6. Native Title and Ecology: Agreement-making in an Era of Market Environmentalism

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Agreement-making, given particular impetus by the advent of native title, forms an important component in establishing a stronger presence for Indigenous peoples in ecological protection and environmental management (Tehan *et al*., 2006: 1–2). Aboriginal and Torres Strait Islanders' customary care for country clearly continues apart from such formal western structures, but of necessity must interface with non- systems (*Yanner v Eaton*, 1999: 76). Predominately, the settler institutions for environmental protection have been built upon an ecological perspective, but these structures and values systems are being substantially reworked through the increasing influence of market environmentalism. Historically, settler models for managing ecosystems have struggled to provide meaningful and effective participation by Indigenous peoples (Hill and Williams, 2009: 161); and while strong potential exists for market environmentalism to offer avenues for more robust participation for Indigenous peoples that is yet to be effectively realised. Accordingly, this chapter explores the dynamic of agreement making in the native title/ecology sphere, and considers the challenges and opportunities posed by market environmentalism for the protection and management of Indigenous peoples' communally-held land and resources and corresponding economic and cultural sustainability. Specifically, it examines how ecology and native title are co-located within a legal, economic and social space framed by the particular contractual/exchange relationships based upon negotiated agreements.[1] This 'space' between native title and ecology is increasingly perceived as operating within wider structural changes precipitated by globalisation, public/private partnerships and market mechanisms: elements of which are all apparent in market environmentalism. In earlier periods, major structural change has marginalised many Aboriginal and Torres Strait Islander peoples excluding them from a range of social and economic benefits, including labour force and industry participation, and precluded due recognition of Indigenous knowledge and customary practices for the sustainable management of country.

1 Agreements are not confined to the ambit of the *Native Title Act 1993* (Cth) and state counterpart legislation. However many agreements arise 'in the shadow' of the legislation.

Connection with country: competing paradigms of environmental governance

Within Australia, the recognition of native title in 1992 by the common law gave specific legal force to Indigenous peoples' involvement in the protection and management of country (*Mabo v Queensland [No 2]*, 1992). While Aboriginal and Torres Strait Islander peoples have long cared for country under law, tradition and custom, *Mabo No 2* gave belated acknowledgment in the settler legal system to the significance of the relationship between Indigenous people and their governance of land and waters, through the concept of connection.[2] Despite the limitations of the construct of native title in capturing the dynamic of Indigenous peoples' relationship, such legal recognition through common law native title, and the subsequent enactment of the *Native Title Act 1993* (Cth) gave Indigenous people, 'a seat at the table' in terms of seeking legal protection for their rights to care for country (Strelein, 1993: 38–39). Since 1992, there has been considerable expansion in the areas in which Indigenous peoples have gained responsibility under the settler legal system for environmental protection and management, with a growing number of determinations of native title.[3] Further, much of the expansion of Indigenous rights to care for country beyond formal native title determinations has been achieved through the instigation of agreements, either directly under the framework for Indigenous land use agreements under the *Native Title Act 1993* (Cth)[4] or pursuant to broader agreement making[5] – much of which was initiated consequent to the legal recognition of native title. The expansion of Indigenous protected areas across northern Australia is one such example where a principally 'environmental' regime has expanded to offer a more receptive forum for Indigenous care for country.

The increasing prominence of native title determinations and agreement-making in the sphere of environmental protection and management occurred in the context of a growing recognition within western knowledge systems of the importance of holistic and integrated ecological understanding of land and waters. Ecology, itself a challenge to the reductionism of many western scientific disciplines, is predicated upon a systemic approach that considers the interconnections and interrelationships between elements in the environment – including people. Ecology, as a guiding paradigm for environmental and

2 For legal requirements to establish connection, see *Native Title Act 1993* (Cth): s 223 and as elaborated by relevant case law; primarily *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

3 Essentially there are two forms of 'determinations' of native title under statute – one the result of a litigation process and the other where there is a consent determination *Native Title Act 1993* (Cth): s 225.

4 *Native Title Act 1993* (Cth) Part 2 Div 3 Subdivs B, C, D and E. On the relationship between ILUAs and other 'future acts', note s 24AB(1).

5 For an overview of agreements see the Agreements, Treaties and Negotiated Settlements Database at: <http://www.atns.net.au/> (accessed 9 May 2009).

natural resource management, tends to emphasise the integrity and uniqueness of natural systems, and accordingly the need to preserve such systems apart from 'human interference'.

Over the last decade or so, the two constructs of native title and ecology have formed major points of institutional and organisational structure around which agreement making has focused with respect to customary care for country. Initially, there were particular points of tension between ecological understandings of wilderness and ecological integrity, and Indigenous approaches which emphasised the integral cultural connection and relationship between Aboriginal and Torres Strait Islander people and their traditional country. More recently, there is a greater appreciation of the inherent tie between Indigenous cultural identity, and connections to land and waters within a prevailing western ecological conservation paradigm (DEH, 2001). Although the trajectory is not always smooth, as tensions around the *Wild Rivers Act 2005* (Qld) in northern Queensland can attest. Moreover, the need for more inclusive Indigenous participation in environmental protection is widely acknowledged, if not always achieved in a truly collaborative manner given power asymmetries at play in many formalised modes of environmental law and management that seek to adopt deliberative or collaborative models, (Hill and Williams, 2009: 163, 168). Agreement-making has played a major role in reorienting the understanding of the dynamic between native title and ecology to give greater prominence for Indigenous peoples. This interaction between native title and ecology, which has been growing in significance, has been built upon particular assumptions of the role for western science and traditional knowledge systems (Verran, 2008). These approaches, and the interface between them, currently inform much of the existing administrative and governance structures for environmental protection. Such institutional arrangements and disciplinary paradigms arrangements are now being challenged in various ways by the rise of market environmentalism.

Market environmentalism, denoting a complex of regulatory, structural economic social, cultural and institutional changes has assumed an increasing role in natural resource management and environmental protection in Australia over the last decades (Eckersley, 1995: 7). Presently, it is being actively promoted through the idea of environmental sustainability. These influences, fashioned by both global and local factors have reshaped many aspects of the interface between Indigenous peoples' communally held land and resources, and western modes of environmental management across many countries. In turn, these changes have the potential to reorient the understanding of key concepts in Australian law and policy, such as native title and ecology, and the dynamics of the interaction between these spheres. Accordingly this chapter seeks to critically interrogate the nature of the changes occurring under the rubric of market environmentalism

to probe whether these policies do offer sustainable long term outcomes for Indigenous communities in their relationship with 'country'. In particular, the chapter investigates pressures associated with market environmentalism to individuate communal land and resource holding associated with native title and to introduce western forms of property and contractual-based environmental regulation and natural resource regimes. While new opportunities may arise for Indigenous economic empowerment through environmental commercialism in fields such as ecosystem services, it is necessary to evaluate whether these agreement and exchange based relationships do offer a compelling means to achieve both community empowerment including appropriate recognition of customary values and knowledge and self determination, as well as effective and responsive care for country in the native title context.

From ecology to native title

Ecology

Over the course of the second half of the twentieth century, recognition of the importance of environmental protection became entrenched in many societies such that environmentalism is now 'as much a state of being as a mode of conduct or a set of policies … [c]ertainly it can no longer be identified simply with the desire to protect ecosystems or conserve resources' (O'Riordan, 1981: ix). Ecology, the new integrative science emerging in the 1960s, and closely identified with environmentalism, illuminated the need for law, policy and management practices designed to arrest the rapid decline of ecosystems that had been precipitated principally through industrialisation, urbanisation and colonisation. Responsibility to arrest the decline was predominately seen as resting with nation state institutions. The 1970s saw a rapid proliferation in the international law and administrative structures, such as the United Nations Environment Program, which sought to protect the natural environment (Fisher, 1999: 372). Developments at an international level had parallels in most western democracies, including Australia, which saw the first comprehensive platform of environmental legislation introduced in the mid 1970s. Since then a comprehensive legislative and institutional framework has been implemented with extensive federal government and state government involvement principally through departments of environment but with significant institutional responsibilities for land and water management within many other government departments, including market regulatory authorities (Godden and Peel, 2010: 125). Ecologically sustainable development, since its policy genesis in 1992, has remained the primary guiding principle informing regulatory objectives under most environmental legislation (Peel, 2008).

In turn, social values have shifted over time, with conceptual notions of what constitutes 'the environment' being fluid as demonstrated by current debates over how water should be perceived against a background of predicted climate change and highly variable precipitation patterns in Australia. For example, should water be seen as a resource, a fundamental component of an ecosystem, a commercial tradeable entity, an ecosystem service, a human right or as a cultural value and native title right? While the parameters of the concept of environment, and indeed natural resources, has shifted under prevailing discourses, the present phase is characterised by growing ascendancy of the neo-liberal paradigm of market mechanisms and deregulatory approaches (Kinrade, 1995: 86). In this regard, such perspectives offer an at times competing, and at other times, a congruent approach to the previously dominant concept of ecology that gave precedence to western scientific knowledge as the basis for environmental governance, management structures and institutions.

Indeed, since at least the seventeenth century, western scientific discourses about nature have played a formative, often decisive, role in determining notions of the environment that have been promulgated internationally. This discourse was highly influential in the expansion of western environmentalism into other cultural contexts; typically, often, as a consequence of colonisation (West *et al*., 2006: 251). Environmentalism has on the one hand contributed to the post colonial construct of development (Blaser *et al*., 2004: 3), while simultaneously criticising the dominant 'growth' ethic of development regimes. Thus, while in the twentieth century the emergence of the science of ecology was a significant catalyst for the invigoration of holistic approaches to nature (for an overview of the rise of ecology, see, Worster, 1994), it was not unproblematic, at the very least, in its interface with indigenous cultures. The inception and growth of the global conservation movement and consequent creation of concepts of 'wilderness' and 'ecological integrity', integral to western scientific conceptions of ecology distinguish 'nature' and 'culture' as antitheses. Such a distinction is significantly different to Indigenous understandings of country (see, for example, Hokari, 2005: 214–222). Further, many of the institutions and laws pertaining to what might be termed 'first phase' environmentalism remain essentially grounded in this distinction. Such a distinction removes agency from the environment; instead constituting it as a space to be protected or plundered (Massey, 2005: 86; Kinnane, 2005: 195–222). Such categorisation has not only removed agency from the environment itself, but also from Indigenous peoples who have historically inhabited and managed country, with consequent social, economic and cultural ramifications for Indigenous communities in many parts of Australia.

Ecological understandings of the environment later became framed predominately as 'biodiversity'. International developments, particularly the influence exerted by international legal instruments, such the Biodiversity Convention in 1992 (United Nations Environment Program, 1994), were highly influential in the further translation of key constructs to regulate and protect the natural environment. This emphasis signified a shift from a focus on the unique and special 'bits' of nature to a more pervasive approach that sought to achieve diversity and complexity in all natural systems rather than selective protection. This influence is clear in national environmental law frameworks, where the rise of ecologically sustainable development was a major trend from 1992 (Ecologically Sustainable Development Steering Committee, 1992). The emergence of these ideas of sustainability coincided with the belated recognition of native title. Thus ecology, with its emphasis upon integration and interdependency had the potential to re-situate human beings as a component of a wider system of web-like interactions involving myriad physical and non-physical elements (Dovers and Price, 2007: 36). Yet despite the broadening of many legal definitions of 'environment' that occurred (see, for example, *R v Murphy*, 1990), the practice of 'separate' treatment of the natural and cultural world largely continued in many spheres of environmental law and management and it remains a guiding assumption in many key natural resource management fields.

In light of the trajectory that developed for the preservation and conservation of ecology within Australia from the 1980s, the culturally-imbued understanding of country that characterises Indigenous relationships to 'ecology' was accorded little direct acknowledgment in key legal and policy frameworks for the conservation and protection of the environment (Plumwood, 2003: 51). Cultural heritage concepts continued to play a significant role in providing some avenues to include Indigenous peoples' perspectives of the value and protection to be accorded to the natural environment, although the limitations of the early cultural heritage frameworks have been widely recognised (see, for example, Thorley, 2002: 110). More holistic framings of Indigenous cultural heritage are now apparent, but these concepts are rarely integrated fully into environmental protection laws.

Thus at least initially, many environmental laws and policies had the effect of excluding Indigenous peoples from participation in mainstream environmental and natural resource management (NRM). Recently, a more dynamic understanding of the complexities of environmental impacts and their social consequences has emerged, consistent with a growing recognition of the significant role of socio-cultural factors in environmental conservation and NRM (see, generally, Langton *et al.*, 2006). Such approaches, potentially, are more open to Indigenous knowledge and values in the care for country. Indigenous cultural identity is

intimately bound with environmental conservation, and should be recognised within legislative and policy regimes which are open to that which Langton describes as Indigenous 'life-ways', as a part of a broader reconciliation project (Langton, 2003: 142). Agreement-making and recognition of native title have performed an important function in 'opening up' environmental protection regimes to Indigenous 'lifeways'.

Australia also has been influenced by the trends at a global level towards greater involvement of Indigenous peoples in managing areas for ecological protection although the extent of 'partnership' and the degree of autonomy accorded to Indigenous peoples in environmental governance and management varies widely. Governance models for implementation of Indigenous involvement in land and water management are diverse, traversing a spectrum from mere consultation to direct decision making (for an overview see Nettheim *et al.*, 2002). Thus while there have been strong calls to create more participatory frameworks for Aboriginal and Torres Strait Islander people, many trends to involve Indigenous peoples within mainstream environmental and NRM management regimes have been criticised as occurring within an assimilation framework. Such schemes have been regarded by some as, predominately building the capacity of Indigenous communities to successfully operate within post colonial environmental management regimes without delivering sustainability and self determination for Indigenous communities (Strelein, 2004: 189, 196–198). Thus where concepts of management are still predominately grounded in the paradigms of western environmental conservation including market environmentalism, meaningful incorporation of an Indigenous worldview may be limited. Accordingly, in approaching environmental conservation with Indigenous communities, concepts of value and significance must be open to Indigenous perceptions and notions of responsibility for a more effective incorporation of Indigenous peoples' care for country. As Ross and Ward note,

> modern land management requires reversing degradation at accepting the concept of 'peopled landscapes' as a fundamental and essential part of a healthy and sustainable environment. Therefore the knowledge values and perspectives of local Indigenous people are now seen by progressive natural resource managers as vital to achieving a more comprehensive and holistic approach to land management … because approaches based on Western science alone have so clearly failed. (Ross and Ward, 2009: 37–38)

Yet despite many acknowledgements of the need for greater recognition to be accorded to Indigenous value systems in ecological and natural resource management, there are surprisingly few successful examples of inclusion of indigenous engagement in natural resource management. Hill and Williams (2009: 172) after a detailed case study of how indigenous marginalisation

occurs at a local or project level, propose a number of suggestions to build more inclusive national level policy responses. A key initiative that is proposed is to establish a separate funding program for Indigenous NRM and recognising the role of Indigenous NGOs who focus on environmental governance and NRM as vital to success.

Thus one of the most marked shifts in delivering more 'on the ground' autonomy for Indigenous communities in recent years has been in specific areas of native title, agreement making and environmental governance. Although agreement-based environmental governance forms are not unproblematic, they offer practical measures for improvement of Indigenous quality of life, especially in remote and regional areas of Australia that are more promising than in many other fields of Indigenous-non Indigenous relations (for a discussion of the role of agreements in regional and remote communities see, Gillard, 2007: 10, 13). Therefore it is useful to trace the changing dynamic of environmental governance and native title.

Native title and ecology

The interface between native title and ecology can be conceived within three key phases since the mid-twentieth century.[6] Firstly, the pre-native title era, which was characterised by the ascendancy of natural balance concepts in ecology and natural resource management, and which largely precluded Indigenous care for country apart from designated statutory schemes. This phase was accompanied by a growing momentum to involve Indigenous peoples in 'managing ecology' through cultural heritage (see, for example, *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth)), statutory land rights (see, for example, *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth)), and co-management schemes over national parks (see, for example, Weir, 2000) and World Heritage areas (see, for example, *Environment Protection and Biodiversity Conservation Act 1999* (Cth): Part 15 Div 4); all with various levels of responsibility accorded to Aboriginal and Torres Strait Islander peoples.

The second phase might be termed the 'Recognition and Litigation' phase of native title. Following *Mabo [No 2]* and enactment of native title legislation there was an emphasis upon defining and shaping the parameters of native title, including explorations of the 'content' of native title rights as determined by litigation involving a series of seminal High Court and Federal Court cases (for an overview of the case law, see, Strelein, 2006: Chs 1–3, 6). Given that the courts predominately favoured a view of native title as embodying non-commercial

6 This is a gross oversimplification as there are multilayered levels at which Indigenous peoples have a relationship with ecology as part of a wider culturally imbued understanding of place (see, for example, Rose, 1999).

interests and uses (Strelein, 2001: 95), the native title rights and interests, where such were found to be recognised and protected, largely accorded with a 'traditional' view of the relationship between Indigenous peoples and the country, the subject of native title rights. These rights implicitly included 'rights' such as care for sacred 'ecology'; particularly in regard to access to country, and to a lesser extent rights conferred in relation to its protection and management.[7]

Agreement-making as the final phase identified here, overlaps with the litigation era. Negotiated 'outcomes' for native title are becoming increasingly more prominent as the courts progressively narrowed the scope of what could be achieved for Indigenous peoples through a litigation-oriented approach, especially given the complexity, financial burden and length of litigation (Tehan, 2003: 523). Indeed, Neate suggests that agreement-making has emerged as the preferred method of dealing with native title issues (Neate, 2004: 176). Formalisation of the reliance upon agreement-making under the *Native Title Act 1993* (Cth) was established in case law: '[t]he stated emphasis of the Act [is] on the facilitation of agreement through negotiation rather then instant recourse to judicial decision' (*Fejo v Northern Territory,* 1998: Kirby J). Agreement-making of diverse levels and scope, now has assumed central importance in many spheres as defining, in legal and economic terms, how Aboriginal and Torres Strait Islander peoples' relationship with 'ecology' is managed. Indeed, agreement-making has assumed a vital role as the interface for managing many aspects of Aboriginal and Torres Strait Islander peoples 'relationship' with settler Australian society and law. Brennan and others note,

> that among the changes in the language of government is a far greater emphasis on the idea of establishing partnerships with Indigenous communities and using agreement-making as a tool of policy and administration. (Brennan *et al*., 2005: 41)

Therefore, within the broader moves to encapsulate Indigenous peoples' relationships with country within an agreement framework, 'ecology' as it manifests in various levels will be the subject of agreement either explicitly as for example in co-management terms for identified areas of land and waters (see Szabo and Smyth, 2003), or more diffusely as part of a general stewardship accorded to native title holders, for example as access rights over a pastoral lease (see, for example, *Western Australia v Ward*, 2002). It is within this more discrete phase of agreement making this article focuses its attention.

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7 Again the rights are highly variable on a case by case basis, ranging from 'ownership' of ecology where there is a grant of exclusive native title rights to *Native Title Act 1993* (Cth): s 211 which preserves the traditional hunting and fishing rights of Indigenous peoples but does not confer wider rights of land and water 'ownership' or exclusive possession.

Indigenous Land Use Agreements (ILUAs) under the *Native Title Act 1993* (Cth) now are integral to the native title mediation process, taking form as future act agreements,[8] or as regionally based agreements (see, for example, Aguis *et al.*, 2002), or as co-management agreements.[9] Other forms of agreements have been made between Aboriginal people and governments, non-government organisations and private entities, such as corporate businesses. Accordingly, ILUAs have assumed greater significance in the resolution of claims. Such agreements have frequently addressed land, biodiversity and cultural heritage management, particularly where part or all of the agreement creates a co-management relationship between Indigenous claimants and a parks authority (Hill, 2006: 577). Outside of the native title process, agreements have been made with Indigenous people in a growing spectrum of ecology related fields most notably under the Indigenous Protected Areas Program (see, generally, Bauman and Smyth, 2007: 13).

Thus over the last decade the proliferation of agreements between Aboriginal people, governments, non-government organisations, and private entities has seen agreement-making occupy, 'a new space between the old dichotomies of state and market, public and private, local and global' (Considine, 2005: 1). The range of agreements in place now transcends a narrow 'land use orientation' although this aspect remains important. Agreements comprise an 'emerging model of public organisation' that adopts a deregulatory middle ground between state-centred governance and privatisation, as part of policy prescriptions that have instituted 'contractualism' across many spheres of modern political social and economic life (Considine, 2005: 1). Agreement-making, is part of a broader dynamic that has emphasised the increasing pre-eminence of contractual and exchange based processes in articulating the overarching political relationship between Aboriginal and Torres Strait Islander peoples within the Australian nation state.[10] As the Federal Minister for Families, Housing, Community Services and Indigenous Affairs, Jenny Macklin observed,

> Agreements under the NTA are the major means of engagement between *Indigenous* people, industry and governments, and enable Indigenous people to plan and make decisions on a range of issues affecting their lives and their environments. (Macklin, 2009: 14–15)

8 *Native Title Act 1993* (Cth) Part 2 Div 3 Subdivs B, C, D and E. On the relationship between Indigenous Land Use Agreements and other 'future acts', note s 24AB(1).

9 See for example, the Wotjobaluk, Jaadwa, Jadawadjali Wergaia and Jupagulk Indigenous Land Use Agreement, signed on 11 November 2005, which forms part of the resolution of three native title claims. The Agreement, between the State of Victoria, the Commonwealth of Australia, the registered native title claimants and the Barengi Gadjin Land Council Aboriginal Corporation, provides for the grant of freehold title to three Crown allotments totalling 45 ha, National Native Title Tribunal Media Release, 25 October 2002.

10 This agreement oriented approach designated by the Howard Government as 'practical reconciliation' to date has not been substantially modified by Rudd Government policies.

Such articulation by governments of the function of agreements as 'delivering certainty' for Indigenous peoples represents a major shift in the strategic role to be played by agreement-making in providing benefits for Indigenous peoples in Australia. To date though, the major focus for securing benefits has been agreements in the mining/resource exploitation sector or the business/ entrepreneurial sphere with much less attention on benefits accruing to Indigenous peoples in the natural resources/ environment sector (Ross and Ward, 2009: 37), with the major exception of environmental co-management agreements. Co-management agreements, at least initially, were largely premised on congruence between environmental preservation and Indigenous peoples' care for country, with less attention to economic development aspects.

Agreement-making in a deregulatory environmental era

Agreement-making, native title and Indigenous environmental governance are firmly enmeshed in structural changes that are being promoted for Indigenous communities, which hinge upon economic development discourses. These discourses emphasise local Indigenous community capacity and the need to provide sustainable economic opportunities (Commonwealth of Australia, 2003). Thus agreement-making with Indigenous peoples, as a form of 'community partnership' that initially emerged in response to perceived failings of 'top down' government approaches, has now assumed a more proactive focus. Simultaneously, there have been strong moves to critique top-down statutory 'command and control' approaches in environmental governance as these models are regarded as limiting local community participation. However, despite the apparent reorientation to 'bottom up' governance in both arenas, agreement-making alone, without effective redress of the underlying structural differentials between Indigenous and non-Indigenous participants, may have limited success in establishing long term sustainable outcomes for Indigenous communities. There is a dilemma implicit to deliberative 'agreement' oriented processes where opening up dialogue between the parties can also be the mechanism to extend the policy influence of agencies involved in the agreement.

Therefore agreement-making, including ILUAs under the *Native Title Act 1993* (Cth), while proving specific opportunities for many local Indigenous communities to participate in environmental governance at a variety of levels (Bauman and Smyth, 2007) may not deal effectively with the more pervasive institutional exclusion of Indigenous peoples from economic opportunities. Indeed, historical exclusion of Indigenous peoples along the chain of policy making and service delivery has contributed much to the structural forms of

disadvantage experienced by Indigenous communities (Brennan *et al*., 2005: 35). Therefore, promotion of agreement-making in environmental governance must engage at a strategic and forward planning level (see, for discussion of a potential model, Fox, 2009: 52). Such strategies will need to negotiate the evolving 'space' between the state and the market as well as to build collaborative governance structures to achieve long-term improvements in Indigenous social capacity, environmental and economic well being. Yet when agreements are implemented in contractually-oriented policy settings, there is the potential for them to act as powerful agents of settler state economic assimilation. Accordingly, it needs to be recognised that much of the movement to embrace Indigenous partnerships for ecological protection is premised upon those communities functioning as economic as well as cultural entities under deregulatory management models (Lyster, 2002: 34, 36).

Integral to the multiple intersecting dimensions of native title, ecology and agreement-making are the economic opportunities provided by agreements in emerging areas of environmental 'service' provision (Ross and Ward, 2009: 37, 39). Environmental 'services' provision is gaining momentum as a central organising principle for many federal and state government environmental agencies; a prominent example being the introduction of the Carbon Farming Initiative by the federal government. Such economic adjustments have been clearly felt in Indigenous environmental and natural resource management spheres (Collings, 2009: 45). Altman and Cochrane endorse the conjoining of ecological protection and economic incentives by arguing for the capacity of 'bottom up' collaborative biodiversity management to achieve both economic and environmental sustainability for Indigenous communities (2005: 473). Central to this approach is a concept of 'hybridity' which integrates customary, commercial and state economic components (Altman and Cochrane, 2005: 474); also referred to as a multiplex economy (Gerritsen, 2007: 79, 81). These multiplex models are advocated for those parts of the 'Indigenous estate' which is held under some form of customary tenure or substantially controlled by Indigenous Australian – this aspect may be problematic where native title rights are held to confer less than exclusive possession (Pearson, 2004: 98, 100).[11]

Suggestions for a local hybrid economy on aboriginal land are illustrated by wildlife harvesting and management in the tropical savannah of the Northern Territory (see also, Garnett and Woinarski, 2007: 38; Gerritsen, 2007: 79), which achieves both sustainability and Indigenous economic empowerment goals. Such twining of objectives, in turn, requires new forms of interaction between Indigenous peoples, scientists and government organisations with

11 By contrast, Pearson has argued that, 'the common law of native title recognises that Indigenous people in occupation of land are entitled to possession where the Crown has declined to expropriate their title by act of State' (Pearson, 2004: 98, 100).

institutional innovation and purpose-built arrangements and the devolution to Indigenous community based organisations. The ramifications are far reaching, with a proposal to reorient income support for Indigenous people participating in wildlife management schemes away from, 'excessive reliance on CDEP, a work for the dole scheme' (Altman and Cochrane, 2005: 477). Similarly, '[tr]aditional indigenous skills in land and a fire management could be augmented by a role in threatened species management and exotic flora and water control to create a natural resource management economy that would be an integral part of the multiplex economy of remote Australia' (Gerritsen, 2007: 79, 81–82). With much potential for Indigenous engagement in these fields, it is necessary to canvass the factors that coalesce to produce the structural and governance changes associated with market environmentalism.

Market environmentalism

Market environmentalism has many characteristics in common with postcolonial forms of global economic policy engagement (Wallerstein, 2006: 1), particularly its relationship with an overarching discourse of economic efficiency. Under this rubric, pressures exist in many countries to introduce private property and market exchange mechanisms into customary governance of land and resources. Thus market environmentalism cannot be isolated from other political and regulatory trends that have seen the formal 'state-based' regulation of both land and Indigenous peoples (the two trends arguably are closely related) devolved to a series of intermediary and private/public partnership forms, as well as the rise of 'mutual responsibility' forms of governance associated with agreement-making.

Market environmentalism is variously linked with 'neo-liberalism', privatisation or de-regulation (see, for analysis, Beard, 2007). Broadly speaking it has precipitated a general shift in the nature of environmental governance, highlighting new discourses, such as market mechanisms and economic rationalism, which place less emphasis on the importance of a centralised role for the state in dealing with environmental problems (Stewart, 2001). This phenomenon often is described as 'governing at a distance' (Rose and Miller, 1992: 173), and is associated with the devolution of some state functions to semi-government actors and private entities who act as 'surrogate regulators' (Gunningham and Sinclair, 1998: 592, 607). In addition, it signals the expanding scope and globalisation of corporate activity into many areas of environmental protection and natural resource management (Grabosky, 1994: 419, 422). A less direct role for the state in protecting the environment and managing natural resources also can be traced to financial and resource pressures on governments (Godden and Peel, 2010: 126). These different influences have facilitated the

emergence of a variety of regulatory models for environmental management in Australia which increasingly operate in conjunction with native title. However, the strategy of increasingly financially constrained governments devolving service delivery to local communities requires critical attention in the context of Indigenous participation in environmental protection and natural resource management to ensure that adequate resources are available to achieve holistic, long-term outcomes.

Such critical attention is made more pressing as economic perspectives appear to have displaced ecological science as the major contributor to understandings of how environmental problems – and indeed local communities – should be managed. Environmental problems now are conceived primarily as the problem of allocating and managing scarce resources between competing ends to achieve efficient outcomes (Ramsay and Rowe, 1995: 68). Thus in a mainstream economics framework, the environment becomes another kind of resource or asset; which provides particular types of goods and services desired by people (Tietenberg, 2004: 15). Elements of the environment become not components of inter-connected ecosystems but assets whose value is determined by utility to humans; calibrated against price. Together with biodiversity, a range of other environmental elements, such as water are now seen as providing valuable 'life-sustaining services' from fresh air and water to scenic qualities (Tietenberg, 2006: 15). Schemes in many countries have created markets for the provision of 'services' commencing with clean air and water and the avoidance of land degradation. Some schemes were developed expressly by governments[12] and others by private entities.[13] There are strong advocates of the benefits of such markets, '[t]hese experiences have demonstrated that investing in natural capital rather than built capital can make both economic and policy sense' (Salzman, 2005: 870). From an Indigenous perspective, it is important that these schemes are seen as more than investments in 'natural capital' but instead extend to long term community sustainability. Such community sustainability goals however may be eclipsed by a focus on efficiency in market environmentalism (Lyster, 2002) and an emphasis on global or national benefits to the detriment of the more localised concerns of and potential benefits for Indigenous peoples.

The public goods of environmental protection

Efficiency is measured in various ways, but broadly equates to a situation where a particular resource allocation maximises the overall benefits to society from using resources. Efficiency is given pre-eminence in economic theory, as it is

12 Examples of such schemes in Australia include 'Bush Tender' and 'Eco Tender' schemes in Victoria.

13 For example see Greening Australia, the organisation's website is <http://www.greeningaustralia.org.au/about-us/our-partners>

considered to be an objective criterion of social welfare (Daly and Farley, 2004: 4). Environmental economics seeks to attribute a monetary or other economic value to environmental resources or environmental protection,[14] so that the full environmental costs and benefits of resource allocations can be factored into policy and decision-making processes (Costanza *et al*., 1998: 67), to produce a 'rational' outcome. Economic rationalism favours the free markets, with minimal governmental intervention, as the optimal means for efficient allocation of resources, in order to 'maximise' social welfare (Kinrade, 1995: 86). Yet, the belief in the free market to produce efficiency of resource allocation is underpinned by assumptions that often are problematic in terms of the public 'goods and services' provided by the environment. Situations where individual actions conflict with social objectives, are designated as market failure. Advocates of economic rationalist approaches consider that, '[t]he government's role in is to seek out market failures and correct them with policies designed to align private and social interests' (Luckert and Whitehead, 2007: 11). This constrained view of the role of government, as one limited to correcting market failures, represents a major reorientation in governance for federal and state governments in Australia. The implications of this view are already apparent in many spheres of Indigenous policy but the intersections with environmental governance are striking. If governments are seen primarily as correcting market failures, where the market itself is the main vehicle for delivery, it renders problematic many areas of strategic and institutional government service provision. Moreover, within Australia in regional and remote areas, many public goods and services are still supplied by governments, albeit with increasing levels of private provision. In many instances though, private provision will be uneconomic and/or unable to address externalities and third party effects. Externalities such as pollution and third party effects, that is effects on entities that are not parties to the market exchange/agreement, are common in environmental spheres. Typically, much private exchange based environmental service provision does not address these aspects – these are the so-called market failures.[15] To withdraw government environmental protection and broader service provision where market failures operate thus risks increasing Indigenous disadvantage and may lock regions into a 'resource curse' situation where the benefits of natural resource/economic exploitation flow outside the source region.[16] Accordingly, it is necessary to consider the circumstances where governments should adopt a more expansive role in promoting economic development and stimulus consistent with broader

14 Adam Smith's *The Wealth of Nations* was a seminal work advocating market mechanisms to achieve efficiency in allocation.

15 As a consequence, private entities often are able to 'cherry pick' the more profitable aspects of environmental service provision.

16 For an analysis of the resource curse concept see Langton and Mazel, 2008: 31–33.While this phenomenon is most often associated with mineral exploitation, it is apparent that NRM can be subject to similar disparities in return income flow.

social goals, such as the alleviation of the relative disadvantage of Indigenous communities. This expansive role is most imperative in areas of 'public goods' and ecosystem services such as biodiversity protection.

Markets tend to perform poorly when it comes to the allocation of environmental resources that are public goods (Moran, 1995: 73, 79), or so called 'common pool resources' – including many areas that comprise Indigenous land and waters. NRM is often characterised by market failures for public goods, as the 'goods' obtained such as climate mitigation or land protection cannot be regarded as 'exclusive'; that is third parties cannot be effectively excluded from the benefits of such environmentally beneficial measures, even though such entities may not contribute to the provision of such benefits (the free rider problem). Luckert and Whitehead suggest,

> there are many goods and services that suffer from public good properties. In addition to biodiversity, carbon sequestration, retention of cultural values and scenic resources may all exhibit public group properties. Many of these resources are enjoyed by non-indigenous Australians who are able to free ride on the provision of these values by indigenous peoples. (Luckert and Whitehead, 2007)

Given that many native title determinations do not confer exclusive possession on native title holders – often such rights will comprise a non-exclusive right of access and use – then the free rider problem may be exacerbated in these circumstances. The situation may be less critical under statutory land rights schemes and in 'joint management' situations where there is greater Indigenous control over access. However, incursions into Indigenous control over access to land and resources, such as that under the Northern Territory 'intervention'[17] must be treated with caution where there are attempts to facilitate 'economic opportunities' without appropriate safeguards for Indigenous management of lands and resources. By contrast, market failure and problems in the exclusion of free riders offer a grounded economic rationale justifying government programs promoting Indigenous involvement in NRM and environmental protection programs (Luckert and Whitehead, 2007).[18] The non-government sector also can be involved in such programs (O'Riordan, 1981: ix), – again an important consideration for future directions in ecology, native title and partnership approaches. Such co-regulatory approaches where governments promote market

17 Pursuant to s122 of the *Australian Constitution* ('Territories Power') the Commonwealth 'intervened' to address perceived child welfare and human rights abuses in the Northern Territory. See *Northern Territory National Emergency Response Act 2007* (Cth), *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth); *Families, Community Services and Indigenous Affairs and other Legislation Amendment (Northern Territory National Emergency Response and other Measures) Act 2007* (Cth).

18 These authors suggest that there are two principles on which such programs should be predicated; first an 'impacter pays' principle and secondly, a 'beneficiary pays' principle.

opportunities in environmental management and biodiversity protection are welcome additions to the range of environmental regulation where they give due acknowledgment to Indigenous autonomy and long term community viability.

Trends are less encouraging in relation to the recognition of Indigenous peoples and local community governance of 'common pool resources', at an international level. In the case of the common pool resources, classical economic theories, predicated upon Coase's social cost theorem (Coase, 1960: 1), argue that 'informal users' deplete the 'common resource' without regard to the interests of the broader community. Ultimately this situation will result in over-exploitation and collapse (Hardin, 1968: 1243).[19] Informal users are regarded as those people not part of a formal private property regime. Solutions that are advocated to deal with this type of 'market failure' generally suggest making land and environmental resources a private entity and tradeable commodity. A prominent recent example of dealing with the degradation of common pool resources in this manner is through the creation of emission permits in an emissions trading market and in carbon 'offsets' (see, for analysis, Gerrard, Chapter 7, this volume). Drawing on social cost theory and the proliferation of cap and trade schemes, market mechanisms for trading in environmental resources, such as water, have been adopted in environmental regulation in many parts of Australia.

The use of market tools for the purposes of environmental regulation has not occurred without substantial critiques. Yet market environmentalism continues to gain momentum as 'market tools' have been strongly promoted by a suite of new (and old!) governmental institutions, increasingly committed to the property rights/trading model.[20] Indeed, use of trade and exchange to regulate for environmental goals is regarded now in policy and government circles as offering substantial advantages compared with traditional state based ecologically oriented environmental regimes (see, for discussion, Ackerman and Stewart, 1985: 1333). However as experience with market environmentalism emerges, the Australian situation suggests that markets in practice do not always capture the predicted theoretical benefits (Eckersley, 1995: 7, 21). Generally, what is emerging in Australia as the predominant market-based model is not 'free' market, but rather a hybrid of command-and-control and market measures perhaps best categorised as 'legally regulated marketization' (Braithwaite and Parker, 2004: 269). Specific criticisms of the market model of particular pertinence to this analysis are that market exchange may work effectively for environmental regulation in situations of discrete pollutants which can be

19 Hardin's article generated many counter views that challenge the premise that human beings inevitably act as individualised rational economic actors incapable of organising communitarian responses to protect shared environmental resources (see, for example, Ostrom, 1990).

20 For example, the Productivity Commission has issued many reports of the potential for markets in 'ecosystems services' in areas such as water management, salinity control, biodiversity conservation and carbon capture (see, for example, Murtough *et al.*, 2002; Productivity Commission, 2001).

effectively monitored and valued for trade/offset purposes, (although even here not all costs are captured). However trade and exchange are less effective for complex, heterogeneous environmental resources such as biodiversity (Luckert and Whitehead, 2007: 11). Other critiques of the market-based model point to more intangible values that may be sacrificed through the focus of markets on the criterion of efficiency (Jacobs, 1995: 46, 68). These points have particular resonances for the intersections between native title, ecology and markets given that many western legal and economic instruments fail to capture the nuances of Indigenous relationships with country.

Markets, ecology and native title

How then are Indigenous peoples, native title, ecology to be situated in the rapidly emerging regulatory structures of environmental markets and the accompanying structural changes? In turn, how should agreement-making operate in such a governance and organisational space?

Clearly, significant potential exists to utilise native title and agreement-making in concert with sustainable environmental objectives to facilitate long term structural change in the economic opportunities available to Indigenous communities (see, for example, Ridgeway, 2005), particularly, but not exclusively, in remote and regional Australia. Thus,

> [t]he insertion of customary institutions and jurisdictions into the market place through agreement making, such as Aboriginal heritage management agreements … is not mere syncretisation of tradition and modernity, but the transformation of relationships. These postcolonial forms of policy engagement are underwritten by both customary exchange and market considerations. (Langton and Palmer, 2004: 47)

Postcolonial policy engagements combining market considerations and forms of exchange built upon Indigenous knowledge and values governing care for country are exemplified, as noted, by Indigenous agreements for the provision of a variety of ecosystems services, such as carbon sequestration. (Gerrard, 2008: 941, 945). As Gerrard suggests:

> Many environmental services performed by Indigenous peoples are not 'new' to federal, State and Territory governments. Government departments and agencies have been involved in joint and cooperative management arrangements with Indigenous peoples for some time. However, the current threat of climate change and associated 'low carbon'

> context creates the need to value these services more appropriately and to provide adequate financial and regulatory infrastructure to enable access to, and growth of, new opportunities. (Gerrard, 2008: 945)

Indigenous involvement in the provision of environmental and NRM services reflects structural and administrative governance changes that have direct consequences for Indigenous employment and benefit flow to Indigenous communities. A further advantage to stem from such involvement is the potential for closer integration of Australian Indigenous communities with global markets in environmental 'goods'. The predicted rise of green economies in a carbon constrained world arguably presents unique opportunities for Indigenous peoples whose customary knowledge of land and waters can make a significant contribution to international and national efforts to address environmental deterioration including climate change. Yet, as Gerrard comments in regard to climate change mitigation and adaptation;

> [a]lthough parts of Australia have benefited from innovative and supportive Caring for Country programs and Indigenous environmental and land management services, greater acknowledgement and support is needed for Indigenous peoples to grow development opportunities associated with climate mitigation activities. At present, traditional knowledge and the ecological services performed by Indigenous peoples are generally informal, undervalued and/or under-supported. (Gerrard, 2008: 941)

Indigenous peoples' involvement in environmental services must be predicated upon an approach that respects and gives effect to Indigenous people's customary relationship with land and waters but which is contemporary and practically grounded (Ross and Ward, 2009: 39). Experience with agreement-making in Australia and comparable jurisdictions suggests that effectively negotiated and implemented agreements can offer a structure to value Indigenous contributions to environmental management both tangible and intangible and facilitate access to, and growth of new opportunities for Indigenous communities (see, generally, Langton *et al.*, 2006). Environmental markets provide Indigenous communities with the chance to participate in rural businesses which are uniquely located in regional and remote areas. The lack of inherently viable local business in such areas has long been acknowledged as problematic on the basis that 'traditional' forms of capital investment are not available.

However, agreement-making in environmental markets must also operate within the ambit of strong national legislative and international law safeguards for traditional knowledge and customary practice in the delivery of environmental

services.[21] The history of the interface between Indigenous communities, traditional knowledge and values, and global markets has not always been beneficial to Indigenous peoples (see, for example, Davis, 1999: 40).[22] Global markets in biotechnology are now pervasive, supplying many goods that have a basis in either genetic material gained from Indigenous held land and waters or utilising traditional knowledge. Given this experience, clearly there is a need to develop robust protocols and legally enforceable safeguards to protect Indigenous peoples and traditional knowledge practices that are integral to Indigenous participation in 'environmental services' provision.

From the perspective of changing structural forms and employment opportunities, earlier experience of globalisation and the market penetration of Indigenous communal systems, gives some cause for concern. The adoption of market environmentalism offers some parallels with earlier periods of globalisation and privatisation that intruded into Indigenous capacity to care for country (Gerritsen, 2007: 79). Gerritsen argues that previous interventions of western capitalist modes of production into remote and regional parts of Australia also were predicated upon the idea of the identified need for greater efficiencies. However a rubric of efficiency often acted to displace Indigenous peoples from the labour force and emerging economies (Gerritsen, 2007: 79). Alternatively, in market environmentalism, are Indigenous peoples likely to become a 'labour force' in yet another industry where Indigenous employment is concentrated at the unskilled 'end', rather than at the managerial/decision making level? The history of the pastoral industry offers salutary historical experience in this regard (Gerritsen, 2007: 79). In this context, market environmentalism might be regarded as yet another capitalist encroachment; a type of 'green-wash' intervention that needs to be carefully managed to ensure that full participation of Indigenous communities and a flow of benefits to communities from the use of Indigenous land and waters and associated traditional knowledge is achieved. As noted, careful monitoring is important especially where financially constrained governments may be tempted to regard Indigenous participation in ecosystem services as a lower-cost option. In the context of global warming Gerrard this volume identifies that,

> Australia's responses to climate change must preserve space for Indigenous peoples to determine and realise meaningful opportunities based on their specialised knowledge and traditional practices. (Gerrard, Chapter 7, this volume)

21 The important role of traditional knowledge in biodiversity conservation is recognised explicitly in the *Convention on Biological Diversity* articles 8(j), 10(c), 17(2) and 18(4).

22 Indigenous peoples' experience with global biotechnology markets and the exploitation of traditional knowledge being a case in point.

Further, it may be useful to consider the other forms of institutional and structural reforms, such as taxation incentives, that may be required to fully implement a robust model for effective Indigenous employment and business development under the auspices of agreement-making for environmental service delivery.

Conclusion

In many countries where indigenous peoples and local communities hold significant amounts of communal land and resources, these customary systems increasingly are regarded as problematic and 'inefficient' in persuasive neo-liberal policy platforms. There are strong pressures operating through globalisation forces, and in equivalent domestic national natural resource and environmental management policies to renounce communal holding in favour of market and property-based regimes (Hughes and Warin, 2005). When aligned with an uncritical acceptance of the 'Tragedy of the Commons' phenomenon, it produces the call to formalise and individualise communal governance of land and waters, often irrespective of the local situations that pertain (Schlager and Ostrom, 1993: 14–18; see, more generally, Ostrom, 1990). Importantly, adoption of 'the commons' terminology also blurs together many facets of multilayered Indigenous governance systems under a simplifying assumption that imports a bimodal schema of either private or communal categories (see, for a critique, Lee, 2006: 22). Such oppositional categories fail to accommodate the highly porous nature of relationships that exist in Indigenous and local communities which allows diverse forms of entitlement and responsibility within an overarching communal governance system (Macintyre and Foale, 2007: 49–59).

On an international scale, communal governance of land and resources that, broadly speaking, can be regarded as equivalent to native title, is subject to internal policy and externally derived trends to replace such tenures with commercially oriented, market-based forms as the preferred medium for Indigenous peoples to manage land and resources. Under this trend, complex interactions with land and waters, that offer the capacity for more multifaceted objectives in protecting ecological and spiritual relationships, risk being constituted as inefficient. Inefficiency is the most recent signification of a long history of property relations between Indigenous peoples and settler societies that have inscribed Indigenous relationships with land as ineffective or even more negatively as non existent (that is as terra nullius). In concert, long standing discourses of security and certainty have produced a sense that the modern, highly technological use of land – that which creates settler property – is commercial and private. Assigning causal trajectories, such as inefficient land and resource practices with customary systems, reveals the limitations of market

values and efficiency paradigms for holistic ecological outcomes, even where these have been substantially modified to take account of cultural factors. Moreover, what is at stake in many debates over market regulation is not only economic productivity, but also the struggle for recognition of more dynamic community relationships than those modelled on market environmentalism. Finally, a key issue is whether the instigation of agreement-making in environmental markets deflects from fundamental questions about Indigenous self determination and native title as denoting ownership of land and communal resources? More positively perhaps, the challenges and opportunities presented by the change in paradigm from ecology to environmental markets are ones to be grasped by Indigenous communities. As the policy and legal responses to climate change and ecological preservation that are emerging around carbon sequestration and fire burning practices signal, there are significant windows of opportunity opening up for Indigenous Australians to participate in major new structural models for ecological management and benefit. Such change is precipitating under a range of ecological imperatives such as climate change adaptation, but also due to significant shifts in international finance and trading regimes, and indeed to the very concepts of value and 'offset' in a range of ecologically-related activities. As these emerging models of governance over land and resources crystallise, institutional, legal, political and cultural questions will arise as to how to most effectively provide a platform for recognising the significance of Indigenous relationships with country and the need for flexibility and local community participation in native title and associated forms of agreement-making with Indigenous peoples.

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Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007 (Cth)