sea levels, storm surges and their limited access to resources and infrastructure.<sup>1</sup> As a response to these challenges, and frequently with

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<sup>1</sup> N Mimura, L Nurse, RF McLean, J Agard, L Briguglio, P Lefale, R Payet and G Sem, '2007: Small islands. Climate Change' in ML Parry, OF Canziani, JP Palutikof, PJ van der Linden and CE Hanson, (eds), 2007: *Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, (Cambridge University Press, 2007), 687-716.

international support, several small Pacific Island nations are currently planning or engaging in anticipatory adaptation; from hard engineering strategies e.g. building sea walls, to radical social upheaval e.g. developing international emigration strategies.<sup>2</sup> Due to their minimal past and current greenhouse gas emissions, questions of equity around who should pay for the full costs associated with these adaptation activities remain incompletely addressed.

The polluter pays principle suggests that these costs should not exclusively be borne by the impacted countries alone.<sup>3</sup> In fact, under international environmental law, States have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment, or to other states or areas beyond the limits of their national jurisdiction. It is this premise on which the Framework Convention on Climate Change, and the Kyoto Protocol, is based.<sup>4</sup> Despite this, the legal response to provide resources to non-state islands is not at all clear. In January 2009, the Office of the UN High Commissioner for Human Rights (OHCHR), declined to find that climate change is a violation of human rights law. The OHCHR did, however, conclude that States have legal duties concerning climate change, including helping people to adapt.<sup>5</sup>

This paper seeks to explore the legal options that non-state islands have to redress climate change. In each case study we look at the physical and cultural impacts of climate change on those islands. We also explore the possible legal remedies in human rights and cultural heritage laws, land rights, as well as tort and environmental laws in each jurisdiction. In essence, laws aimed at protecting Indigenous land rights and culture are the most effective in highlighting the needs of Torres Strait Islanders, and mounting the case for law reform that may lead to funding for adaptation. Tort laws that could provide a more direct means of compensation are at present less effective in providing funding for adaptation.

While litigation in this area has not yet been successful, there are other options to increase the prominence of these issues in the public domain. Public attention has increasingly been brought to these issues through the traditional media, and increasingly online and through social media, to encourage society to debate public values and the need to protect our environment.<sup>6</sup> Moreover, unsuccessful cases can expose weaknesses in the law, and highlight the need for law reform, and the development of the law, allowing subsequent cases to build on the legal arguments

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<sup>2</sup> Samir Patel, 'Climate science: a sinking feeling' (2006) 440 *Nature* 737-736; *Endangered Pacific islet facing mass relocation* (5 May 2011) <<http://www.abc.net.au/news/stories/2008/06/05/2265671.htm>>.

<sup>3</sup> Paul Baer, Tom Athanasiou & Sivan Kartha, *Greenhouse Development Rights, The right to development in a climate constrained world*, (Heinrich-Böll-Foundation, 2007).

<sup>4</sup> UNFCCC, 8<sup>th</sup> paragraph, Preamble and article 3.3, Kyoto Protocol, article 2.3, K Latu, 'Human Rights and Climate Change in the Pacific', (2009), 18(2) *Human Rights Defender*, 19.

<sup>5</sup> J Knox, 'Linking human rights and climate change at the United Nations', (2009) 33 *Harvard Environmental Law Review*, 491.

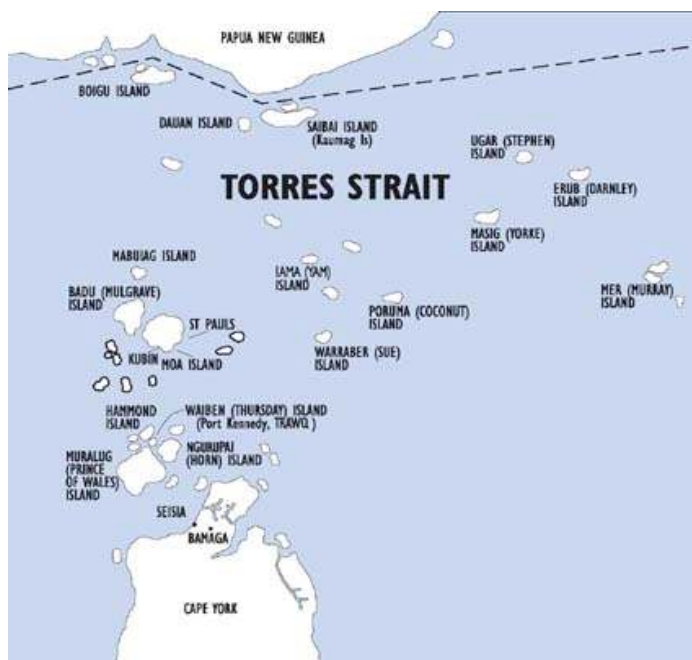
<sup>6</sup> Brian Preston, 'The role of public interest environmental litigation' (2006) 23(5) *Environmental and Planning Law Journal*, 337 at 347 (2006). See websites such as: <<http://www.islandsfirst.org/>>; <[www.sprep.org/climate\\_change/index.asp](http://www.sprep.org/climate_change/index.asp)>; <[www.tshrw.atsiphj.com.au/](http://www.tshrw.atsiphj.com.au/)>; <[www.torresstraitclimate.org](http://www.torresstraitclimate.org)>.

and scientific evidence presented.<sup>7</sup> The following section uses Mer Island, Australia as a detailed case study to explore these issues further.

## II MAIN CASE STUDY: MER ISLAND, AUSTRALIA

Torres Strait Islanders are the lesser known of the two Indigenous Australian peoples. The majority of Islanders, about 30,000, live on mainland Australia, with approximately 8,500 people still living on 17 islands in the Torres Strait; a region which covers an area of over 48,000 km<sup>2</sup>.<sup>8</sup> Mer Island, the most easterly inhabited island, is the only island group in the Torres Strait that has successfully won exclusive native title over its land. In addition to the native title over land, in July 2010, a successful, non-exclusive native title claim was won over 44,000 km<sup>2</sup> of ocean, covering much of the area between Cape York and Papua New Guinea and including the sea surrounding Mer Island.

Figure 1: Location of Mer Island, Torres Strait.



Source: tsra.gov.au

### A *Climate Change Impacts on Mer*

Two papers have recently been published on the impacts of climate change in the Torres Strait.<sup>9</sup> These reports provide climate projections for the region, including a discussion of the likely impacts from average and extreme weather events that are projected to occur. Specifically, for the Torres Strait region, the observed ‘above

<sup>7</sup> J Smith and D Shearman, *Climate Change Litigation* (Presidian, 2006), 12.

<sup>8</sup> ABS, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples, 2005*, (20 Nov, 2011) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4704.0>>.

<sup>9</sup> D Green, L Alexander, K McInnes, J Church, N Nicholls and N White ‘An assessment of climate change impacts and adaptation for the Torres Strait Islands, Australia’. in *Climatic Change* (2010) DOI 10.1007/s10584-009-9756-2 and R Suppiah, J Bathols, M Collier, M Kent and J O’Grady, ‘Observed and Future Climates of the Torres Strait Region’ (CSIRO report prepared for the TSRA, 2010).

average' rate of sea level rise of 6mm/year (compared to the global average of 3mm/year) is highlighted as a major concern. Considering this above average increase in sea level, these reports conclude that significant adaptation will be required for communities living on islands in this region in the short term.

The CSIRO report recommends that any further development of planned infrastructure—including all coastal development—must factor in these changes. The report concludes by noting how climate impacts will affect daily life by impacting the economic livelihoods of the inhabitants, and also the ecosystems within the region. For example, it notes that stress from El Niño Southern Oscillation (ENSO) related impacts is likely to affect some marine ecosystems causing long-term, irreversible changes in species and ecosystem composition.<sup>10</sup> The impacts on marine ecosystems will have profound indirect impacts on the cultural resilience of these communities.<sup>11</sup>

An analysis of extreme sea level heights for Mer Island, based on current greenhouse gas emissions trajectories, was carried out for this (co-authored) paper. This analysis suggests that by 2050, there will be an increase in the frequency of extreme sea level events that are usually associated with inundation events on the island. Specifically, this analysis shows that the present 'one in one hundred year' sea level height of 1.43m above mean sea level may be exceeded, on average, at least every ten years by 2050. This statistical analysis shows that by 2050, the 'one in ten year' sea level height would be 1.5m above mean sea level. The 'one in one hundred year' sea level height is projected to increase from 1.43m to 1.6m by 2050.<sup>12</sup>

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<sup>10</sup> R Suppiah, J Bathols, M Collier, M Kent, and J O'Grady 'Observed and Future Climates of the Torres Strait Region'. (CSIRO report prepared for the TSRA, 2010) vii and 50.

<sup>11</sup> D Green, J Billy and A Tapim 'Indigenous Australians' knowledge of weather and climate' in (2010) 100 (2) *Climatic Change*.

<sup>12</sup> This work was performed by J Hunter using the IPCC AR4, A1F1 emissions scenario. Complications arise for this work because the size of the model grid in the vicinity of Mer Island is around five times the size of the island. Therefore, the model data has been linearly interpolated to roughly the centre of Mer Island. A Gumbel distribution to describe the present storm tides was used (see J Hunter, 'A simple technique for objectively estimating an allowance for uncertain sea-level rise' (2011) *Climatic Change* (submitted)). The model data used in this analysis was provided by the Australian National Tidal Centre and is in the process of being verified by the ACE CRC. This process results in data which is of the best quality that is practically achievable at this time, although some unresolved errors may remain. The IPCC projections of sea-level rise used in these calculations involve considerable uncertainty, arising from imperfect understanding both of the science and of the world's future emissions. These results relate to the increase in the probability of extreme events caused by a rise in mean sea level; they do not make any projections based on changes about the mean. These results do not include effects of wave run-up. They also only include the effect of wave setup to the extent by which it affected the specific tide gauge. These results were developed using data from tide gauges with sufficient quality and length of data to permit robust analysis. The method used to derive the future probability distributions has been formally peer-reviewed (see J Hunter, 'Estimating Sea-Level Extremes Under Conditions of Uncertain Sea-Level Rise' (2010) *Climatic Change* 99, 331-350).

## 1 *Indirect Impacts*

Plant and animal biodiversity on the islands and in the surrounding seas is likely to be significantly impacted by climate change. Beach areas are important habitats and nurseries for several significant species of marine animals. Increasing sea surface temperatures and ocean acidification are likely to impact the viability of sea grass beds, which are important feeding ground for turtles, and serve as a nursery area for prawns and tropical rock lobster.<sup>13</sup> Many marine animals including turtles, stingrays and sharks have long been known to have an immensely important cultural role for Mer Islanders.<sup>14</sup> In addition to the cultural damage, any major impacts on the lifecycles of these animals would reduce the availability of a nutritious source of fresh food for many coastal communities that traditionally hunt these animals.<sup>15</sup> Although detailed studies have not been carried out for the northern end of the Great Barrier Reef where the Mer Island group is located, modelling of sea surface temperature in the Great Barrier Reef Marine Park immediately to the south have identified a high likelihood of regular coral bleaching episodes within one or two decades.<sup>16</sup>

Climate impacts, such as more extreme weather or an increase in the intensity of storm tides, are likely to result in the need for more maintenance of basic infrastructure, including roads, culverts, jetties, airstrips, water piping, fencing and sea walls.<sup>17</sup> Such maintenance is more difficult and expensive than for less remote communities on the Australian mainland, particularly due to extra transportation costs and time involved with bringing all hardware into the Torres Strait by barge or air. Finding these additional resources is extremely difficult due to the existing extreme socio-economic disadvantage in this region.<sup>18</sup>

Surface and ground water resources are also likely to be impacted by climate change, making resource management in the dry season difficult. In the past, Mer depended on the collection of rain to provide drinking water, but high demand for water (particularly since the introduction of reticulated sewage systems) has caused supply problems. Rainwater tanks and a large, lined dam are used to trap and store water for use in the dry season with the increasing reliance on a desalination plant to meet demand.

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<sup>13</sup> H Marsh, A N M Harris, et al. (1997) 'The Sustainability of the Indigenous Dugong Fishery in Torres Strait, Australia & Papua New Guinea' (1997) 11 (6) *Conservation Biology*, 1375-1386.

<sup>14</sup> NHMRC 2000 *Nutrition in Aboriginal and Torres Strait Islander Peoples* (Commonwealth of Australia).

<sup>15</sup> Donna Green 'How Might Climate Change Affect Island Culture in the in the Torres Strait?' *Climate Change Impacts and Risk* (CSIRO Marine and Atmospheric Research Paper 11, 2006).

<sup>16</sup> T Hughes, A Baird, D Bellwood, M Card, S Connolly, C Folke, R Grosberg, O Hoegh-Guldberg, J Jackson, J Kleypas, J Lough, P Marshall, M Nyström, S Palumbi, J Pandolfi, B Rosen and J Roughgarden 'Climate Change, Human Impacts, and the Resilience of Coral Reefs' (2003) 301 *Science* 5635.

<sup>17</sup> D Green, S Jackson and J Morrison (eds), *Risks from Climate Change to Indigenous communities in the Tropical North of Australia* (DCCEE, 2009).

<sup>18</sup> ABS, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples, 2005* <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4704.0>>.

## 2 *Psycho-social Well-being*

The biggest determinant of Mer Islanders' individual and community 'health' is their strength of cultural connection to their islands. For these communities, their land and sea country is entwined into their ancestry, identity, language and livelihood. This connection suggests that biophysical changes affecting the 'health' of natural ecosystems are likely to also impact human systems: both through individuals' physical and psychological well-being, as well as the 'health' of a community's cultural cohesion. It is therefore likely that changes in natural systems will cause economic, social and psychological damage for the Island's community, especially if these impacts affect totemic fauna e.g. shark, other important sea food e.g. crayfish, turtle or culturally important flora e.g. wongai and almond trees. Such problems are likely to further hinder Islanders' attempts to reinvigorate traditional gardening practices.

As a result of the indirect impacts outlined above, the implications for the health and well-being of Islanders have not been given proper consideration to date in literature addressing climate impacts. Specific examples include how extreme weather events are likely to damage sacred sites, which, despite several Elders drawing these issues to the state and federal government representatives' attention, has not yet been addressed.<sup>19</sup>

### B *Legal Options to Facilitate Adaptation to Climate Change in the Torres Strait*

The types of laws that Torres Strait Islanders could use to assist them to address climate change impacts fall into two broad categories: laws that are aimed at protecting Indigenous culture and land rights, like the *Torres Strait Islander Cultural Heritage Act 2003* (Qld) and the *Native Title Act 1993* (Cth), and laws that are directed at finding persons liable for damage to the environment, such as tort laws and specific environmental statutes.

There is some legal recognition of generic Torres Strait Islander culture. *Ailan Kastom* is recognised by State and Commonwealth agencies through enshrinement in the *Torres Strait Islander Land Act 1991* (Qld)<sup>20</sup> and refers to a distinctive Torres Strait Islander culture and way of life, incorporating traditional elements of Islander beliefs together with Christianity. The way that the Act protects Torres Strait Islander culture is explored further below. Although the communities in the Torres Strait work collectively on many issues, and share extended family networks, there remain many significant cultural differences between communities; differences most clearly seen through language groupings and cultural practices. As previously noted, the differences in land holding between the Islands themselves (either exclusive or non-exclusive) further differentiates what options might be available at the inter-island level.

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<sup>19</sup> D Green, S Jackson and J Morrison (eds), *Risks from Climate Change to Indigenous communities in the Tropical North of Australia* (DCCEE, 2009).

<sup>20</sup> Defined as: 'generally the body of customs, traditions, observances and beliefs of Torres Strait Islanders or of a particular group of Torres Strait Islanders, and includes any such customs, traditions, observances and beliefs relating to particular persons, areas, objects or relationships', (*Torres Strait Islander Land Act 1991* (Qld), s 2.02).

Public interest litigation has always played a key role in ensuring that citizens are heard and their rights are protected. Mer Island has a proud tradition of public interest litigation, being the home of Eddie Mabo, whose case in the High Court brought about the recognition of native title and the *Native Title Act 1993* (Cth).<sup>21</sup>

### 1 *Laws to Protect Torres Strait Culture*

In 2003, Queensland reshaped its Indigenous cultural heritage laws. Two corresponding Acts were passed, the *Aboriginal Cultural Heritage Act 2003* (Qld) that applies to Aboriginal cultural heritage and *Torres Strait Islander Cultural Heritage Act 2003* (Qld) (TSICH Act) which applies to Torres Strait cultural heritage. The aims of the legislation are to provide effective recognition, protection and conservation of Aboriginal cultural heritage. Importantly, the Act includes fundamental principles such as respect for Torres Strait Islander knowledge, culture and customary practices. It also recognises that Torres Strait Islanders should be the primary guardians, keepers and knowledge holders of Torres Strait Islander cultural heritage and reaffirms the importance of respecting, preserving and maintaining knowledge, innovations and practices of Torres Strait Islander communities. It recognises that activities involved in recognition, protection and conservation of Torres Strait Islander cultural heritage are important because they allow Torres Strait Islanders to reaffirm their obligations to island custom. The principles also affirm the need to establish timely and efficient processes for the management of activities that may harm Torres Strait Islander cultural heritage.<sup>22</sup>

Climate change will have a significant impact on Torres Strait Island culture through a number of direct and indirect impacts (outlined in the previous section). In the Mer Island group specifically, inundation of graves has already occurred on Dauar, and several significant coastal heritage sites are currently impacted by inundation (at high tide) and erosion. From interviews with Elders carried out by Green between 2006—2010, several Mer Island Elders identified areas of particular cultural significance. These included the loss of their traditional fish traps due to an increase in wave energy damaging the rock walls and overtopping by sand (see figure 2); the loss of traditional dances associated with totemic animals that are not appearing at expected times; changes in breeding patterns, for example turtles not being able to reach breeding grounds because of fallen trees caused by erosion; a feeling of lack of control of their country due to an inability to revegetate sand dune areas with trees as they used to do in past times.

An unresolved question leading from these cultural heritage laws—and particularly from the TSICH Act—is whether they serve to protect Torres Strait Islander culture from climate change? Is there a duty of care under the TSICH Act owed by persons carrying out activities to take reasonable and practical measures to ensure that cultural heritage is not harmed? The TSICH Act allows the Minister to develop cultural heritage duty of care guidelines to provide guidance to ensure cultural heritage is not harmed. These guidelines do not contemplate a situation such as climate change that will significantly diminish Torres Strait Islander cultural heritage, as outlined above. It

<sup>21</sup> *Mabo v Queensland (no 2)* (1992) 175 CLR 1.

<sup>22</sup> *TSICH Act*, s 6.

could be that Torres Strait Islanders could argue that the specific threats of climate change require the Minister to issue detailed guidelines to call on polluters to take explicit actions to protect their heritage. Failure to issue such guidelines would conflict with the principles of the TSICH Act.

As is the case with negligence, the causation issues will be problematic in terms of proving a breach of the duty of care against polluters. Section 23 of the TSICH Act, that sets out the duty, discusses the need to consider (in determining a breach) whether the activity is likely to be causing harm to Torres Strait Islander culture. Consequently, it would be necessary to link the activities of a particular polluter with the harm being caused. Certainly putting such polluters on notice would increase the likelihood of a breach of the duty, if consultation was not undertaken by the polluters about the means to alleviate the harm. Importantly, as is the case with many environmental laws, the Court can order the costs of rehabilitation or restoration be paid by the polluter if they are found to have breached their duty of care.<sup>23</sup> This could be crucial in the case of climate change in forcing polluters to pay for adaptation costs where in the short term, there may be structures—such as seawalls—that could provide some level of immediate protection to cultural heritage sites.

One of the main deficiencies of the TSICH Act is that it does not allow for Torres Strait Islanders to take enforcement action to rectify a breach, unlike similar Queensland environmental laws which do allow for third party enforcement.<sup>24</sup> The power to enforce the TSICH lies with the relevant Queensland Minister, in this case, the Minister for Environment and Resource Management. There has been no enforcement action undertaken by the Minister to enforce a breach of the TSICH as of July 2011. Nevertheless, the lack of wider third party enforcement powers is not a complete impediment to action by Torres Strait Islanders. Instead it would be necessary to use equitable principles to bring enforcement action, similar to what has been done under other environmental laws where no such specific power exists.<sup>25</sup>

There is also an overarching level of protection for Torres Strait Islander culture provided for by the Commonwealth Government, in the *Aboriginal and Torres Strait Islander Protection Act 1984* (Cth). While the law is currently being reviewed, it provides the Commonwealth Minister for Indigenous Affairs with the ability to make an emergency declaration for an area or object. The Minister only needs to be satisfied that the area is under imminent threat of injury or desecration.<sup>26</sup> In the case of the more permanent protections available under that Act, the Minister must receive a report and allow people to make representations about possible orders.<sup>27</sup> It is unlikely that the Minister would make such orders given much of the inaction is occurring as a result of the lack of federal government initiatives in this area. However, it could be possible for a declaration to be made that generally recognised the threats facing the Torres Strait and required action to protect areas of concern.

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<sup>23</sup> *TSICH Act*, s 27.

<sup>24</sup> *Integrated Planning Act 1997 (Qld)* s 4.3.22, *Nature Conservation Act 1992 (Qld)*, s 173B; *Environmental Protection Act, 1994 (Qld)*, s 507

<sup>25</sup> *Environment East Gippsland Inc v VicForests* [2010] VSC 335.

<sup>26</sup> *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), s 9.

<sup>27</sup> *Ibid* s 10.



## 2 Native Title

Native title is recognised as an important form of customary land law for Indigenous Australians. Native title rights are particularly important to the Torres Strait. Not only did the Mabo decision establish those rights, but *all* communities in the Torres Strait have their native title rights and interests legally recognised. Of the 59 native title determinations made in Queensland as at July 2007, 27 are related to Torres Strait communities.<sup>28</sup> This is the opposite situation to most mainland Indigenous communities which are still fighting in the Courts to have their native title rights recognised.<sup>29</sup> Such claims can take 10-15 years to finalise.<sup>30</sup>

One of the key barristers involved, Keon-Cohen, noted that the Mabo case in turn became a ‘real test of the participants of the system, of human strengths and weaknesses, of political and legal forces.’ Sadly Mabo did not survive to see his life’s work, and many others involved in the case died during the ten year fight for their land.<sup>31</sup> Their lasting legacy has been to set up a system of recognition of these rights through the *Native Title Act 1993* (Cth) (NT Act) which provides for the protection and recognition of native title.<sup>32</sup> The Mabo decision is also recognised as a major turning point in post-colonial history in Australia.<sup>33</sup>

Those who hold exclusive determinations of native title, such as the Traditional Owners of the Mer Island group, obtain the right to control and manage land, similar to freehold landowners. This gives them a powerful right to manage their land, to the exclusion of all others. Most native title rights have not been recognised with such strength and include only the lesser rights to fish and hunt, and undertake cultural practices on the land, rather than manage the land exclusively. The NT Act regulates the recognition of these rights, and sets up a system to ensure that there are certain procedures to be adopted before those rights can be affected. The NT Act also sets up a system of compensation if Governments allow those rights to be affected.

It took over nine years to resolve the rights to the Torres Strait Island native title sea claim which were determined in July 2010, over 44,000 km<sup>2</sup> of ocean between Cape

<sup>28</sup> Determinations include Badu & Moa People #2, Badu Islanders #1, Buru & Warul Kawa, Dauan People, Erubam Le (Darnley Islanders) #1, Garboi, Gebara Islanders #1, Kaurareg People (Murulug #1), Kaurareg People (Mipa, Tarilag, Yeta, Damaralag), Kaurareg People (Murulug #2), Kaurareg People (Ngurupai), Kaurareg People (Zuna), Kulkalgal People, Mabo, Mabuig People, Masig People and Damuth People, Meriam People, Moa Island, Mualgal People, People of Boigu Island #2, Porumalgal Poruma People, Saibai Island, Ugar (Stephen Islanders) #1, Warraber People, Warraberalgal, Porumalgal and Iama Peoples, Yam Islanders/Tudulaig People, Torres Strait Regional Sea Claim, National Native Title Tribunal website <<http://www.nntt.gov.au/Native-Title-In-Australia/Queensland/Pages/Queensland.aspx>>.

<sup>29</sup> National Native Title Tribunal website <<http://www.nntt.gov.au/Applications-And-Determinations/Search-Applications/Pages/Search.aspx>>.

<sup>30</sup> Yalanji determination <[http://www.nailsma.org.au/publications/kantri\\_laif\\_issue\\_3\\_2007.html?tid=427709](http://www.nailsma.org.au/publications/kantri_laif_issue_3_2007.html?tid=427709)>.

<sup>31</sup> B Keon-Cohen, ‘The Mabo Litigation: A personal and procedural account’ (2000) 35 *Melbourne University Law Review*.

<sup>32</sup> *Native Title Act 1993* (Cth) s 3.

<sup>33</sup> Margaret McMurdo, President of Queensland Court of Appeal, ‘Traditional Pacific Land Rights and International Law: Tensions and Evolution’, presented at 18<sup>th</sup> *Pacific Judicial Conference*, 15-18 June 2009, Tahiti. 4.

York and Papua New Guinea.<sup>34</sup> In the sea claim, Justice Finn of the Federal Court recognised the rights of Torres Strait Islanders to use marine resources for food as well as for commercial purposes. The native title in the sea claim differs from the title over Mer Island in that it is non-exclusive. It allows ships, fisherman and other businesses to continue to operate in the waters that have the determination made over them. The non-exclusive title does require that Islanders are consulted about activities in these waters prior to a licence, or other right to operate, being granted or extended.

One of the risks posed by climate change is that sea level rises or other storm events will damage land—and infrastructure located on it—held by Torres Strait Islanders under the NT Act, as well as the rights over the sea and inter-tidal zones. Given that native title cannot be extinguished, except in accordance with the NT Act, there is an interesting, if currently unresolved question about whether the NT Act effectively protects Torres Strait Islanders' land rights from the impacts of climate change.

There is an argument that sea level rise is an 'act' in the sense contemplated by and protected under the NT Act. Of relevance, section 226 of the NT Act defines 'acts that affect native title' to include not only positive acts such as the making of legislation or granting of a licence, but the 'creation, variation, extension, renewal or extinguishment of any interest in relation to land or waters'. The rising sea will inevitably extinguish certain rights and interests over land due to inundation and erosion, in which case this suggests it could be considered an 'act'.

Another important related issue is how climate change is impacting Islanders' native title rights over the sea. As previously noted, climate change will acidify the ocean and raise sea surface temperatures. In the Torres Strait region, these impacts will include damage to reefs, sea grass beds and traditional fishing grounds. It is likely that the rights that have been won in the Torres Strait to allow for both customary fishing rights and commercial fishing rights will be significantly diminished over time by these impacts. Again, an important question is whether these impacts are an 'act' that extinguishes or diminishes rights, and for which compensation should be payable under the NT Act. In this case, the 'act' would be one undertaken by those producing greenhouse gas emissions, rather than the Australian government. Yet insufficient action by the Australian government to mitigate the impacts of those emissions on Torres Strait Islanders' native title rights could arguably be considered an 'act'.

This may enable native title holders to bring a compensation claim for the impacts of climate change on extinguishing or impairing their native title rights. The NT Act provides for a regime to award compensation to traditional owners for the impairment of their native title rights over an area of land or water.<sup>35</sup> It could be argued that the *failure* to respond to climate change implicates the Commonwealth and Queensland governments specifically in contributing to the extinguishment, or impairment, of native title rights. This is particularly pertinent in the case of Mer Island. Where the land is inundated, their rights will be diminished due to the non-exclusive rights held to the surrounding ocean.

<sup>34</sup> HREOC Media Release, 'Successful Torres Strait regional sea claim a cause for celebration' (2 July 2010) <[http://www.hreoc.gov.au/about/media/media\\_releases/2010/65\\_10.html](http://www.hreoc.gov.au/about/media/media_releases/2010/65_10.html)>.

<sup>35</sup> See, eg, *Native Title Act 1993* (Cth) ss 17, 20, 22G, 22L, 23J, 50, 51, 51A.

There have been no successful compensation claims under the NT Act as of July 2011. This is partly because of the time taken to establish native title, a prerequisite prior to compensation determination under the NT Act. In the case of Mer it would certainly be possible for them to seek compensation for any extinguishment of their rights both over the sea and the land. Compensation can be no more than what would result from a compulsory acquisition and enshrines the concept of ‘just terms’.<sup>36</sup> Compensation would be based on market value plus an amount to reflect the cultural value of the land. In the case of the Torres Strait, the market value could be considerable. Therefore, Torres Strait Islanders could lodge claims for compensation on the basis of the extinguishment of their rights as a result of the impacts caused by climate change. Other than compensation, the NT Act does not otherwise offer suitable remedies to protect Islanders native title rights from climate change.

### 3 *Tort Laws and Environmental Statutes*

The question remains as to whether it is fair that some Torres Strait Island communities suffer a disproportionate share of the consequences of climate change. Environmental protection laws in many countries seek to ensure that people are held accountable for the damage they cause to the environment. Australian academics such as Durrant have argued that existing environmental protection laws in Australia allow regulatory authorities to control greenhouse gas emissions as pollutants.<sup>37</sup> However, as her research shows, there has been little action to use the current laws available in most Australian states to prosecute those responsible for unlawful emissions, or to in fact authorise those emissions under pollution licences.<sup>38</sup> It is arguable that in this context the rest of Australia has an obligation to assist communities in the Torres Strait to ensure their culture and way of life is preserved.

In Australia, no tort cases have yet been commenced over climate change impacts because of the complex causation issues and other tort law reforms that have made it harder to sue governments for breaching their duty of care.<sup>39</sup> There is still the potential for such claims to be brought against large-scale emitters through nuisance and negligence actions. The ability to make the causation link is, however, incredibly difficult to make. An eminent class action lawyer, Cashman, has said:

Any plaintiff seeking to use tort law for either preventative or remedial purposes in connection with damage arising out of human-induced climate change would face formidable legal, logistical, evidentiary and financial obstacles....The picture is undoubtedly complicated by underlying uncertainties in the law of negligence itself, some of which have been created or exacerbated by recent legislative ‘reforms’. Negligence based climate change cases presently lie in the realm of hypothetical.<sup>40</sup>

Almost two years ago, Gray and Hodgson commenced the first case in Australia that used existing pollution laws to target an individual coal fired power station for its

<sup>36</sup> B Keon-Cohen, ‘Compensation and Compulsory Acquisition under the Native Title Act 1993’ (2002), 28 *Monash University Law Review* 1.

<sup>37</sup> N Durrant, *Legal Responses to Climate Change*, (Federation Press, 2010) 201.

<sup>38</sup> Ibid 215-216.

<sup>39</sup> Ibid 297, *Civil Liability Act 2003* (Qld) s 36(2).

<sup>40</sup> P Cashman and R Abbs, ‘Liability in Tort for Damage Arising from Human-Induced Climate Change’ in R Lyster (ed), *In the Wilds of Climate Law*, (Australian Academic Press, 2010) 237-238.

impact on climate change. The case against Macquarie Generation is for wilfully or negligently disposing of waste (carbon dioxide) at their Bayswater Power Station at Muswellbrook in the Hunter Valley NSW, in a manner that harms, or is likely to harm the environment.<sup>41</sup>

Similar actions have succeeded in the US,<sup>42</sup> however the focus was on the failure of the EPA to regulate vehicle emissions under the *Clean Air Act*. Importantly, in that case, the United States Supreme Court recognised the importance of regulating emissions. Justice Stevens stated:

[The EPA's] argument rests on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum. Yet accepting that premise would doom most challenges to regulatory action.<sup>43</sup>

However, the litigation to date in Gray has been hard fought. Macquarie Generation held an environmental protection licence ('the licence') for operating the power station. Gray alleged that Macquarie Generation had no legal authority to emit carbon dioxide gas from the power station, as carbon dioxide was not a gas which constituted a 'waste' under the licence. It was therefore in breach of its licence terms.

Soon after the proceedings commenced, Macquarie Generation filed an interlocutory motion seeking to dismiss Gray's proceedings on the basis that they were frivolous or vexatious, no reasonable cause of action was disclosed, or that the proceedings were otherwise an abuse of the process of the court. The argument essentially came down to the interpretation of the licence which Macquarie Generation holds, and what conditions could be implied, if any.

Macquarie Generation suggested that carbon dioxide was a necessary by-product of burning coal for electricity generation, and that the EPA had contemplated this when it issued the licence. On broad principles of interpretation, the language of the licence should be read as a whole, and that its provisions 'were intended to give effect to harmonious goals.' Otherwise, the licence would be of no practical use. Moreover, Macquarie argued that 'the licence contemplates that CO<sub>2</sub> will be released into the environment as a result of the operation of the Bayswater Power Station and, subject to the conditions of the licence, permits this to occur.'

Justice Pain of the NSW Land and Environment Court agreed with Macquarie Generation on its broad construction of the licence and found that the licence would have 'no sensible operation [if it was] construed as not allowing the emission of CO<sub>2</sub>.'<sup>44</sup> The remaining claim was that if there was a finding that Macquarie Generation did in fact have lawful authority to dispose of waste by way of emission of carbon dioxide under the licence, then the question then becomes whether that authority extends to the emission of carbon dioxide in a manner 'which does not have reasonable regard and care for the interests of other persons and the environment'.<sup>45</sup>

<sup>41</sup> *Gray and Hodgson v Macquarie Generation* [2010] NSWLEC 34.

<sup>42</sup> *Massachusetts v EPA*, 549 US 497, 524 (2007).

<sup>43</sup> *Massachusetts v EPA*, 549 US 497, 524 (2007).

<sup>44</sup> *Gray and Hodgson v Macquarie Generation* [2010] NSWLEC 34 at 55-56.

<sup>45</sup> *Gray and Hodgson v Macquarie Generation* [2010] NSWLEC 34 at 67-68.

After Gray amended his pleadings to argue this point, Macquarie Generation issued another strike out application on the basis of the pleadings being embarrassing. In February 2011, Justice Pain gave judgment allowing those pleadings to go ahead if further particulars were provided. Since that judgment was handed down, Macquarie Generation has appealed to the NSW Court of Appeal. If the appeal is dismissed, it will be some time before the case can proceed. The fact that after two years the case is yet to progress, after protracted appeals and interlocutory strike out applications, suggests that there will be no quick legal resolution to climate change through the use of existing climate laws.<sup>46</sup>

#### 4 *Has the Use of Tort Laws Worked Elsewhere?*

Climate litigation in the US has often sought to bring damages claims using pollution or tort laws. Some of this litigation has been commenced by State governments, others by Indigenous communities. In particular, there have been a number of public nuisance cases that have sought redress and damages for the impacts of climate change.<sup>47</sup> None of these cases have ultimately succeeded. The Supreme Court determined the issue in *American Electric Power Company v State of Connecticut*.<sup>48</sup> They rejected the lawsuit stating that in the absence of further federal regulation of greenhouse gas emissions there was no role for public nuisance. The Court found that Congress assigned the role of dealing with greenhouse gas emissions to the Environmental Protection Agency through the *Clean Air Act*, with the courts playing only a limited secondary role. The Court did not however settle the issue of standing to sue for private nuisance. In *Kivalina v Exxon Mobil*,<sup>49</sup> the Native Inuit village of Kivalina commenced a public nuisance action as well as a conspiracy case against nine oil companies, fourteen power companies, and a coal company for damages it is suffering from the melting Arctic ice.<sup>50</sup> The case was initially dismissed as non-justiciable, and an appeal against this decision is yet to be heard.<sup>51</sup> However the chances of it succeeding have greatly reduced following the Supreme Court decision in *American Electric Power*.

Extreme weather events, such as Hurricane Katrina, have also resulted in a significant amount of litigation in the United States. One such case was *Comer v Murphy Oil*,<sup>52</sup> where 13 individuals harmed by Hurricane Katrina sued nine oil companies, 31 coal companies and four chemical companies for negligence stemming from their

<sup>46</sup> C McGrath, 'Legal Liability for Climate Change in Queensland', (2007) 13 *Queensland Environmental Practice Reporter* 17.

<sup>47</sup> *Native Village of Kivalina v ExxonMobil Corp*, 2009 WL 3326113, No09-17490 (9<sup>th</sup> Cir); *California v General Motors Corp*, 2007 WL 2726871 (ND Cal2007); *Comer v Murphy Oil USA Inc* No CIVA 1:05-CV436LGRHW, 2007 WL6942285; *North Carolina, ex rel Cooper v Tennessee Valley Authority* 615 F3d 291 (4<sup>th</sup> Cir. 2010).

<sup>48</sup> *American Electric Power Co, Inc, Et Al v Connecticut Et Al*, Supreme Court, 10-174 dated 20 June 2011. Decisions below *Connecticut et al v American Electric Power Company Inc et al* (2004) No 04-CV-05669 (US District Court for Southern District of New York, 15 September 2005). No 04-CV-05669 (US District Court for Southern District of New York, 15 September 2005), *Connecticut v American Electric Power Inc* 582 F 3d 309 (2<sup>nd</sup> Circuit 2009).

<sup>49</sup> *Native Village of Kivalina v ExxonMobil Corp*, 663 FSupp2d 863 (ND Cal 2009).

<sup>50</sup> Complaint for Damages at 1, *Kivalina v. Exxon Mobil Corp*, No 08-1138 (ND Cal Feb 26, 2008) <<http://www.uchastings.edu/wnw/docs/Kivalina%20Decision-Armstrong.pdf>> .

<sup>51</sup> *Native Village of Kivalina v ExxonMobil Corp*, FSupp2d, 2009 863 (ND Cal Sept 30, 2009).

<sup>52</sup> No1:05-CV-436-LG-RHW (30<sup>th</sup> August 2007)

contribution to the emission of greenhouse gases knowing those emissions would harm public health and private and public property interests. The District Court dismissed the claims on the basis that they were non-justiciable, and the Plaintiffs lacked standing to bring the action. However in late 2009, this decision was reversed by the US Court of Appeal.<sup>53</sup> The case is now proceeding to hearing on the damages claim.

The lack of outcomes in this area so far, does not give much hope that tort law holds the immediate answers to climate change litigation as a magic bullet as some have suggested.<sup>54</sup> The US cases in this area commenced in 2004 and have yet to have a successful damages claim determined. Limited success was achieved in obtaining an injunction in case of *North Carolina v Tennessee Valley Authority* requiring the plant to immediately install air pollution controls on a number of power plants.<sup>55</sup> In this case, the case targeted particulate pollution from nitrogen oxides, sulphur dioxide, rather than carbon dioxide. This decision was overturned on appeal.<sup>56</sup> It will be sometime before the case law is settled as to whether there is standing to proceed with such claims, and then more time will be needed to determine liability and damages in the US.

The progress both in the US and Australia in climate change litigation that has sought to pursue polluters directly suggests that the use of pollution or tort laws is not the best option for Islanders to achieve a timely outcome. Few Australian cases have sought legal recourse to address climate change in this manner because the causation issues are difficult to overcome.<sup>57</sup>

Specifically for Mer Islanders, their main concerns are about the loss of their land, culture and way of life. Damages will not be an adequate remedy for those issues. This paper therefore focuses more on how the laws that protect their land and culture can be used to encourage law reform. While these laws are specific to Australia, to some extent the concepts readily translate to customary law systems in the Pacific.

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<sup>53</sup> *Comer v Murphy Oil* USA 609 F3d 1049 (5<sup>th</sup> Cir2010).

<sup>54</sup> Shi-Ling Hsu, 'A Realistic Evaluation of Climate Change Litigation through the Lens of the Hypothetical Lawsuit' (2008) 79 *University of Colorado Law Review* 701.

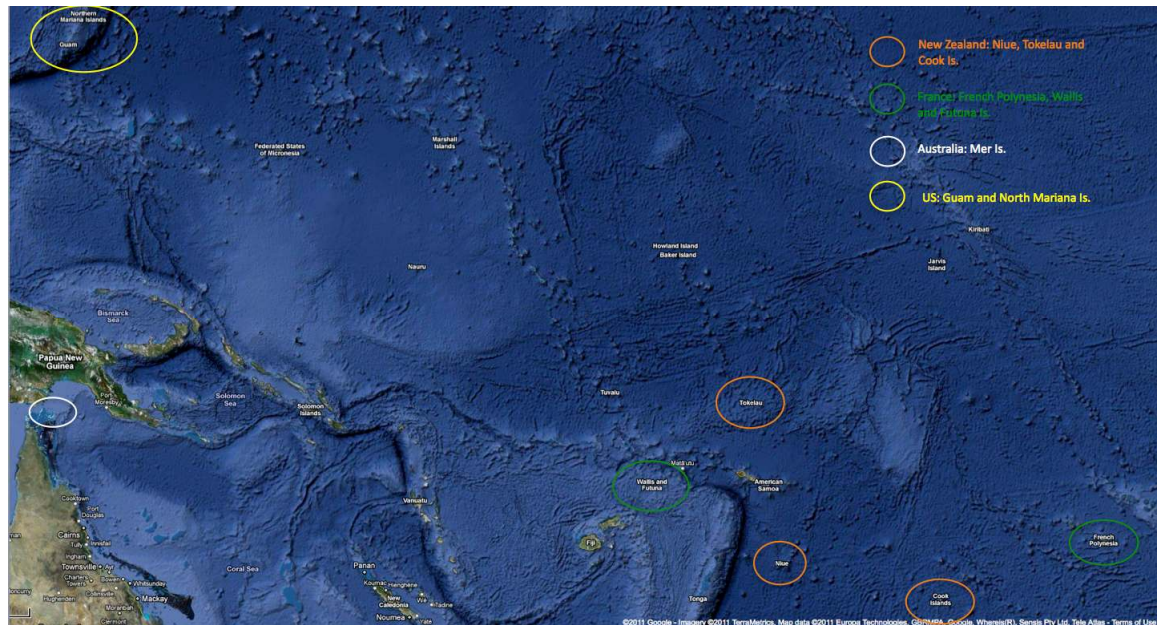
<sup>55</sup> *North Carolina, ex rel Cooper v Tennessee Valley Authority* 615 F3d 291 (4<sup>th</sup> Cir2010).

<sup>56</sup> *North Carolina, ex rel Cooper v Tennessee Valley Authority* 615 F3d 291 at 311-312 (4<sup>th</sup> Cir2010).

<sup>57</sup> Most Australian cases to date have focused on reviewing Government decisions to approve coal mines or coal-fired electricity generators. The first case to raise such issues was *Greenpeace Australia Limited v Redbank Power Company Pty Ltd and Singleton Council* (1994) 84 LGERA 143, where the Court imposed conditions upon a coal-fired power station in NSW requiring it to mitigate the effects of greenhouse gas emissions by the planting of sinks, the limitation of fuel sources for the station to tailings from particular mines, and the monitoring of and reporting on stack emissions. See also: *Australian Conservation Foundation v La Trobe City Council* (2004) 140 LGERA 100; *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment & Heritage* (2006) 232 ALR 510; *Gray v Minister for Planning* (2006) 152 LGERA 258; *Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources* [2007] F.C.A 1480; and *Re Xstrata Coal Queensland Pty Ltd & Ors* [2007] QLRT 33 where merits review was used to object to a mining lease before the Land and Resources Tribunal.

## III NON-STATE PACIFIC ISLAND CASE STUDIES

Figure 2: Location of non-state case study islands

A *Climate Change in the Pacific*1 *Sea Level Rise*

The South Pacific Sea Level and Climate Monitoring Project has been running for over a decade. The project uses tide gauges and satellite data to accurately record variations in long-term sea level and land movement. Monitoring from this project has shown that the region has experienced relatively high rates of sea level rise in the southwest Pacific, and falling rates in the northeast. The sea level trend for this region has been consistently higher than the global average for the last 16 years.

Many of the direct and indirect impacts from climate change outlined in the previous section for Mer Island will similarly impact these case study islands. Further discussion of precise impacts can be seen in Island specific reports.<sup>58</sup>

B *Constitutional Protections and Recognition of Customary Law*

There are many similarities between the recognition of Torres Strait *Ailan Kastom* and the Indigenous legal rights in the Pacific.<sup>59</sup> In Papua New Guinea (PNG), for example, the Constitution recognises “the worthy customs and traditional wisdom of our people.”<sup>60</sup> The National Goals and Directives for PNG also state that “PNG’s natural

<sup>58</sup> See, eg, SEAFRAME Niue, FSM, Cook Islands 2008.

<sup>59</sup> Margaret McMurdo, President of Queensland Court of Appeal, ‘Traditional Pacific Land Rights and International Law: Tensions and Evolution’, presented at 18<sup>th</sup> Pacific Judicial Conference, 15-18 June 2009, Tahiti.

<sup>60</sup> *Constitution of the Independent State of Papua New Guinea*, preamble.

resources and environment to be conserved and used for collective benefit and for the benefit of future generations”. Similar legislation exists to protect customary land to the *Native Title Act 1993* in the *Land Act 1996*, PNG. The *Constitution of the State of Samoa 1960* also recognises that the State of Samoa will be based on Christian principles and Samoan culture and traditions. It likewise recognises customary land that is held in accordance with the law of Samoan custom and usage, and sets up a Chiefs’ Court to deal with land disputes.<sup>61</sup>

Fiji recognises that there needs to be regard to the protection and enhancement of Fijian and Rotuman interests, and regard had to customs, traditions, usages, values and aspirations of the Fijian people. A system of native land management by native owners, *mataqali* that recognises customary rights, as well as a Native Land Commission to determine disputes, has been established.<sup>62</sup> In Tuvalu, the *Constitution of Tuvalu* recognises Christian principles, the rule of law and Tuvaluan custom and tradition. It states that the “happiness and welfare of the people of Tuvalu, both present and future, depend very largely on the maintenance of Tuvaluan values, culture and tradition, including the vitality and sense of identity of island communities and attitudes of co-operation, self-help and unity within and amongst those communities.” Similarly, their legal system recognises a system of native land and also allows adjudication of those rights, including fishing rights.<sup>63</sup>

Although many nations have constitutional provisions addressing environmental protection and environmental health as fundamental rights, in the Pacific there are only a handful of similar provisions.<sup>64</sup> The Constitution of the Northern Mariana Islands includes a right to a clean and healthful environment.<sup>65</sup> The Pitcairn Islands Constitution also contains a provision that establishes a right to the environment. It states “everyone has the right to an environment that is generally not harmful to his health or well-being and to have the environment protected, for the benefit of present and future generations, through such laws as may be made under this Constitution including laws to:

- (a) Prevent pollution and ecological degradation;
- (b) Promote conservation; and
- (c) Secure ecologically sustainable development and use of natural while promoting justifiable economic and social development.<sup>66</sup>

The *Constitution of Vanuatu 2006* states that, “Every person has the following fundamental duties to himself and his descendants and to others including to protect the Republic of Vanuatu and to safeguard the national wealth, resources and environment in the interests of the present generation and of future generations”.

<sup>61</sup> *Constitution of the Independent State of Samoa 1960* ss 100-101.

<sup>62</sup> *Constitution of the Sovereign Democratic Republic of Fiji (Promulgation) Decree 1990* s 100, *Native Lands Act 1978* (Fiji) s 2.

<sup>63</sup> *Native Land Ordinance (Tuvalu)*.

<sup>64</sup> Around 130 constitutions have such a provision see R Abate, ‘Climate Change, the United States and the impacts of Arctic melting: a case study in the need for enforceable international environmental human rights’ (2007), 26A *Stanford Environmental Law Journal*, 3, 3.

<sup>65</sup> *Commonwealth of the Northern Marian Islands Constitution*, article 1, s 9.

<sup>66</sup> *Pitcairn Islands of the Constitution*, s 19.



### C *Role of International Law and Human Rights Law*

At an international level, there has been little progress in using law to address climate change impacts. While it is certainly possible that Islanders could use international law to bring complaints under the various treaty systems, these complaints have not achieved much change. In 2005, the Inuit, who are the Indigenous inhabitants of the Arctic region of North America and Greenland, brought a petition to the Inter American Commission of Human Rights (IACHR).<sup>67</sup> The petition requested IACHR's assistance in obtaining relief from human rights violations resulting from the impacts of climate change caused by the acts and omissions of the United States (including their failure to act). In particular, in the petition the Inuit argued that the US had violated a number of rights set out in the *American Declaration of the Rights and Duties of Man*,<sup>68</sup> *International Convention on Civil and Political Rights (ICCPR)*<sup>69</sup> and *International Covenant on Economic, Social and Cultural Rights (ICESCR)*.<sup>70</sup>

The Inuit further argued that climate change will continue to impact on the Inuit people's right to enjoy their traditional lands, to maintain their cultural property, as well as their rights to health and life, residence, the inviolability of their home and right to means of subsistence. The IACHR rejected the petition on the grounds of admissibility but held a public hearing to present testimony of the impacts of climate change on Inuit people.<sup>71</sup>

In relation to climate change it may be possible for some non-state islands (other than the US territories who are US citizens) to use the *Alien Tort Claims Act* to seek redress for the impacts of climate change, so far as that relates to breaches of their human rights.<sup>72</sup> While *Alien Tort Claims Act* claims are extremely complex and fraught with difficulty, the failure of the US to take action and the extent of their emissions leave this a possibility.<sup>73</sup>

<sup>67</sup> Inuit Circumpolar Conference, *Petition to the Inter American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States*, 7 December 2005 (hereafter Inuit Petition) (11 May 2011) <[http://www.earthjustice.org/library/legal\\_docs/petition-to-the-inter-american-commission-on-human-rights-on-behalf-of-the-inuit-circumpolar-conference.pdf](http://www.earthjustice.org/library/legal_docs/petition-to-the-inter-american-commission-on-human-rights-on-behalf-of-the-inuit-circumpolar-conference.pdf)>.

<sup>68</sup> American Declaration of the Rights and Duties of Man, OAS Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/SerLV/II82 doc6 rev1 at 17 (1992).

<sup>69</sup> International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force generally 23 March 1976, for Australia 13 August 1980).

<sup>70</sup> International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 U.N.T.S 3 (entered into force generally 3 January 1976, for Australia 10 March 1976).

<sup>71</sup> I Millar and E Wartski, 'Climate change litigation- a human rights perspective' (2009) 18(2) *Human Rights Defender*, 2.

<sup>72</sup> R Reed, 'Rising Seas and Disappearing Islands: Can Island Inhabitants Seek Redress under the Alien Tort Claims Act?' (2002) 11 *Pacific Rim Law and Policy Journal* 339.

<sup>73</sup> R Abate, 'Climate Change, the United States and the impacts of Arctic melting: a case study in the need for enforceable international environmental human rights' (2007), 26A *Stanford Environmental Law Journal*, 3, 2, 19-25.

## D Discussion of the Use of International Law for the Torres Strait Case

It is possible that Torres Strait Islanders could similarly bring their complaints to United Nations bodies. In particular, the United Nations Human Rights Committee (HRC) can receive individual complaints and actively investigate and rule upon them.<sup>74</sup> Some commentators have argued that this system is the oldest, most used, and most authoritative within the UN regime.<sup>75</sup> While the HRC cannot make binding decisions, its recommendations can highlight the problem and place moral and political pressure on governments to act.<sup>76</sup> The rulings of the HRC are unenforceable, and as a consequence, may not influence Australian government policy to assist Torres Strait Islanders.

While Australia is a signatory to the ICCPR and ICESCR, as well as the Declaration on the Rights of Indigenous People, there is no Federal Bill of Rights that expresses a duty to protect Indigenous rights.<sup>77</sup> Nor does the Australian Constitution expressly refer to human rights. This situation is different to other Pacific countries.

The recognition of native title in Australia is significantly less than the recognition of Aboriginal customary law.<sup>78</sup> While the system is not the same as the recognition in many Pacific Constitutions of the rights of customary landowners, there are some important similarities. Importantly, the lessons learned in Australia are analogous to many Pacific countries due to the explicit recognition of customary law rights in their constitutions.<sup>79</sup>

## IV SUPPLEMENTARY CASE STUDIES

In this section, the paper seeks to explore and compare the situation with non-states in the Pacific. In most Pacific jurisdictions, customary land law has a strong role to play in protecting Islanders from climate change. Other areas have strong environmental protection laws that may be of assistance and may provide useful models for law reform in the Torres Strait.

<sup>74</sup> *International Covenant on Civil and Political Rights 1966*. Australia acceded to the Optional Protocol to the ICCPR on 25 September 1991 and the Protocol came into force for Australia on 25 December 1991.

<sup>75</sup> M Doelle, 'Climate change and Human Rights: The role of International Human Rights in motivating States to take Climate Change seriously', (2004) 1 *Macquarie Journal of International and Comparative Environmental Law*, 186.

<sup>76</sup> E Evatt, 'Reflecting on the role of international communications in implementing human rights' (1999) 20 *Australian Journal of Human Rights* (5 October 2007) <[www.austlii.edu.au/au/journals/AJHR/1999/20.html](http://www.austlii.edu.au/au/journals/AJHR/1999/20.html)>.

<sup>77</sup> I Millar and E Wartski, 'Climate change litigation- a human rights perspective' (2009) 18(2) *Human Rights Defender*, 3.

<sup>78</sup> Z Korosy, 'Native Title, Sovereignty and the Fragmented Recognition of Indigenous Law and Custom' (2008) 12(1) *Australian Indigenous Law Review*, 81.

<sup>79</sup> *Constitution of the Republic of Vanuatu 1980*, s 73, *Constitution of the Independent State of Samoa 1960*, s100-102, *Constitution of the Independent State of Papua New Guinea*, preamble recognizes worthy custom and traditional wisdom of our people, as well as section 54, and Land Act 1996, s 2, *Constitution of Sovereign Democratic Republic of Fiji (Promulgation) Decree 1990*, s100 and chapter III, *Constitution of Kiribati*, preamble, *Constitution of Tuvalu*, preamble.

### A *French Polynesia, Wallis and Futuna, France*

French Polynesia is a collective group of islands, while Wallis and Fortuna are territories. Both are an overseas territory community within the Republic of France.<sup>80</sup> Residents of these islands are French citizens and vote in French elections. None of these islands have independence (such as self-governing states like Niue or the Cook islands that are in free association with New Zealand). While French Polynesia has its own Territorial Assembly, Assembly of French Polynesia, the local government has no competence to deal with justice, education, security and defence. In that situation, the French territories are in a very similar situation with their parent nation France, as are the Torres Strait Islands with Australia.

One of the main differences between French Polynesia and the Torres Strait is in the recognition of customary law. After colonisation, the French in these territories substituted their own land tenure system and disregarded the traditional land tenure system.<sup>81</sup> Sales of land to French foreigners were recognised similarly to the colonisation of Australia, and this has continued to cause cultural clashes and uncertainty over land ownership.

The French Constitution may provide French Polynesians and residents of Wallis and Fortuna with an interesting argument given they are French Citizens. In 2005, France amended its constitution to include environmental provisions, known as the Environment Charter. The Charter contains 10 articles covering rights and responsibilities of its citizens in relation to the environment. As it is incorporated into the Constitution, it is legally binding and gives environmental rights and responsibilities the same status as other rights, such as the right to life and universal suffrage. Article 1 of the Charter states, “Everyone has the right to live in a balanced environment which shows due respect for health.”<sup>82</sup> This could enable French Polynesians and residents of Wallis and Fortuna to make an extensive argument under French law about how climate change is affecting their environment and health. In addition, France is a signatory to the European Convention on Human Rights and Fundamental Freedoms, and therefore within the jurisdiction of the European Court of Human Rights (ECHR). Islanders could bring a claim if they can show that France is directly and personally affecting their rights. However, it is necessary like other international law mechanisms, to exhaust remedies within French Courts before such an appeal is brought. The argument in relation to France could be more difficult where steps have been taken to reduce emissions through the EU Emissions Trading system, than against countries like Australia or the US where no current mechanisms exist to reduce emissions.

There has only been one case in the ECHR that has favourably considered environmental rights. In *Lopez Ostra v Spain*,<sup>83</sup> a Spanish citizen complained of fumes, noise and contamination from a waste facility near her home. Lopez Ostra argued that the failure of the Government to deal with the nuisance constituted an

<sup>80</sup> Article 1, Organic Law, 2004, governed by Article 74 of France’s Constitution.

<sup>81</sup> Y-L Sage, ‘Evolution of Land Policy in French Polynesia’ (1996) 7, *Canterbury Law Review*, 382.

<sup>82</sup> *Constitution of France*, 4 October 1958 <<http://www.assemblee-nationale.fr/english/8ab.asp>>.

<sup>83</sup> *Lopez Ostra v Spain*, 303-C EurCtHR (ser A) at 46 (1994) <<http://www.worldlii.org/eu/cases/ECHR/1994/46.html>>.

unlawful interference with her home and peaceful enjoyment of it, and a violation of her liberty and safety.

### B *Guam and the Northern Mariana Islands, United States*

Both Guam and Northern Mariana islands are unincorporated, organised territories of the United States of America. Guam is subject to an *Organic Act of Guam* passed by the US Congress.<sup>84</sup> It has its own seat of government in Agana, Guam. The Organic Act includes various human rights or bills of rights. The right to life (in a limited sense in not being deprived of life without due process of law) might be useful in respect to legal recourse. Guam's Organic Act also adopts part of the US Bill of Rights.<sup>85</sup> Laws of the United States that are made applicable to the Northern Mariana Islands also apply in Guam.<sup>86</sup> Guam is also responsible for a non-voting delegate to the Congress.

The Northern Mariana Islands are regarded as a Commonwealth because it is regarded as self-governing under its own Constitution. Its Constitution includes strong environmental rights; Article 1, section 9 states:

Each person has the right to a clean and healthful public environment in all areas, including the land, air and water. Harmful and unnecessary noise pollution, and the storage of nuclear or radioactive material and the dumping or storage of any type of nuclear waste within the surface or submerged lands and waters of the Northern Mariana Islands, are prohibited except as provided by law.

Arguments could be made about how the rights of Northern Mariana islanders are infringed by the impacts of climate change so far as it affects a healthful public environment. Climate change as discussed earlier will impact on land, air and water in this area.

In both Guam and the Northern Mariana Islands the *Clean Air Act* applies. This means that the litigation pursued in *Massachusetts v EPA* could assist the Islanders to force the EPA to regulate emissions that are impacting their islands. To this extent, developments in the US case law will have a significant impact on the rights of these Islanders.

Similarly, it may be possible for Guam and the Northern Marianas to argue about the application of doctrines accepted in the US such as the public trust to the atmosphere that are the subject of new litigation brought by children in the US.

### C *Niue, Tokelau and Cook Islands, New Zealand*

The free association relationship between the Cook Islands and New Zealand means that New Zealand cannot make law for the Cook Islands. Nor does New Zealand law apply (except that which applied prior to independence) as the Cook Islands has power

<sup>84</sup> *Organic Act of Guam* 48 U.S.C. § 1421 et seq.

<sup>85</sup> See, eg, 1421b (u) incorporates article I, section 9, clauses 2 and 3; article IV, section 1 and section 2, clause 1; the first to ninth amendments inclusive; the thirteenth amendment; the second sentence of section 1 of the fourteenth amendment; and the fifteenth and nineteenth amendments.

<sup>86</sup> Organic Law of Guam, s 1421q.

to make its own laws, and their executive has full executive powers. The Cook Islands remain part of the realm of New Zealand, and Cook Islanders retain New Zealand citizenship. Section 5 of the *Cook Islands Constitution Act* ensures New Zealand retains responsibility for external affairs and defence, but these responsibilities can only be exercised on request of the Cook Islands.<sup>87</sup>

Due to the arrangements outlined above, it is not possible to use New Zealand land, heritage or pollution laws to protect the rights of Cook Islanders against climate change because the existing laws that applied at independence did not elaborate on these areas. The *Cook Islands Constitution Act* has no protections for customary land, but section 64 protects certain fundamental human rights including, “The right of the individual to own property and the right not to be deprived thereof except in accordance with law.” An interesting argument might evolve under this provision as to whether this would protect landholders from climate change impacts caused by sea level rise and a response to it was not legislated.

The only other heritage laws that apply in the Cook Islands are the *Cook Islands Natural Heritage Act 1999*. Section 5 of that Act sets out that the objects of the Trust are to:

- (a) investigate, identify, research, analyse, study, classify, record, integrate and preserve scientific information and traditional knowledge of and practices relating to flora and fauna;
- (b) make such information available to the public;
- (c) assist Government departments and agencies upon request with the supply of information.

Its powers include educating the public on the objects of the Trust, and obtaining aid and finance to assist with these objects. To the extent that traditional knowledge of flora and fauna is showing changes due to climate change impacts, the Trust has an important role in both compiling this information and ensuring that it becomes publicly available so that flora and fauna threatened by climate change is adequately researched. The objects of the Trust however are quite narrow, and would not assist to protect these flora and fauna if they were at risk.

Similarly the *Environment Act 2003* makes the National Environmental Service responsible for protecting the Cook Islands environment. The functions of the service in section 9 include:

- (d) prevent, control and correct the pollution of air, water, and land;
- (e) carry out investigations, research and monitoring relevant to the protection and conservation of the natural resources of the Cook Islands;
- (f) protect, manage, and prevent damage to any beach, land, internal waters, inland waters, drain, building, market place and any area used or frequented by members of the public;
- (g) monitor and evaluate activities which significantly affect the environment;
- (o) make recommendations and provide, advice to file Government in relation

<sup>87</sup> Cook Islands, *Constitutional Status and International Personality* (Ministry of Foreign Affairs and Trade, Wellington, May 2005).

to any regional or international obligations arising from any regional or international conventions, treaties, protocols or agendas relating to the environment, which the Cook Islands has ratified, or to which the Cook Islands has acceded or become a signatory;

The responsibility to protect beaches and market places would mean that Cook Islanders could hold the service responsible for protecting these areas from the impacts of climate change. The service also has a responsibility to prevent pollution; however, given the small emissions contribution of the Cook Islands, this is of little direct assistance. Such provisions though could be used to advocate over transboundary pollution caused by carbon dioxide, given the Services' responsibility for international conventions which include the Kyoto Protocol.<sup>88</sup> The pollution offences in the *Environment Act 2003* are unlikely to give rise to arguments about the impact of carbon dioxide and transboundary pollution on the islands, as they are not broad enough to capture such matters.

The relationship between New Zealand and Cook Islands could be used by the Cook Islands and Niue to put pressure on New Zealand to advocate for greater protection of those islands. Both countries are able to request that New Zealand exercise their foreign affairs in a particular way on their behalf, which presumably could include negotiations on climate change at international conventions. Given that New Zealand could be responsible for any citizens of the Cook Islands and Niue (due to their New Zealand citizenship) could also assist in lobbying for specific policy by the New Zealand government.

The Constitution of Niue is very similar to that of the Cook Islands, but does not contain any human rights provisions. While Niue has an *Environment Act 2003*, it does not contain the same duties and protections as that of the Cook Islands.

Many Pacific Constitutions include basic human rights including the Right to Life. In the case of Tokelau, the *Constitution of Tokelau 2006* sets up an interesting system of customary law. Tokelau is a non-self governing territory of New Zealand. Their Constitution does recognise international law, and in particular, individual rights that are stated in the Universal Declaration of Human Rights, as reflected in the ICCPR.

The Tokelau Constitution sets up a number of sources of law in clause 12, in descending order of priority; the Constitution, General Fono Rules, Village Rules, the custom of Tokelau, and the general principles of international law. There could be some value in using the polluter pays principle of international law in this context.

Countries that have human rights protected in their Constitution or Bill of rights are starting to address environmental rights. A pertinent example relating to this situation is the case of Ecojustice, Canada which is acting on behalf of members of the Aamijinwnaang First Nation community of 700 reserve residents, and 1100 off-reserve residents who live close to a heavily industrialised valley known as 'Chemical Valley'. It has one of the highest air pollutant emissions in Ontario, Canada; including a number of pollutants that increase the risk of cancer, respiratory, cardiovascular, reproductive and developmental health problems. The case challenges the decision of the Ministry of Environment to permit one of the manufacturers, Suncor Energy, to

<sup>88</sup> *Environment Act 2003*, s 9(3).

increase its petroleum refinery operations in Chemical Valley. The applicants argue that the Ministry's decision infringes their right to life, liberty and security guaranteed by section 7 of the *Canadian Charter of Rights and Freedoms*, part 1 of the *Constitution Act 1982* to the *Canada Act 1982* (UK).<sup>89</sup> The case is yet to be heard.

## V DISCUSSION

The lack of access to financial and human resources is a major limiting factor in the ability of many non-state Islands in the Pacific to build resilience to climate impacts. In developing resilience-building activities, built infrastructure such as roads, houses, water and electricity services, airstrips and public buildings will need to be planned with 'climate-proofing' in mind. New sources of money to pay for these projects will need to be found.

This paper sought to make an assessment of the legal avenues to obtain compensation to enable Torres Strait Islanders to exercise their legal rights to seek to address the impacts of climate change. Through the analysis of the Torres Strait case study, the suggestion that laws designed to protect culture, rather than tort and environmental statutes, might be the most effective and efficient avenues to pursue in this respect.

While any legal actions will be long and difficult under current laws, it is imperative that governments at all levels begin to address and understand the issues they are facing and urgently develop strategies to protect Torres Strait Islander's rights and culture. One way of ensuring that policy-makers become aware of the need to protect the rights and interests of Torres Strait Islanders is to use the law to highlight these issues to seek to hold both governments and corporations responsible for their contribution to climate impacts felt there. This paper is part of an ongoing dialogue with Torres Strait Islanders to explore how the law may (or in some cases may not) assist them in seeking climate justice. Law reform is vital in addressing these issues. However, the absence of such reform and the failure to engage Islanders in this discussion is forcing Islanders to explore more litigious options.<sup>90</sup>

Similarly, as discussed in other non-state Pacific Islands case studies, there may be options Islanders could pursue to seek climate justice until international environmental law develops to deal with climate change and provides adequate remedies to assist them. The analysis of these cases has shown a range of legal angles that could be further explored by Islanders interested in taking further action against their (non-island) country.

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<sup>89</sup> See Pleadings in the case *Ada Lockridge & Ronald Plain v Director, Ministry of Environment, Attorney – General of Ontario and Suncor Energy Products Inc*, Ontario, Supreme Court of Justice, Court file no. 528 of 2010 (2 March 2011) <[www.ecojustice.ca](http://www.ecojustice.ca)> (downloaded 2/3/11).

<sup>90</sup> Joe Ross and Emily Gerrard, 'Climate Change: Issues facing Indigenous Australians' [2008] 35(8) *Indigenous Law Bulletin* 7.