

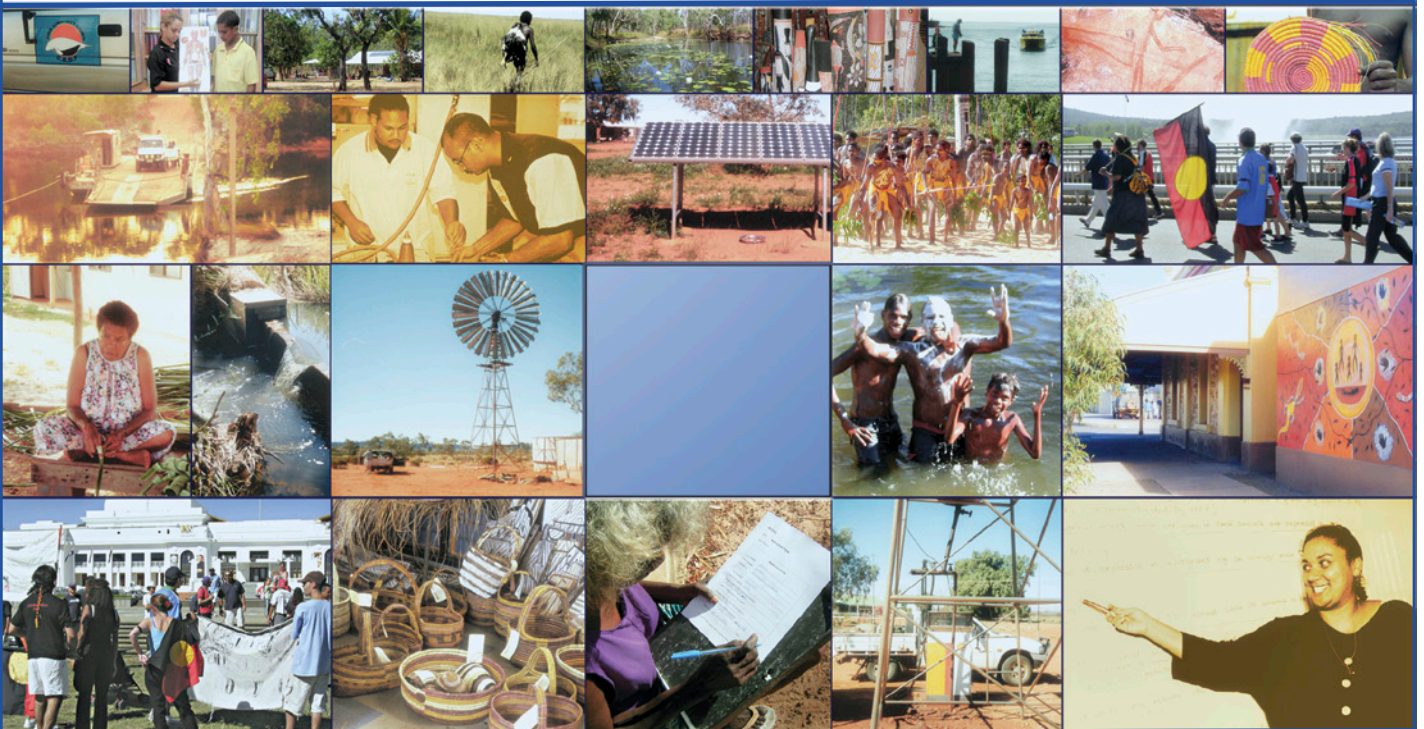
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Wild Rivers and Informed Consent on Cape York

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I make this brief submission as an academic with background in economics and anthropology who has researched land rights and native title legislation since 1977. My special focus is on the property rights implications of such laws and their associated capacity to have a beneficial impact on Aboriginal economic status, especially in remote Australia.

I note at the outset that my commentary and recommendations seek to deal more with general issues of policy principle rather than Cape York particulars. In recently reading a paper by Professor John Holmes 'Contesting the Future of Cape York Peninsula' (in review, *Australian Geographer*) I am reminded of the prolonged development debate on Cape York between Aboriginal, conservation and commercial interests mediated by the Queensland State that has extended back for decades. His paper also highlights a lack of unanimity among Aboriginal stakeholders about development futures for the Cape.

BACKGROUND

The Australian Government and all States and Territories (under the Council for Australian Governments' National Indigenous Reform Agreement of July 2009) have recently committed to Closing the Gap in socioeconomic disadvantage between Indigenous and other Australians. Much of the focus of this policy framework is on remote Australia where opportunities for economic parity are most circumscribed.

Since the 1970s first land rights and then native title laws have seen more and more of the Australian continent returned to some form of Aboriginal ownership with considerable variation—from inalienable freehold title in the Northern Territory under the Commonwealth *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA) to different forms of determination under native title law, with the strongest in terms of property rights being exclusive possession.

ALRA:
*Aboriginal
Land Rights
(Northern
Territory) Act
1976*

Today, the Indigenous estate covers more than 20 per cent of the Australian land mass (over 1.5 million sq kms) mostly in very remote Australia. However, both land rights and native title laws deprive Aboriginal title holders of ownership of commercially valuable resources such as minerals, fisheries and fresh water. While we continue to express policy concern about Indigenous poverty, wealth disparities between Aboriginal and other Australians will arguably never be eliminated unless land and native title rights are accompanied by resource rights.

Paradoxically, while the current policy approach to Indigenous development focuses on mainstream participation, the only guarantees that Indigenous people have to resources are outside the market system. So under all forms of land rights, native title and complementary resource laws, Indigenous groups are guaranteed 'customary' nonmarket use rights, but not commercial market (and tradable) rights. This is demonstrated by the anomaly that an Indigenous person can harvest a resource for a customary non-market purpose (like domestic consumption), but that same resource cannot be sold commercially unless in possession of a state-provided (and generally expensive) licence.

INTENT OF THE WILD RIVERS BILL 2010

On Cape York, as elsewhere in remote Australia, this restrictive resource rights regime applies. Hence on native title lands what are termed in the current debate traditional owners do not have commercial rights to develop their lands because they lack property rights in commercially valuable resources. The need for such rights is important on Cape York for two reasons. First, according to analysis of 2006 Census data disaggregated at the regional level, Aboriginal people here are among the most disadvantaged in Australia. Second, the development project that is proposed for Cape York by Noel Pearson and the Cape York Institute and that is strongly supported financially, rhetorically and morally by the Australian State is focused on transitioning people from welfare to engagement in the productive market economy.

The Wild Rivers Bill seeks to address this resource rights situation (which perpetuates Aboriginal underdevelopment) in two ways. First, it proposes to protect the rights of traditional owners of native title land within the wild rivers areas to own, use, develop and control that land under section 4 (3). Second, it seeks to limit any State government regulation of native title land in a wild river area under the *Wild Rivers Act 2005* (Qld), unless the traditional owners of the land agree (section 5).

In his second reading speech in the House of Representatives on 22 February 2010 the Leader of the Opposition Tony Abbott noted the absence of economic opportunities for Aboriginal people living in remote areas. He noted that Aboriginal rights in land were not real rights if native title land did not include the right to use this land for productive purposes. By productive purposes, Mr Abbott is referring to commercial purposes. And it is difficult to see what such productive purposes might entail if they did not also include rights to resources such as fresh water, commercial fisheries or minerals, all currently vested with the Crown.

It is important to note two things here. First, the *Wild Rivers Act 2005* (Qld) complies with s.211 of the *Native Title Act 1993* (NTA) so that customary rights on native title lands are maintained. Second, it is my understanding that the *Wild Rivers Act 2005* (Qld) only limits certain forms of intensive development in what is termed a High Preservation Area within a kilometre of a river in a declared wild river basin; and that a specific reservation of water is set aside specifically for Aboriginal communities for economic development purposes, although it is unclear whether this reservation is limited to those with native title interests ('traditional owners') alone or to a wider set of potential Aboriginal beneficiaries.

NTA:
*Native Title Act
1993*

RESOURCE RIGHTS

It is important to place the issue of resource rights in wider historical and regional comparative contexts.

Up until the 1950s, Indigenous rights were unrecognised, except on Crown lands reserved for their use. Then in 1952, Minister for Territories Paul Hasluck came upon the novel idea of hypothecating all royalties raised on reserves in the Northern Territory (over which as Minister of Territories he had control) for Aboriginal use. Surprisingly though, in Hasluck's scheme these royalties were earmarked, at double the normal statutory rate, for all Aboriginal people in the Northern Territory—not those affected and not those on whose lands mining occurred, now called traditional owners.

Mr Justice Woodward was tasked by the Whitlam government to provide a means to transfer ownership of unalienated land and associated sub-surface mineral rights to Aboriginal people in the Northern Territory in 1973. He made effective recommendations for the former, but refused to countenance the latter, partly bowing to protests from the mining industry that this was going too far in terms of its vested interest. This was a major opportunity missed in terms of Aboriginal resource rights.

Woodward's recommendations of 1974 were largely incorporated in the ALRA in 1976. This has set the high watermark in Aboriginal resource rights, but arguably this benchmark was set too low. Instead of recommending the *de jure* right in minerals that Whitlam sought, Aborigines were provided by the Fraser government with a *de facto* right in the form of right of consent or right of veto provisions. This provided a form of leverage that Aboriginal traditional owners have since been able to utilise in negotiations with resource developers to lever some negotiated mineral rents in benefit sharing agreements above the equivalents of statutory royalties guaranteed by this law.

Woodward's rationale was politically pragmatic rather than based on legal principle alone. This is clear because subsequently, under the New South Wales *Aboriginal Land Rights Act 1983* mineral rights (except for gold, silver, coal and petroleum) were provided with land rights, demonstrating that there is no barrier under Australian law for this to happen.

Similar issues arise with other resources such as fisheries and fresh water. As already noted, in most situations Aboriginal people have customary rights to fish for domestic purposes only. Native title law seems to protect that right, which is exercised by a significant 80 to 90 per cent of adults in remote Australia (National Aboriginal and Torres Strait Islander Social Survey 2002; The National Recreational and Indigenous Fishing Survey 2003). The High Court has reiterated this right in its finding in favour of the plaintiff in *Yanner v Eaton 1999*.

Fresh water is arguably the new frontier in the aftermath of the National Water Initiative and this is clearly of import in the Cape York case. Aboriginal native title groups enjoy domestic use rights and possibly customary rights to fresh water, but the Crown asserts ownership of water and especially ground water: Aboriginal people do not have commercial rights in water beyond those that might be allocated by the State. Other new frontiers in resource rights might be carbon or biodiversity credits. But again there is a distinct possibility that the Crown may unilaterally assert ownership rights, even though Aboriginal natural resource management action might see carbon abated or environmental values maintained.

FREE, PRIOR, INFORMED CONSENT RIGHTS

The second issue raised in the Wild Rivers Bill is linked to free, prior, informed consent, although here it is proposed that traditional owner consent is sought before Wild Rivers are declared rather than when commercial development on Aboriginal-owned land is proposed. It should be noted that in the Wild Rivers Bill 'traditional owners' are not defined; I assume the term refers to members of a registered native title claimant group or where there has been a determination members of a prescribed body corporate.

In Australia, free prior informed consent provisions only exist under the ALRA framework, and even here there are national interest override provisions although these have not been invoked in the 33 years since this law was passed. In other jurisdictions (except Western Australia) under State land rights laws there are other specific forms of consultation and negotiation possible.

The NTA framework does not provide native title groups free prior informed consent rights. Instead under the future acts regime only a right to negotiate at best (with a window of opportunity restricted to six months) and a right of consultation, at worst are provided. These rights represent a weaker form of property than the *de facto* property in the ALRA. But they have been used to leverage some apparently significant benefit sharing agreements, although it is unclear if financial provisions agreed provide equitable deals or fair compensation. As one extreme example, the NTA's future acts regime allowed the Century Mine Agreement to be leveraged up from a \$60,000 initial offer (before the Mabo High Court judgment) to a reputed figure of \$60 million over 20 years. But even this latter figure seems limited when compared to the company's profits of over \$1 billion in one year (as reported in the Zinifex annual report for 2005–06) or deals subsequently struck elsewhere on the Indigenous estate.

POLICY IMPLICATIONS

Without resource rights Aboriginal goals to either integrate into the market or to earmark resources for local and regional benefit uses are limited. There is also a great deal of inequity in land rights and native title legal frameworks, jurisdiction by jurisdiction, across Australia. As the emerging development conflict in the Kimberley with respect to offshore gas and onshore facilities indicates, the right to negotiate in the NTA framework does not effectively give native title groups a right to actually stop a development as in the Northern Territory under land rights law. To create commercial opportunity in remote locationally disadvantaged regions like Cape York will require the allocation of any existing commercial advantage possible to Aboriginal land owners in the region, as well as the provision of the maximum leverage in negotiations that can be provided either by the allocation of 'special law' resource rights or free, prior, informed consent rights. So in terms of Indigenous policy, the proposals in the Wild Rivers Bill are important and should be strongly supported. However, unless such provisions are extended Australia-wide this change will constitute Cape York bioregion-specific legal exceptionalism. This is hardly appropriate given that the Closing the Gap framework applies nation wide; the problem of regional inconsistency alluded to above will be exacerbated.

Beyond Indigenous policy, it seems that there is a growing murkiness or uncertainty in the overlapping space between customary and commercial rights in resources which makes property rights increasingly unclear. This lack of legal certainty has the capacity to increase transaction costs from legal contestation and will result in inefficient allocation of resources, a problem for Indigenous and non-Indigenous Australians. Unless there is concerted effort to clarify and ensure greater consistency in property rights on the myriad forms of Aboriginal land tenures across Australia, there will be ongoing and unproductive legal contestation over resource rights.

RECOMMENDATION

The Act proposed by Tony Abbott has been accompanied by a dominant media discourse promulgated by *The Australian* from late 2009 (with contributions from Noel Pearson, Tony Abbott and Peter Holmes-à-Court) that advocates providing Aboriginal land owners with rights in commercially valuable resources on their lands, but only in Cape York. Were the Wild Rivers Bill passed into law we would see a fundamental change in the current workings of land rights and native title laws in Australia, the attachment of resource rights to native title lands to an extent that exceeds the current-best case situation in the Northern Territory on the Aboriginal-owned terrestrial and intertidal estates (following the High Court's finding in the Blue Mud Bay case in 2008).

While the proposal contained in the Wild Rivers Bill makes good economic sense, in my view attention is focused on the wrong law: it is the Commonwealth NTA that needs to be amended to confer either full rights in all resources where claims have succeeded; or as a second best provide the free prior informed consent provisions as currently exist under the ALRA to native title parties.

It is timely for the Australian state to address two issues: the State and Territory inequities that have resulted from different land rights regimes enacted at different times; and the limitations inherent in the NTA statutory framework in terms of supplementing native title determinations with resource rights to assist Indigenous economic development.

I make only one recommendation: The Senate Inquiry should focus on limitations in the NTA statutory framework rather than seeking to override the Queensland Wild Rivers statutory framework. If the federal native title regime were stronger, the need to override State laws would be eliminated. I urge the Rudd Government and the Abbott Opposition to review all land rights and native title laws Australia-wide in a bipartisan manner to ensure that the important resource rights and free, prior, informed consent issues being raised by this Inquiry into the Wild Rivers Bill are given appropriate national, rather than region-specific, attention.

CONCLUSION

In remote locations such as Cape York, Indigenous affairs policy that is currently focused on Closing the Gap will require Aboriginal people to be in a position to utilise their lands in one of three ways: to use natural resources in the customary non-market economy; to utilise natural resources commercially, either in Aboriginal stand-alone or joint ventures; and to be in a position to trade away commercial advantage for financial benefit in the form of a compensatory benefit stream. The *Wild Rivers Act 2005* (Qld) clearly limits this suite of possibilities owing to the perceived conservation values of this bioregion and the Queensland State's statutory response to this view. The Wild Rivers Bill is looking to empower regional Aboriginal native title groups to have a right to commercial development and to have real power in negotiations. It is clear that without resource rights and leverage (as well as access to high quality expertise independent of the state and multinational corporations) power asymmetry will ensure that the resource allocation status quo will be maintained. It might be timely to make the playing field a little bit more level on Cape York and elsewhere if, as a nation, we are looking to close some persistent socioeconomic gaps.