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CRICOS Provider No. 00120C

RE: Inquiry into the Native Title Amendment (Reform) Bill 2011 [the NTA Reform Bill]

Thank you for your letter of 23 May 2011 seeking a submission to this Inquiry and for then granting me permission for late lodgment.

I concur with the view in the Explanatory Memorandum for the NTA Reform Bill that the Bill if passed into law, will implement important and arguably long overdue reforms to the *Native Title Act 1993* that will enhance its effectiveness. The NTA Reform Bill targets two key areas, the barriers that registered native title claimants experience in making the case for determination of native title rights and interests and in procedural issues relating to the complex future act regime. These issues need to be addressed in the interests of native title claimants, but also in the wider national interest. Of particular significance here is the attempt to move the *Native Title Act 1993* (NTA) in a direction that is more consistent with principles enunciated in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) that was belatedly supported by the Australian Government in April 2009. Domestically, changes to the future act regime are likely to ensure more equitable and efficient processes for negotiating resource development projects on land where there is a registered native title claim or a determination of native title.

The issues that this Bill seeks to address have been highlighted for a number of years and are complex, indeed so complex and politically contentious that they have been largely ignored. So as an academic whose research over the past three decades has focused on Indigenous development and policy, I want to commend the Australian Greens for developing and tabling this comprehensive reform package in the Australian Parliament. To make my submission of manageable size and accessible, I do not propose to rehearse in any detail the extensive native title literature and arguments within it on the two broad issues of native title recognition under Australian law and the operations of the future act regime that has afforded asymmetric power favouring resource developers in negotiations. That is because there are a number of recently published books that do this very well including Lisa Strelein's *Compromised Jurisprudence: Native Title Cases since Mabo* (2009), David Ritter's *Contesting Native Title: From Controversy to Consensus in the*

Struggle over Indigenous Land Rights (2009) and *The Native Title Market* (2009) and a volume of essays *Power, Culture, Economy: Indigenous Australians and Mining* (2009) that I have co-edited with David Martin. And this is just a selection of recent titles.

So rather than provide a comprehensive submission heavily referenced as is the usual academic approach, I am keen to provide a brief submission written in an accessible essay style. For me personally, this submission is the latest in a surprisingly large number made to parliamentary and departmental inquiries on native title matters in the last two years. Rather than rehearse my earlier arguments in any detail, I will merely append here my three most recent submissions to the House Standing Committee on Economics Inquiry into Indigenous economic development in Queensland and review of the Wild Rivers (Environmental Management) Bill 2010 (dated 18 February 2011) as Appendix 1; to the Senate Legal and Constitutional Affairs Committee Inquiry into the Wild Rivers (Environmental Management) Bill 2010 [No.2] (dated 31 March 2010) as Appendix 2; and to the Australian government's Indigenous Economic Development Strategy Draft for Consultation (dated 17 December 2010) as Appendix 3. I do so in part because it is my view that many of the issues to be addressed in this Inquiry, at least in so far as they relate to the economic empowerment that native title might bestow on Indigenous Australians, are closely linked with issues raised in these earlier Inquiries. I also do so to provide members of the Senate Standing Committee on Legal and Constitutional Affairs a sense of my perspectives on native title property rights and associated development implications that will inform the following commentary.

I draw attention in particular to two of my recommendations. My only recommendation to this Committee's earlier Inquiry into the Wild Rivers Bill was (and I paraphrase) that there is a need to review all land rights and native title laws Australia-wide to ensure that important resource rights and free prior informed consent rights proposed for Cape York by the Abbott Opposition be given national attention (see page 30 below). My first recommendation to the House Standing Committee on Economics was that the unprecedented form of native title property rights being proposed in the Abbott Bill as a special measure for advancement and protection on Cape York be extended to all parts of Australia as proposed by the Australian Greens in the Bill that is the subject of this Inquiry (see page 18 below). I highlight these submissions to make my vested intellectual interest in this Inquiry transparent, noting that I was referring to a draft of the current Bill.

I provide this somewhat reflexive opening commentary because of the conflicted and highly politicised nature of Indigenous policy making, including sensible legal reform, in Australia. Under such circumstances the need for transparency seems paramount. And now to some scene setting, brief commentary on several areas of proposed reforms, a comment on what is missing in the reform agenda and a final comment on the politics of reform.

Scene setting

The Native Title Act was passed in 1993 in response to what some have referred to as the judicial revolution of the High Court's *Mabo* judgment of 1992 that recognized a form of Indigenous 'native title' at common law. Some, and I include myself here, viewed this as a 'judicial revolution'; while others such as David Ritter in his recent book *Contesting Native Title* (2009) have argued that by recognising native title, Australia was merely catching up

with precedents set in other settler colonial societies, caught up, perhaps, in the tide of global history.

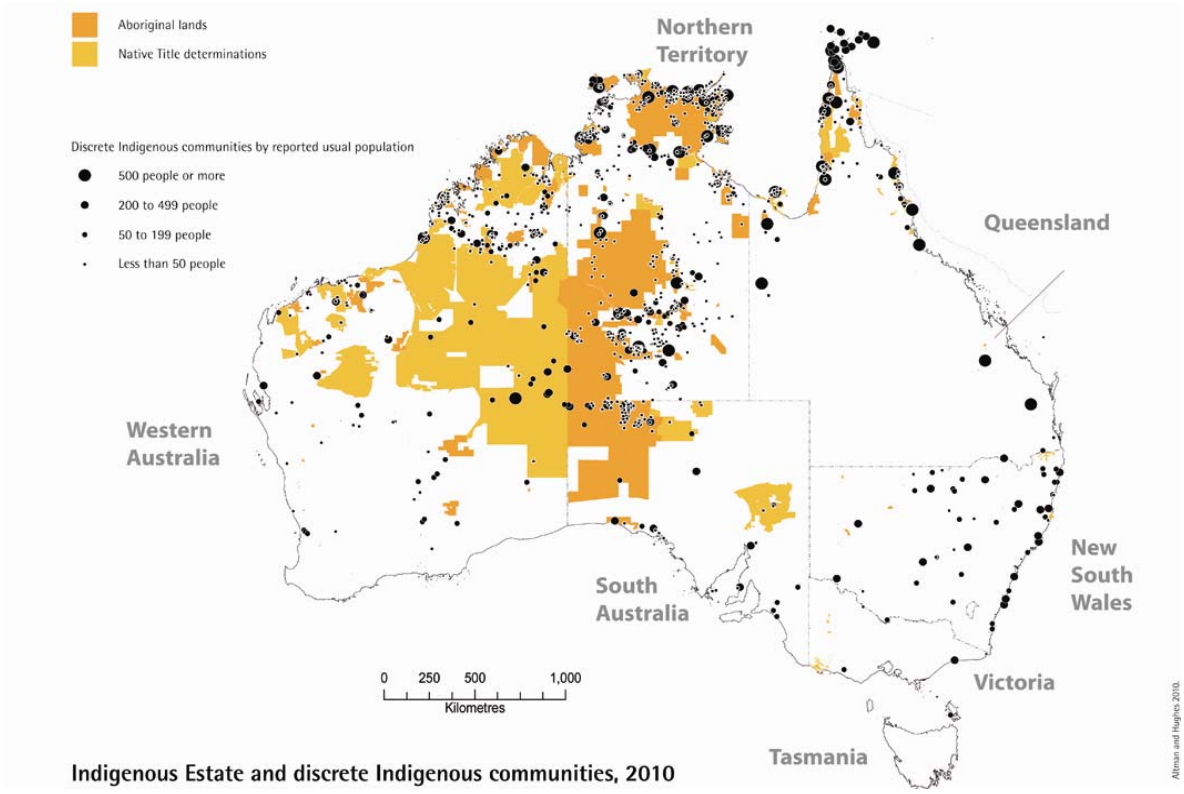
There has been a spectrum of views about the benefits of native title to Indigenous people on two inter-linked issues. The first is the extent of land over which there have been successful native title determinations. The second is what development benefit native title determinations, even from so-called ‘exclusive possession’, might have actually generated.

For the Committee’s information I present two maps developed with my colleague John Hughes from a variety of sources including the National Native Title Tribunal. The first map shows the national coverage of land vested with Indigenous groups as a result of land rights and native title laws. To summarise briefly, an estimated 1.7 million sq kms is now vested in diverse forms of Indigenous ownership or management following land claims and over 100 successful native title determinations. Clearly, however, there is enormous inequity in their geographic distribution with over 98 per cent by area being in remote Australia. And a successful determination does not equate to ownership; it could mean that the group has simply been determined to hold non-exclusive rights to hunt, fish, camp etc. In other words, despite apparent massive land and native title coverage, the cliché about Aboriginal people being ‘land-rich but dirt poor’ needs to be challenged given the weak property rights under which much of this land is held.

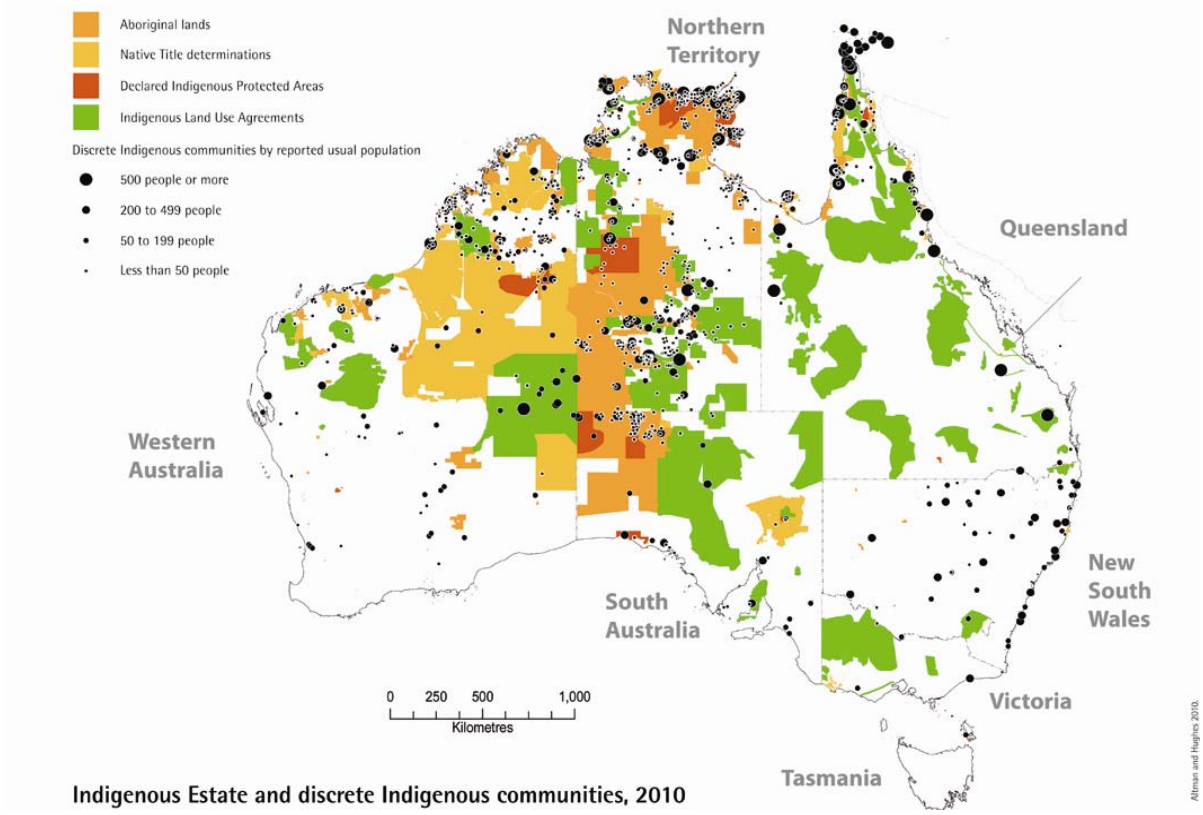
The second map shows areas where there are registered Indigenous Land Use Agreements (ILUAs), although in such situations there are generally very weak, if any, procedural rights in relation to future acts. The map also shows declared Indigenous Protected Areas of high conservation value.

What is becoming increasingly clear is that the national diversity in land rights and native title laws constitute very different forms of property. The cogent argument that is being increasingly put forward by Indigenous interests is that for land ownership to have economic development potential land owners must enjoy a form of free prior informed consent rights that constitutes a meaningful form of property. Such a form of property is only effectively recognised under land rights law in the Northern Territory. This issue has been at the heart of the Wild Rivers debate, as well as development disputes in the Pilbara and west Kimberley.

In a broader Indigenous policy context it can readily be argued that if the Closing the Gap policy framework is to have any realistic prospect for reducing disadvantage for the estimated 100,000 Indigenous people living at the 1,200 discrete Indigenous communities [shown on maps] on what I term the ‘Indigenous estate’, there will be a need to strengthen their rights to not just own but also to use, develop and control the lands, territories and resources that they possess by reason of traditional ownership as noted in Article 26 (2) of UNDRIP. Or to put it more bluntly, how can socioeconomic gaps be closed without economic development where people live? Such development will surely require property rights in commercially valuable resources and more balance in possibilities for negotiation for equitable compensation deals when commercial activities, especially mineral extraction, occurs on Indigenous land. As the Australian government itself seeks to extract a greater share of mineral rent from resource developers, with its proposed Mineral Resources Rent Tax (MRRT), so consideration needs to be given to how native title groups might similarly gain an equitable share of mineral rents generated from their land.



Indigenous Estate and discrete Indigenous communities, 2010



Indigenous Estate and discrete Indigenous communities, 2010

The Native Title Act and UNDRIP

The Native Title Act was passed in 1993, 14 years before the adoption of UNDRIP by the General Assembly on 13 September 2007. 144 states voted in favour of UNDRIP with Australia being one of only four nations who voted against. On 3 April 2009 Australia reversed its position. The NTA Reform Bill aspires to more closely align Australia's native title law with UNDRIP principles that themselves seek to embody recognition and implementation of international human rights. As a General Assembly Declaration UNDRIP is not a legally binding instrument under international law, but clearly in now supporting UNDRIP the Australian government is keen to see its principles reflected in Australian domestic law dealing with Indigenous Australians.

Importantly, in the Wild Rivers (Environmental Management) Bill 2010 proposed by the Leader of the Opposition Tony Abbott direct use was made of Articles in UNDRIP that refer to the right of Indigenous peoples to own, use, develop and control their lands while also guaranteeing that Indigenous land owners have a right of consent over any decision that might affect their lands. This reference by the Opposition Leader to UNDRIP is surprising given the Howard government's strong opposition to the Declaration.

In my view it is quite appropriate for the NTA to be updated to comply as closely as possible to key 'property and procedural rights' principles in UNDRIP. I note additionally that Indigenous groups are invoking articles in UNDRIP to highlight their relative disadvantage in benefitting economically from their lands and in having more equitable leverage for negotiating with powerful economic actors over development where native title interests have been recognised.

The definition of 'traditional' and burden of proof

Ever since the NTA was passed there has been criticism of the courts' interpretation of S223 which has been very narrow and uninformed by the body of international common law on native title. Arguably, the problem is not so much the requirement that claimants must legally demonstrate continuity of rights and interests under 'traditional laws acknowledged' and 'traditional customs observed' or in the need to demonstrate the maintenance of connection with lands and waters since colonisation. Rather, the problem stems from the Federal and High Courts' interpretations of these requirements resulting in Indigenous Australians have become trapped in a western legal definition of authenticity to gain formal title to their ancestral lands. The onus has been on them to prove their authenticity.

The operations of S223 have obviously worked for some native title claimants as clear from the maps above. And in other cases native title claimants have missed out perhaps most clearly in the Yorta Yorta case. Some commentators have been highly critical of the processes for claiming land under native title law, referred to by historian Patrick Wolfe as 'repressive authenticity' and by anthropologist Elizabeth Povinelli as the 'cunning of recognition' because the late modern Australian liberal democracy is permitting return of land, but only if claimants can legally prove forms of 'original' connections and continuity of custom as required by western laws, as if never invaded.

The NTA Reform Bill looks to deal with this issue in two ways.

First it is proposed that the burden of proof be shifted so that in determining native title it will be assumed that registered claimants enjoy continuity of custom and connection unless government parties can prove otherwise.

Second it is proposed that the notion of 'traditional' is not frozen at some fictitious time of colonial contact but is recognized as both evolving and adaptive as all cultures are. This appears to have been the intention of the High Court in the *Mabo* judgment but this intent was lost in the codification in the NTA and subsequent legal interpretation of the law by differently constituted High Courts.

Such changes will allow the recognition that contemporary Aboriginal social norms, even in the remotest parts of Australia, comprise a mix of customary and western social norms and values to various degrees. In recent years, cultural analysis in Australia has increasingly rejected the false essentialised distinction between modernity and tradition. Instead there is a recognition of the intercultural circumstances of Indigenous life everywhere, with the precise nature of this interculturality varying enormously across the continent.

Having said this, it is important to note that these changes will reduce the legal burden of proof that claimants have to demonstrate to a generally non-Indigenous wider jural public and the state. But there will still be a need for detailed and complex connection research both for passing the registration test to lodge a claim and to ensure that the correct native title interests are identified within regional Indigenous domains.

The proposed changes to the NTA here will not entirely undo the 'repressive authenticity' embedded in Australian law, but it will go some way to ameliorating its impact.

The future acts regime and good faith negotiations

From the time that the NTA was passed it was recognized that its 'future acts regime' conferred a weaker form of property on native title groups than those enjoyed by traditional owners of land in the Northern Territory under Commonwealth land rights law passed in 1976. This is because at best, native title groups only had a right to negotiate with resource developers, not a right to exclude them. In the Northern Territory on the other hand, in part because of historical precedent limiting access on pre-land rights Aboriginal reserves, land owners have rights that amount to free prior informed consent rights, sometimes called a right of veto. While this is not a de jure property right in minerals, it is a de facto right created by the right to exclude. The only reason for this weaker property right in the NTA was political: at the time the NTA was being debated and was eventually passed a judgment was made that such an approach was needed to expedite passage through the Australian Parliament. At that time it was also unclear if native title rights might include mineral rights that were retained by the Crown (the Australian government) on land granted under the Northern Territory Land Rights Act.

So, an innovative and somewhat experimental mechanism was introduced in the NTA's future acts regime that encouraged resource developers and native title groups (including registered claimants) to come to an agreement within six months without any restrictions on the financial provisions in such 'commercial' agreements. However, if agreement is not reached during this narrow window of opportunity, then under S38(2) of the NTA the matter

is referred to an arbitral body [the National Native Title Tribunal] but the value of minerals cannot be taken into consideration in determining compensation.

This regime was introduced in response to mining company views that delay represented a 'transaction cost' that could undermine the commercial viability of mines and result in a flight of shareholder capital. It was intended that an incentive structure would be created to encourage all parties to settle in good faith and out of court. The message to miners was to expedite proceedings by making reasonable, even generous, compensation offers. The message to native title groups was not to use the rights to negotiate as a de facto right of veto because in all likelihood less compensation would be provided from an arbitrated, rather than negotiated, agreement. At the time I was skeptical that such a blanket approach would necessarily work owing to site by site differences in the need for rapid mineral extraction, the type of mine and the size and affluence of the mining company.

Over time it has emerged, mainly through the research of Ciaran O'Faircheallaigh, Tony Corbett and David Ritter, which have found that in almost all cases when agreement could not be reached, the decision of the arbitral body favoured miners. So a moral hazard has arisen whereby there is actually an incentive for mining companies not to negotiate in good faith and to delay proceedings because they will benefit from an arbitrated, rather than negotiated, agreement in situations where a speedy outcome is not required. This has meant that the power asymmetry already embedded in the original future acts regime has been exacerbated. In particular, native title groups might be forced to settle for inferior benefit sharing deals fearing that delay beyond six months might further erode whatever deal is on the table. Unfortunately, the meaning of 'good faith' has been interpreted very generously by the National Native Title Tribunal and the Federal Court, in part because it is very difficult to establish that a company has not negotiated in good faith. (see Sarah Burnside's 'Negotiating in Good Faith under the Native Title Act: A Critical Analysis, 2009.)

The historic genesis of the problem is that the NTA (like the Aboriginal Land Rights Act before it) has never been clear whether the negotiated agreements between resource developers and native title groups are compensatory for loss of native title rights, in which case it is unclear why the value of the mine is an issue; or whether benefit sharing is intended as a fair division of mineral rent with native title groups who have a legally recognized interest in the land, but no legal rights in sub-surface minerals. If mineral rent is recognized as a legitimate basis for calculating compensation, why does this rationale suddenly end after six months? Excluding the value of minerals from the equation after six months merely acts to further weaken an already weak property right represented by the right to negotiate.

It is unquestionable, in my view, that if the arbitral body was legally empowered to recommend profit linked, royalty type, payments to native title groups in arbitration and operated in an impartial way, the negotiation playing field would be more level; and there would be an incentive for all parties to engage in negotiations in 'better' faith.

Commercial rights and interests

There are two puzzling aspects of the Native Title Act in relation to commercial rights and interests.

The first is that while customary (non commercial) rights are recognized under S221 of the NTA, commercial rights in resources appear excluded. This might make sense if one were to interpret native title as frozen in some imagined 'at the threshold of colonisation' (to use the term coined by Ian Keen in his book *Aboriginal Economy and Society*, 2004) and so commercial rights, especially to subsurface minerals, are viewed as too modern to encompass tradition.

The second is the view that property rights can be neatly divided between customary and commercial. This is clearly not the case, as I have demonstrated in research in relation to fresh water property rights. If there are competing customary and commercial interests in fresh water (surface or ground) it is obviously the case that, not only is the competition over the same water, but that customary use might impact on commercial use and vice versa. In the interests of clarifying property rights to reduce potential for legal disputation (and associated transaction costs that might arise from litigation) over which rights take primacy it is probably sensible not to make imagined distinctions based on the nature of use over the same resource.

Legal scholar Lisa Strelein in her book *Compromised Jurisprudence: Native Title Cases Since Mabo* (2009) refers to a series of native title test cases since the *Mabo* judgment as 'compromised jurisprudence'. Nowhere is this clearer than in High Court decisions to support the customary right of a native title party in *Yanner v Eaton* (1999) but to dismiss the mineral rights of a native title claimant group in *Western Australia v Ward* (2002). Just as in the case of water above, what if the sub-surface mineral right is actually a surface mineral right as is the case in much strip mining for iron ore in the Pilbara. Can the land surface that constitutes native title and the mineral that is extracted from that surface be neatly demarcated and merely be the subject of a negotiation process whereby native title parties cannot say no?

In similar vein, the NTA makes a neat distinction between terrestrial and marine estates in relation to the operations of the right to negotiate framework as if such a distinction is logical either on ecological or cosmological grounds. Indigenous people who live in the coastal zone has always asserted that their terrestrial and marine interests are interlinked and so it makes sense to extend the right to negotiate offshore in situations where there has been an offshore native title registered claim or determination. Some of the issues that have arisen in relation to the intertidal zone in the *Blue Mud Bay* High Court decision (2008) are instructive here.

Lisa Strelein notes in her book (p63) that 'The assertion by the Crown of property in minerals was always going to be a problematic fiction for the courts and it has to be seen as a political compromise'. I concur with this view and now wonder how, in accord with Article 26 (2) of UNDRIP native title groups can now be granted commercial rights and interests. While sub-surface mineral rights might still require 'political compromise', there are many other old and new forms of property including forestry, fisheries, fresh water and carbon, to name four, that could be vested with native title groups to ensure that the land is a <u>potential</u> economic asset. I intentionally underline the term potential here to emphasise that native title is first and foremost a property right and it is the prerogative of native title groups alone, not well-intentioned politicians or resource developers, to decide to what purpose this property right might be exercised.

Other issues

There are three other issues not addressed in NTA Reform Bill that I would like to briefly raise.

First, as noted already, the precise nature of payments made to native title groups for future acts impairment of native title has never been clearly defined. Nevertheless, there is general agreement that, at least in part if not in whole, payments to native title parties in relation to a future act on land where there is a registered claim or a native title determination are compensatory payments from a private source (a mining company) to groups with interest in the land to be mined. This is a very different arrangement from that current in the Northern Territory where payments to Aboriginal interests from mining on Aboriginal owned land are mainly provided from the equivalents of statutory royalties paid by the Commonwealth. In the former case payments are definitely private, in the latter there is some debate about their status but the payments are technically at least public.

And yet over the last three years we have seen considerable attention paid by first the Rudd and now Gillard governments to how native title payments should be both taxed and regulated by the state. And so there have been three discussion papers released by the Australian government ['Optimizing Benefits from Native Title Agreement' by the Department of Families, Housing. Community Services and Indigenous Affairs in February 2009; 'Native Title, Indigenous Economic Development and Tax' by Treasury in July 2010; 'Leading Practice Agreements: Maximizing Outcomes from Native Title Benefits' by Attorney-General's in July 2010] that have all advocated for these compensation payments to be used for community purposes. Indeed, mining companies and the Australian government seem to be on a concerted campaign to ensure that such payments should be closely regulated in a manner that would not be countenanced if made to non-indigenous land owners.

I have made submission on each of these discussion papers that this focus is a misallocation of reform zeal, while also pointing out that the state is conflicted here as using compensation payments for general public and/or community purpose could result in cost shifting away from expenditure areas that are the legitimate responsibilities of the state. This reform process appears to have stalled, possibly because the paternalistic tone of the discussions papers that reinforces the view of governments and mining companies that they have a legitimate role to play in dictating how compensation payments are utilized and what form compensation might take, has been challenged. In my view there is no legitimate role for either a mining company or the state in regulating the use to which moneys provided in benefit sharing agreements are applied.

Second, in so far as at least some share of payments made to native title groups in benefit sharing agreements are linked to profit sharing and royalties, there is clearly a political economy struggle over the division of the total mineral rent extracted from native title lands between four sets of actors: the Australian government; States and Territories; mining companies; and native title groups. There is a steep gradient in power from the Australian government and States and Territories that issue licences to operate, export licences and have taxation powers being most powerful and native title groups who have a mere right to negotiate (despite having 'exclusive possession' rights over much land) being least powerful and having least leverage. Again in my view the state is conflicted operating in a

manner that Peruvian lawyer and anthropologist Patricia Urteaga-Crovetto has termed the 'broker state'.

The potential for conflict here has grown since the Australian government has proposed its new Mineral Resources Rent Tax regime because now both state and mining company actors will be competing more directly over the division of mineral rent and there is the prospect that native title groups will miss out (an argument made opportunistically by some miners who do not want to pay the new tax). This situation can be contrasted again with arrangements in the Northern Territory where Aboriginal interests and the Northern Territory government are far less conflicted because both want to see the 20 per cent profits tax payable under the NT Mineral Royalty Act levied, cognisant that the Australian government will pay equivalents to the Aboriginals Benefit Account. Furthermore, in the Northern Territory, there is provision for additional negotiated payments to be made above the statutory royalty equivalent minimum that operates as a base. However, it should be noted that only 30 per cent of payments made in relation to any mine are paid to Aboriginal corporations whose members live in, or are the traditional Aboriginal owners of, the area affected by those mining operations.

Arguably, if the Australian government wants a say in how mining moneys are spent it should share or hypothecate a proportion of the mineral rent it levies on resource developers with native title groups, as in the Northern Territory.

Third, in recent months considerable popular and social media coverage has been aired on the future acts negotiation dispute between Fortescue Metals Group (FMG) and the Yindjibarndi Aboriginal Corporation (YAC) in relation to the multibillion dollar Solomon Hub iron ore development in the Pilbara. This has been shown to be a highly divisive dispute in large measure because the YAC has been offered a relatively poor deal by Pilbara industry standards in terms of financial benefits. Furthermore FMG have demonstrated an extremely paternalistic attitude in seeking to regulate native title compensation payments. Such an approach should not be possible in 21st century Australia.

When the NTA was passed in 1993 there was an Australian government reluctance to introduce a statutory land council system as operating quite effectively in the Northern Territory. This reluctance reflected a Keating government acquiescence to concerns expressed by the States that a statutory system would give native title interests too much political power. It seems to me that there may be a need to revisit this issue to consider the benefits of a statutory role for well resourced and independent 'land councils' (Native Title Representative Bodies or NTRBs) in assisting native title groups negotiate with powerful mining companies and act as 'at-arms-length' advocates for native title groups with a statutory role as co-signatories of agreements. As in the Northern Territory, consideration could be given to providing NTRBs with a revenue stream from royalties that are at least partially independent of annual government appropriations.

The politics of reform

Many of the issues being addressed in the NTA Reform Bill have been around for over a decade and yet have remained unresolved. There seems to be an emergent trend in Australian policy making at the national level for reform either to be extraordinarily protracted or else be perennially delayed.

Part of the problem in this particular case might be that despite policy rhetoric of practical reconciliation or Closing the Gap, elected governments are too conflicted to initiate truly beneficial reform for Indigenous Australians. In this submission I have suggested that the Australian government (of the day) might be too conflicted on one hand keen to maximize its mineral rent revenue flows from native title lands; on the other, being keen to minimize its expenditures by cost shifting legitimate government expenses on citizenship entitlements onto native title groups and mining companies. In general, governments do not want to antagonize the mineral resources sector in such arrangements, although clearly the attention to this priority slipped in 2010 with the political dispute over the Resource Super Profits Tax.

It seems to me that at long last the NTA Reform Bill addresses some hard issues that have been identified as problematic for a long time and that have been neglected. Aspects of this Bill may need some fine tuning, but in my view the Bill should attract multi-party and Independent support if Australia as a nation is serious about Closing the Gap on native title lands most of which are located, owing to the process of colonisation, in remote Australia

Ultimately, and a little paradoxically, the impetus for reform appears to have been born from a combination of the failure to pass the conservative opposition's Wild Rivers (Environmental Management) Bill 2010 [No.2] and the reform initiative and zeal of the Australian Greens who have tabled the NTA Reform Bill. Both the Australian Greens and the Liberal National Party Opposition appear to agree that principles articulated in UNDRIP should be applied in Australian domestic law, in the name of development opportunity for Aboriginal people living on their own land in remote Australia. There might be rare opportunity for reform in the current parliament from an unusual political coalition.

I would like to emphasise that the following submission reflects my views alone with some drawn from previously published works; I would be happy to supplement it with verbal evidence to the Inquiry if required.

Yours sincerely

Attached:

Appendix 1: Submission to the House Standing Committee on Economics Inquiry into Indigenous economic development in Queensland and review of the Wild Rivers (Environmental Management) Bill 2010.
Appendix 2: Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Wild Rivers (Environmental Management) Bill 2010 [No.2]
Appendix 3: Submission to the Australian government's Indigenous Economic Development Strategy Draft for Consultation

Appendix 1: Submission to the House Standing Committee on Economics Inquiry into Indigenous economic development in Queensland and review of the Wild Rivers (Environmental Management) Bill 2010

Committee Secretary
House Standing Committee on Economics
Parliament House
CANBERRA ACT 2600

RE: Inquiry into Indigenous economic development in Queensland and review of the Wild Rivers (Environmental Management) Bill 2010

Thank you for the invitation to make a submission to this Inquiry.

I would like to begin with a somewhat reflexive preamble. The issues that this Inquiry looks to address are important. But they are also a little confused and conflicted. In June 2010 The Senate Legal and Constitutional Affairs Legislation Committee completed its report *Wild Rivers (Environmental Management) Bill 2010 [no.2]*. This report came out with three recommendations:

- that the Senate should not pass the Wild Rivers Bill, the majority recommendation that could be characterised as the anti-Abbott position;
- that the Senate should pass the Bill, based on a dissenting report by Coalition Senators that could be characterised as the pro-Abbott position; and
- an additional comment by the Australian Greens that the stated intent of the Wild Rivers Bill should be reflected in amendment to the *Native Title Act 1993* that could be characterised as giving national legislative coverage to the Abbott position and more effective native title rights.

I have some sympathy for all three positions.

This new Inquiry announced in October 2010 makes no mention of this earlier Inquiry but instead has greatly expanded terms of reference even though the Inquiry remains largely focused on the Wild Rivers Bill. So now the focus is not just on Wild River jurisdictions, but on the whole of Queensland, and on barriers to economic development experienced by Indigenous and non-Indigenous people, on the potential for the conservation sector to provide economic development and employment opportunity and on the effectiveness of both Queensland State and Commonwealth mechanisms to preserve free flowing rivers retaining their natural values and biodiversity. The new Inquiry does not allude to the fact that the Australian government is in the process of developing an Indigenous Economic Development Strategy for the whole of Australia, not just Queensland.

I am in broad agreement with Noel Pearson's observation in October 2010 [http://www.abc.net.au/news/stories/2010/10/01/3026814.htm] that this new Inquiry might constitute 'cynical tactical maneuvering' by the Gillard government. Even with widened terms of reference, the Inquiry could be construed as an attempt to delay putting the Wild Rivers Bill to a parliamentary vote by a newly-constituted parliament, perhaps waiting the change in the political balance of the Senate that will come about from 1 July 2011?

Nevertheless, there are serious public policy issues here that could be revisited, namely, what is the value of native title and land rights property, as currently constituted?; and how might such property rights be either utilised or leveraged to ensure beneficial development outcomes for Aboriginal people holding land interests?
My aim below is to make a further brief submission to build on my earlier submission dated 31 March 2010 to the Senate Legal and Constitutional Affairs Legislation Committee (provided at Appendix 1). My focus will be on these two broad issues as they articulate with the new Terms of Reference.

I do this partly because I have received invited and uninvited comment on my earlier submission; and an unusually high level of engagement, some quite robust, with a range of stakeholders directly and indirectly impacted by the Wild Rivers Bill including: spokespeople or leaders from the Cape York Land Council, Cape York Institute, Balkanu Cape York Development Corporation, Chuulangun Aboriginal Corporation, Carpentaria Land Council Aboriginal Corporation, Anglican Church Diocese of Brisbane, the Wilderness Society and the Australian Greens.

My aim is to try and assist the Inquiry with an academic perspective informed by my disciplinary background in economics and anthropology and more recent interests in political ecology and critical development studies, alongside more than 30 years of practical research experience in remote Indigenous development. My principal long-standing research interest of particular relevance to this Inquiry is on the issue of property rights; my policy-related goal is to advocate for greater clarity in property rights associated with lands owned and managed by Aboriginal people under land rights and native title laws; and to highlight the need for the leverage that such property rights might provide Indigenous land owners to be maximised in the interest of enhanced Indigenous empowerment and development.

There are two critical comments (that are arguably inter-linked) to my earlier submission that have emanated from some influential Cape York spokespeople who oppose the Queensland *Wild Rivers Act 2005* and support the Commonwealth's Wild Rivers Bill 2010.

The first is that my aspiration to see a greater consistency both between land rights and native title laws and between all States and Territories in Australia is aiming too high and undermining a political campaign focused on Cape York. In my view geographic exceptionalism, whether it be Cape York or Queensland, is a poor basis for sound national policy making.

The second is that I have not broadly consulted Aboriginal land owners affected by the Queensland *Wild Rivers Act* nor have I physically inspected declared wild river catchments. This observation is factually correct, although as noted above I have had direct verbal and written interactions with many key Aboriginal spokespeople. I have also in the past undertaken research on tourism on the Cape and the impacts of mining in the Gulf. More recently, I have actively participated in the major CSIRO-led scientific study for the Northern Australia Land and Water Taskforce that incorporates tropical Queensland and was the lead author of a chapter in the *Northern Australia Land and Water Science Review Full Report October 2009* [see http://www.nalwt.gov.au/files/Chapter_07-Indigenous_interests_in_land_and_water.pdf]. Historically, I have researched economic possibilities provided by tourism, the visual arts, mineral extraction, commercial utilisation of

wildlife, the services sector, the conservation economy and emerging opportunities in the carbon economy in north Australia. My current research is focused on development in both the conservation economy and the hybrid economy; this research highlights livelihood possibilities and opportunities rather than any ambitious goal to close economic gaps according to mainstream social indicators.

I provide this somewhat prolix and reflexive preamble because of the conflicted and highly politicised nature of the important Wild Rivers debate and this Inquiry; under such circumstances it can do no harm to indicate transparently from where one is coming.

I would like to emphasise that the following submission reflects my views alone; I would be happy to supplement it with verbal evidence to the Inquiry if required.

Yours sincerely

Submission to the House of Representatives Standing Committee on Economics Inquiry into Indigenous economic development in Queensland and review of the Wild Rivers (Environmental Management) Bill 2010

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Introduction

This Inquiry and its terms of reference seek to address two inter-related issues. At a broad level, there is a focus on Indigenous economic development in Queensland, without any explanation why this particular focus by the House Standing Committee on Economics is required. Queensland has the second largest (after New South Wales) estimated resident Indigenous population of 146,000 or 28 per cent of the total Indigenous population. But analysis of standard social indicators does not indicate that Indigenous people in Queensland are especially badly off compared with other Indigenous Australians. Furthermore, the Australian government is in the process of developing an Indigenous Economic Development Strategy Australia-wide, so arguably this special focus on Queensland is unwarranted. The second issue is review of the Wild Rivers (Environmental Management) Bill (henceforth the Wild Rivers Bill) tabled by the Opposition Leader the Hon AJ Abbott in November 2010 that has already been the subject of an Inquiry by the Senate Legal and Constitutional Affairs Legislation Committee which completed its report *Wild Rivers (Environmental Management) Bill 2010 [no.2]* in June 2010. The current Inquiry seeks to subsume the Wild Rivers Bill under the broader ambit of Indigenous economic development in Queensland, but the connection between the two is far from clear.

More specifically, in looking to examine the scope to increase sustainable Indigenous economic development in Queensland (including the Cape York region which obviously is a part of Queensland) the House Standing Committee on Economics is asked to consider existing Commonwealth and Queensland State environmental regulations; the impact that the Wild Rivers Bill would have, if passed; and options for facilitating economic development that will benefit Aboriginal people and protect the environment. More specifically again, the Inquiry is asked to pay particular attention to current barriers to economic development and land use for Indigenous and non-Indigenous people in Queensland in a range of industries; how to reduce such barriers; the potential of environmental management to provide economic opportunity for Indigenous people, the effectiveness of current mechanisms to preserve free-flowing rivers [not just in declared Wild River areas], options for improved environmental regulation; and finally, the impact of such environmental regulations, mining legislation and other relevant legislation on native title rights in Queensland and nationally and the impact that passage of the Wild Rivers Bill might have on these matters.

These are very complex terms of reference that I cannot comprehensively address. Instead my submission takes the form of commentary on four issues, property rights, Indigenous economic development in Queensland, empirical evidence on development options, and practical implementation considerations that all have relevance to the Inquiry's terms of reference. I make one recommendation on each before ending with a conclusion. Like the

Inquiry's terms of reference, the four issues that I address are inter-linked, although my greater emphasis is on the Wild Rivers Bill than on Indigenous economic development in Queensland.

Property rights

The Queensland *Wild Rivers Act (2005)* allows the state government to make wild river declarations to preserve the natural values of rivers. Such declarations only occur after community consultations, but neither the community nor land owners in a proposed wild river area have a right to veto such a declaration. In the parlance of the native title system, communities and land owners only have a 'right of consultation'.

Mobilising the language of special beneficial measures and article 26 of the UN Declaration on the Rights of Indigenous Peoples, the Wild Rivers Bill seeks to bestow special beneficial property rights on what are termed 'traditional owners of Aboriginal land within a wild river area'. It is noteworthy that the term 'traditional owner' is not defined in the Bill, with the term 'owner' preferred. Indigenous land owners are defined in relation to seven forms of tenure under Queensland law and one form of tenure under Commonwealth native title law.

As constitutional expert Professor George Williams notes in his submission [no.1] to the Inquiry the identification of the Bill as a special measure for the advancement and protection of Australia's Indigenous people is constitutionally valid. Beyond this, the Wild Rivers Bill has two main objects described in s 4 and s 5. The first at s 4 (3) is to 'protect the rights of traditional owners of Aboriginal land to own, use, develop and control that land'. The second at s 5 is to require the agreement of land owners: 'The development or use of Aboriginal land in a wild river area cannot be regulated under the relevant Queensland legislation unless the owner agrees in writing'.

These two objects together take the property rights of owners of Aboriginal land within a wild river area to a level that is unprecedented in Australia.

The need to obtain the agreement of the land owner or owners in writing prior to the declaration of a wild river area as outlined in s 5 is a form of free prior informed consent. This has a parallel in the operations of the Commonwealth *Aboriginal Land Rights (Northern Territory) Act 1976* where the agreement of traditional owners as defined in that statute is required before a development can occur on Aboriginal-owned land. Even these consent provisions have limits as they can be overruled by national interest provisions, compulsory acquisition for a legitimate public purpose and, as occurred in the case of the NT Intervention, compulsory leasing of prescribed townships contingent on the payment of just or reasonable terms compensation.

The rights of [traditional] owners of Aboriginal land to own, use, develop and control that land as described in s 4 (3) has strong resonance with the wording of Article 26 (2) of the UN Declaration that states 'Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired'. Paradoxically perhaps, it was members of the Rudd government that endorsed the UN Declaration in April 2009 that opposed the Wild Rivers Bill in the Senate Committee Report of June 2010. On the other hand, members of the Abbott Opposition that had opposed the UN Declaration in September 2007 in the UN General Assembly are now

not only borrowing some of its wording but are also looking to weave the intent of an article of the Declaration not binding in law into Australian domestic law.

Unlike Article 26 (2), the Wild Rivers Bill does not include the word ‘resources’ and so is a little ambiguous about property rights in resources on Aboriginal land in a wild rivers area. Of particular significance would be ownership of commercial assets like sub-surface minerals, fisheries, water and carbon offset or sequestered on Aboriginal-owned land. I will leave it to legal experts to debate if explicit reference is needed to resources beyond use, development and control of land.

One interpretation of the combination of s 4 (3) (a) and s 5 of the Wild Rivers Bill is that a form of sovereignty is provided to traditional owners of Aboriginal land within a wild river area.

What is unclear in the Bill, and this is a comment that I made in my original submission [see Appendix 1] is why such potentially powerful property rights are limited to traditional owners of land ‘within wild river areas’. It is as if after being subject to a wild river declaration under the Wild Rivers Act 2005 (Qld) after a consultation process with all land owners and residents of a proposed wild river catchment, Aboriginal land owners will be especially empowered with a special form of property that is not available to any other native title interest (or non-Indigenous land owner) anywhere else in Australia. This is somewhat confusing on two grounds.

First, it could establish a form of moral hazard whereby Aboriginal land owners might perversely seek wild river declaration under Queensland legislation so as to trigger a Commonwealth override that will provide unprecedented property rights over their land. This would be an unusual source of additional property rights.

Second, assuming a wild river declaration is only made over land with high natural values, it would result in those with the most intact lands and rivers gaining the greatest leverage to either exploit or conserve these lands unencumbered by additional regulations. As argued in my original submission, it might just be preferable to strengthen the property rights guaranteed to native title holders or claimants under the Commonwealth Native Title Act (and other Aboriginal land owners under Queensland laws), a position that was supported by the Australian Greens in their Additional Comments in the Senate Committee Report.

It should be recognised that there are some fundamental weaknesses in the current Native Title framework that would benefit from clearer definition of property rights.

First, in the native title system, claim groups are put to proof on every right that they assert. Hence while in my early submission I noted that the *Wild Rivers Act 2005 (Qld)* complies with s 221 of the *Native Title Act 1993 (Cth)*, so that customary rights on native title lands are maintained, the ‘bundle of rights’ approach taken by the High Court in Western Australia v Ward (2002) might compromise the rights to use and control resources approach taken earlier in Yanner v Eaton (1999). It is again unclear if the Wild Rivers Bill is suggesting that if an Aboriginal land owner in a wild river area opposed extraction of minerals, the assertion by the crown of property in minerals that has been interpreted by the High Court as permanently extracted from native title would be over-ruled? In her book *Compromised Jurisprudence* (2009) Lisa Strelein notes the inconsistency in reasoning between the

Yanner and Ward decisions. Even establishing a right to trade in resources is difficult to prove in the current native title system.

Second, in the native title system, there are a range of procedural rights with the gold standard of free prior informed consent being currently absent. In my earlier submission I noted a lesser set of rights ranging from a right to negotiate to a right of consultation, but this range excluded even lesser 'rights' to be notified or to comment. Such a range of limited rights is clearly unsatisfactory and hardly accord with articles in the UN Declaration on the Rights of Indigenous Peoples. So in principle it is important that procedural rights under the native title system be both strengthened and made more consistent, irrespective of jurisdiction.

Recommendation 1: Taken at face value, and as a matter of principle, the Wild Rivers Bill should be supported because it looks to empower Aboriginal land owners with an unprecedented form of property as a special measure for their advancement and protection. The Bill though should be extended beyond wild river areas to all parts of Australia as proposed by the Australian Greens in their draft Native Title Amendment (Reform) Bill 2011.

Indigenous economic development in Queensland

As noted above, it is unclear to me why there is a specific focus on Indigenous economic development in Queensland unless the issue is related to the 10 wild river areas already declared (with four on Cape York) and three proposed for the Channel Country (where there is little Aboriginal ownership of land according to existing Australian laws). To reiterate there is potential interstate inequity here.

Rather than rehearse the range of issues that I addressed in my submission in response to the Australian government's Indigenous Economic Development Strategy Draft for Consultation (henceforth the draft IEDS) I will attach my submission in full at Appendix 2 and highlight just three issues, two drawn from the earlier submission.

Defining 'economic development'

Just like the draft IEDS, the terms of reference for this Inquiry deploy the term 'economic development' in a variety of ways as if an uncontested term. At the start there is reference to the issue of sustainability and the aspirations of Indigenous people and the social and cultural context surrounding their participation in the economy. Later there is reference to economic development and land use and the identification of key industries, mining, pastoral, tourism, cultural heritage and environmental management. Next there is reference to industries which promote preservation of the environment and the role that they might play to provide economic development [as an outcome or a process?] and employment. Such broad notions of development that countenance opportunity beyond the mainstream economy strongly accord with my views of economic development as a social process to enhance the capacity of actors and communities to improve their well-being and in my view are to be encouraged. Such notions also shift from too much focus on Indigenous deficits and a greater recognition of Indigenous assets [including land held under restricted common property regimes] that can be utilised to improve well-being.

What is surprising about these notions of economic development, however, is that no mention is made either of COAG's Closing the Gap targets, nor of the National Indigenous Reform Agenda nor of the Cape York Institute's well-publicised reform agenda to promote

the ‘real’ (or free market) economy in the Cape York region. Even at the local level, there are indications that Local Implementation Plans required for the 29 priority communities (of which there are four in Queensland, Aurukun, Hopevale, Coen, Mossman Gorge, although none has published an LIP as yet) will focus on forms of economic development that prioritise Closing the Gap even at the local level. It seems that broad goal setting from the top down at a national level is destined to drive local planning, at least in priority communities.

As referenced in Appendix 2, Edelman and Haugerud note in the book *The Anthropology of Development and Globalization* development is an unstable term that is highly ambiguous. This certainly appears to be the case in contemporary Indigenous affairs policy making where the term ‘economic development’ is adaptively managed to address particular regional or political issues or particular audiences.

The hybrid economy
Even though the Inquiry’s terms of reference seek to broaden the notion of economic development, there still seems to be an antipathy to acknowledging that customary or non-market activity and kin-based relations of production might make important contributions to livelihood. In making this observation I am not trying to either romanticise the customary sector or suggest that there is any Indigenous aspiration to return to a pre-colonial way of living. What I highlight in my work using the hybrid economy framework and the notion of interculturality is that many Indigenous economies in Queensland (and elsewhere) live the reality that there is a customary sector interacting with market and state sectors; and that there are ongoing tensions between individualistic market-focused economic norms and community-focused kin-based economic norms.

The notions of economic hybridity and interculturality might appear abstract and theoretical but they capture quite accurately and evocatively the development debates that are being very publicly articulated in the popular media by a diversity of Indigenous stakeholders many of whom have made submissions to this Inquiry: at one extreme some groups want to replicate late capitalist forms of economic development in wild river areas and at the other extreme some groups want to give priority to customary use of resources and to the environmental management of relatively undisturbed river and coastal systems. In between are some who want a mix of both.

I would add the following comments that are not new and have been promulgated for over a decade to highlight the realism on which the hybrid economy model is based. If policy continues to ignore the customary sector and the resilience of distinct Indigenous social norms the Indigenous economic development problem will continue to be misunderstood and proposed solutions mis-specified. This is already evident, for example, in the Australian government’s commitment to radically reform the Community Development Employment Program (CDEP) because it is erroneously perceived in negative terms to hamper engagement with the mainstream labour market rather than positively as an enabler of remote livelihood possibilities in the hybrid economy. It is after all the highly variable interactions between customary, state and market sectors of hybrid economies from place to place that gives them distinction and potential comparative advantage. And it is the reality of the extent of economic disadvantage that suggests that livelihood improvement will require the mobilisation of productive activity not just in market, state and customary

sectors [no sector being privileged in the hybrid economy framework over another] but also in the often most productive segments of overlap between the three sectors.

Development contestation
In recent thinking I have come to realise the inevitability of contestation over the nature that economic development might take on the Indigenous estate that now covers 1.7 million sq kms, over 20 per cent of Australia. To claim land under Australian western laws Indigenous claimants need to legally demonstrate tradition, continuity and connection. Flowing from this required legalistic approach to reclaim land is a discourse of conservation and emerging forms of conservation practice that is enabled by the restricted or limited or community common property regimes [or common-pool resources to use the terminology of 2009 Nobel Laureate Elinor Ostrom] that land rights and native title law bequeath successful claimants. Importantly, the Indigenous estate that has historically had low commercial value owing to its remoteness and lack of suitability for commercial agriculture now has great mineral prospectivity and conservation value. To simplify considerably and rather crudely, Indigenous groups who have regained their ancestral lands now face two broad options: participate in the land's exploitation especially for minerals or participate in its conservation often as a part of the National Reserve System. This is a stark choice. It is not surprising that within the Indigenous domain there are diverse responses to such development challenges with some arguing for rights to exploit their land commercially so as to attain mainstream economic improvement to create wealth, while others seek to conserve lands in accord with tradition and for future generations in the name of livelihood improvement. Again there are others who believe that it is possible to do both and such possibility can certainly be accommodated in the hybrid economy.

Recommendation 2: The Australian government is conflicted and inconsistent in its use of the term 'economic development' as evident for example in the contrast between its use in the COAG National Indigenous Reform Agreement and the draft Indigenous Economic Development Strategy [where development is often equated with mainstream employment] and in the terms of reference for this Inquiry where development is given a wider meaning. Some considerable effort should be invested in unpacking the diverse meanings of Indigenous economic development, giving high priority to garnering the perspectives of Indigenous people who are all too often treated by political and bureaucratic processes as passive subjects of the state project of improvement.

Empirical evidence on development options
A number of this Inquiry's terms of reference allude to barriers to Indigenous economic development and the potential of diverse industries. There is no shortage of information about the structural barriers and community-by-community shortfalls that impede Indigenous economic development. And of course as a new regulatory regime, the Queensland *Wild Rivers Act (2005)* constitutes an additional barrier as it seeks to limit development in High Preservation Areas and impose a decision making regime with some discretion that prioritises the environmental values of relatively undisturbed river systems. Actual or perceived barriers can rapidly transform into sustainable economic development opportunity as evident by the provision of employment opportunities for Indigenous rangers in wild river areas provided by both the Queensland government and by the Australian government under its Working on Country program. The current and potential importance of this work has become so significant that the Wild Rivers Bill at s 4 (3) (b) guarantees that if

the Bill be enacted existing employment in the management of a wild river area will be maintained by the Commonwealth Government.

To get a good sense of economic development options for Indigenous people in Queensland there are a number of methods that can be deployed. The most important and potentially useful for development planning is to undertake an assessment of potential opportunity from a diversity of disciplinary perspectives at a region-by-region or catchment-by-catchment levels. Such an approach will tell us about production possibilities, known knowns that would then need to be matched against diverse Indigenous aspirations and capabilities. Of course over time, the known knowns will become known unknowns and unknown unknowns, aspirations will change and capabilities will expand if the state fulfils its role of getting the foundations right (see 'The proper role of the state' in Appendix 2). Collection of such primary information and its analysis will take time and investment and is unlikely to be undertaken or completed during the life of this Inquiry.

So the Inquiry is left with four other possible approaches, to examine existing empirical information on current development options; to look at historical sources; to look at comparative material; and to look at any prognostic material that might be available. I want to provide brief comment on each option.

Recent research
In 2009 the North Australia Land and Water Task Force commissioned a comprehensive review of northern Australian land and water science. Referred to as the *Northern Australia Land and Water Science Review 2009* [see http://www.nalwt.gov.au/science_review.aspx] the project was coordinated by CSIRO in collaboration with over 80 of Australia's leading scientists working on northern land and water issues. The Science Review represents the most comprehensive and thorough review ever undertaken of conventional science and knowledge of issues relevant to the sustainable development of northern Australian land and water. While the Science review did not cover all of Queensland it certainly covered the tropical north where current wild river areas are declared. I cannot do justice to this report that extended well over 1 000 pages (although it does have a 10 page executive summary), but merely want to note that it cast doubt about the commercial potential of north Australia, mainly on the basis of climatic, soils and water storage limitations, but also on the basis of the interdependence of surface and ground water and commercial and environmental flows. I also need to declare that I contributed to this report and can attest to its rigour and careful peer review.

I highlighted this research in some critical invited commentary provided to the Social Responsibilities Committee (SRC) of the Anglican Diocesan of Brisbane who produced two comprehensive reports *Wild River Policy: Likely Impact on Indigenous Well-Being* (August 2009) and *Wild Rivers Policy: Likely Impact on Sustainable Development* (September 2010). I am sure that the SRC will make a submission to this Inquiry (as they did to the earlier Senate Inquiry of last year) that will table the second report. I do not want to take issue with their perspective that the Queensland Wild Rivers Act provides a regulatory brake on commercial development and that this may disadvantage some Aboriginal land owning groups (after all I make a similar point above). What I do want to highlight is that there is some excellent, comprehensive and up-to-date research available that should be seriously considered by this Inquiry and others providing submissions.

Historical research
There is some excellent historical research available that looks at changes in Australia's Tropical Savannas over the past 35 years. Much of this research has been undertaken by eminent Queensland geographer Emeritus Professor John Holmes who has made separate submission to this Inquiry. I want to highlight just three of his recent publications 'The Multifunctional Transition in Australia's Tropical Savannas: the Emergence of Consumption, Protection and Indigenous Values', *Geographical Research* August 2010, 48 (3): 265–280; 'Divergent Regional Trajectories in Australia's Tropical Savannas: Indicators of a Multifunctional Rural Transition', *Geographical Research* August 2010, 48 (4): 342–358; and 'Contesting the Future of Cape York Peninsula', *Australian Geographer* March 2011 (forthcoming). To summarise briefly, Professor Holmes documents what he terms a 'multifunctional transition' in Australia's tropical savannas where associated with tenure changes there has been a shift from the dominance of production values (pastoralism and mining) to a greater complexity and heterogeneity in regional economies in which a mix of consumption (tourism) and protection (conservation) values have emerged. In his article on Cape York that has been in press for nearly a year and that I referred to in my early submission to the Senate Inquiry (see Appendix 1) Professor Holmes provides a very nuanced account of a prolonged development debate on Cape York, highlighting the current pivotal divide between what he terms traditionalist/localist versus modernist/regionalist visions of Indigenous futures (not dissimilar to my distinctions between different forms that economic hybridity and interculturality can take outlined above).

Comparative research
There is significant comparative research from elsewhere in Australia that could assist this Inquiry address its terms of reference especially in its industries focus. Again I do not seek to summarise this literature but merely focus on two projects, one that I have recently been involved in and the other that is currently underway. The first looked at some cases of Indigenous involvement in a small sample of major mines across north Australia. This research has been summarised in a research monograph *Power, Culture, Economy: Indigenous Australians and Mining* (2009) http://epress.anu.edu.au/c30_citation.html. The research demonstrates that the spin-off benefits for Indigenous land owners from mining can be highly variable. The second is a project that is currently underway that examines the livelihood benefits that can accrue to Indigenous land owners from the provision of environmental services. A great deal of material on this project can be sourced at the People on Country, Healthy Landscapes and Indigenous Economic Futures site http://caepr.anu.edu.au/poc/index.php. The research highlights that there is potential in industries which promote the preservation of the environment and in the abatement of carbon with support from public, philanthropic and private sectors, the last on a commercial basis.

Predictive research
Some current research has predictive power with obvious probability of error. I provide just two examples. In 2009 the Department of Climate Change commissioned research that sought to assess the risks from climate change to Indigenous communities in the tropical north of Australia. This report (released in April 2010) http://www.climatechange.gov.au/en/media/whats-new/risk-from-climate-change-to-indigenous-communities-tropical-north-australia.aspx. made climate change projections to 2030 and 2070 and then assessed threats as well as mitigation and development

opportunities for Indigenous communities. More recently, Professor Holmes has been building on his historic work in unpublished research that turns to the future. He examines the ‘occupance mode’ and ‘trajectory’ for Cape York across four points in time, 1970, 1990, 2010 and 2030. In the future he predicts the ‘occupance’ mode to be complex multifunctionality with pre-eminent Indigenous engagement and the trajectory to be ‘modest increments in production and consumption values and further entrenchment of protection values, with the production values pursued mainly by modernist Indigenous leadership, protection by traditionalist leadership and consumption by both’ (John Holmes, e correspondence, 1 December 2010).

Recommendation 3: A body of current, historic, comparative and predictive research on development options in north Australia and in Queensland is brought to the attention of the House Standing Committee on Economics. I am not suggesting that all this research is of equal quality nor am I suggesting that empirical evidence is ideology free. What I am recommending is that this considerable body of published research is considered as much as possible in this Inquiry.

Practical implementation considerations

One of the key issues for this Inquiry is what would be the impact if the Wild Rivers Bill was passed and what might be the impact of passage on other laws including the national native title regime. I interpret this as a legitimate governmental concern about how s 5 of the Wild Rivers Bill that requires the agreement of the owner(s) of a wild river area to agree in writing to any regulation of Aboriginal land in a wild river area. Many questions arise here: Who has to give consent? All members of a land owner group by consensus? An elected or self proclaimed leader of the ‘traditional owners’? The applicants (if it is a native title claim group) or the prescribed Body Corporate (if it is a determined group)? What if there are overlapping claim groups?

To give this issue some context, in the original Wild Rivers Bill tabled by Senator Scullion in the Senate in early 2010 there was no definition of traditional owner. In the revised Bill tabled by the Hon. AJ Abbott in the House in November 2010 this oversight is corrected with a very broad notion of ownership used: as noted above ownership is equitably defined across eight different legal regimes and in principle such equity might be welcomed. However, it is noteworthy that this new definition excludes native title claimants or groups who might have completed a land use agreement as an alternative settlement.

However, the mechanism that will be required to secure land owner agreement is not specified in the Wild Rivers Bill except at s 6 with respect to native title holders as defined under s 224 of the *Native Title Act 1993*. One practical problem here is that claimants appear to be excluded. Another is that the mechanisms to obtain agreements of other categories of owner are unspecified with such practical matters being left under s 8 for regulations that may prescribe procedures for seeking the agreement of an owner under this Act. This failure to address practical implementation considerations is potentially highly problematic. Again many questions arise owing to this lack of specificity: Does there have to be negotiation in good faith? Will consultations result in legal action over allegations of duress or unconscionable conduct? Will such practical problems perversely encourage the Queensland government to compulsorily acquire wild river areas?

Given that a wild river declaration has the principal objective to protect the environmental values of relatively undisturbed river systems, whole of catchment consensus will be needed to support a declaration. In some situations such consensus might be forthcoming and this may already be the case in some wild river declarations even though such consensus was not a statutory requirement. But it is likely that when the written agreement of owners is required the practical basis for gaining agreement will become considerably messier, bearing in mind that a declaration needs to cover an entire river system to be ecologically effective.

There is an emerging literature on the social effects of native title [see http://epress.anu.edu.au/c27_citation.html] that highlight the divisions that native title can create. I do not so much want to engage with this literature as to raise awareness of how difficult it can be to gain consensus among land owners. For example, I have undertaken research recently in fresh water rights in western Arnhem Land where a number of entire river catchments sit within the Arnhem Land Aboriginal Land Trust. In some parts of Arnhem Land traditional owners are collaborating to protect the environmental values of river systems through collaborative natural resource management activities. Such activities can be formalised through the declaration of Indigenous Protected Areas. In September 2009, over 100 traditional owner groups reached consensus to allow the declaration of the Djelk Indigenous Protected Area over an area of 6 672 sq kms. This is a region where there is only one tenure system, inalienable Aboriginal freehold title, with a form of free prior informed consent as being proposed in the Wild Rivers Bill. Even here the process for declaration took several years of consultation and constructive engagement managed by the regional Bawinanga Aboriginal Corporation [http://caepr.anu.edu.au/system/files/cck_misc_documents/2010/09/Djelk%20Annual%20Report%202010%20web.pdf].

In my view, reaching the agreement needed under s 5 to allow the declaration of a wild river in Queensland will be far more complicated and hence protracted and costly than in the above Arnhem Land case. This is because forms of land tenure are more diverse and fragmented in Queensland and because there is often a mix of Indigenous and non-Indigenous land owners and a mix of community members and land owners. Customary law is likely to privilege some land owners over other interests, but a catchment is unlikely to be the domain of just one group, and so some level of contestation is likely.

Similarly, as noted above, it is unclear why it will only be Aboriginal owners of land within a wild river area who will benefit from the special property rights being proposed in the Wild Rivers Bill.

In making these practical observations, I am not suggesting that practical obstacles should override matters of principle. But what I am suggesting is that the likely practical implementation problems in the Wild Rivers Bill be addressed before it becomes law rather than after.

Recommendation 4: Careful consideration needs to be given to the mechanisms that will be used to secure the free prior informed agreement of land owners to a wild river declaration; and what mechanism will trigger the special property rights proposed for owners of Aboriginal land within a wild area.

Conclusion

The broad area of Indigenous policy is probably more politicised and complicated than any other in Australian society. Achieving sound policy reform can be very difficult and is often dependent on a serendipitous moment when ideologies, evidence, cogent arguments and interest group politics coincide. While the House Standing Committee on Economics Inquiry is ostensibly about Indigenous economic development in Queensland, it appears to be driven by the tabling of a private member's bill, the Wild Rivers (Environmental Management) Bill 2010, in the Australian House of Representatives by the Hon. A.J. Abbott. This is an unusual process for policy reform that by its very nature is likely to politicise the decision making both at the national parliamentary level, but also at the regional and Queensland state level.

Nevertheless, whether intended or not, the Wild Rivers Bill raises some important issues about the value of Aboriginal land ownership if unaccompanied by effective property rights to allow choice about the form that development might take; and to require the informed consent of land owners in relation to use of their land that might be made or regulated by third parties, including state parties. It is salutary to consider that in 1974 in the *Aboriginal Land Rights Commission Second Report* the late Mr Justice Woodward noted in relation to the right of veto that to deny Aboriginal land owners the right to prevent commercial development [mining] on their land is to deny the reality of their land rights. The same principle can be readily extended to imposed conservation on Aboriginal-owned land.

As the Australian nation and Indigenous people ponder the appropriate means to deliver development or close gaps or improve livelihoods for the marginalised, it might be opportune to use this Inquiry to explore a multi-partisan means to deliver consistent free prior informed consent rights to all Indigenous people who own land under restricted or community common property regimes as currently only occurs in the Northern Territory under Commonwealth land rights law; and how to strengthen property rights in land, its use, its development and control as recommended by the UN Declaration on the Rights of Indigenous Peoples. Some might see the passage of the Wild Rivers Bill as an initial mechanism to achieve such ends. Others might feel that an alternative approach that does not raise the spectre of disputation over Queensland State rights might require a focus on the native title system. Whichever of these two avenues is pursued, this is not the time for a hurriedly drafted and poorly considered law that will likely prove unworkable. There are serious policy issues at stake that deserve considered and constructive debate, Indigenous input, and resolution.

Appendix 2: Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Wild Rivers (Environmental Management) Bill 2010 [No.2]

Committee Secretary
Attention: Ms Julie Dennett
Senate Legal and Constitutional Affairs Committee
Parliament House
CANBERRA ACT 2600

Dear Ms Dennett

RE: INQUIRY INTO THE WILD RIVERS (ENVIRONMENTAL MANAGEMENT) BILL 2010 [NO 2]

Thank you for your invitation of 4 March 2010 to make a submission to the Committee's Inquiry into the Wild Rivers (Environmental Management) Bill 2010 (henceforth the Wild Rivers Bill).

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* to different forms of determination under native title law, with the strongest in terms of property rights being exclusive possession. 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 never be reduced until 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' non-market 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 that 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, Mr 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.221 of the *Native Title Act 1993* 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.

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 NT in 1973. He made effective recommendations for the former, but refused to countenance the latter partly bowing to pressure 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 *Aboriginal Land Rights (Northern Territory) Act* (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 in 1983 under the NSW *Aboriginal Land Rights Act 1983* mineral rights (except for gold, silver, coal and petroleum) were provided with land rights, so demonstrating that there is no barrier under Australian law for this to happen.

Similar issues arise with other resources, like fisheries and fresh water. As already noted in most situations Aboriginal people have customary rights to fish for domestic purposes only and 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). And 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 and Aboriginal people do not have commercial rights in water beyond allocations 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 to allow a commercial development on Aboriginal-owned land. 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 *Aboriginal Land Rights (Northern Territory) Act* 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 Native Title Act framework does not provides 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 mere right of consultation, at worst are provided. These rights represent a weaker form of property than the *de facto* property in the *Aboriginal Land Rights (Northern Territory) Act*. 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 Native Title Act'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 beneficial uses are limited. There is also a great deal of inequity in land rights and native title legal frameworks, jurisdiction by jurisdiction, across Australia and as the emerging development conflict in the Kimberley with respect to offshore gas and onshore facilities indicates the right to negotiate in the Native Title Act 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 nationwide; the false logic 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 is makes property rights increasingly unclear. This lack of legal certainty has the capacity to increases transactions 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 what is currently the high water mark 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 native Title Act that need 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 *Aboriginal Land Rights (Northern Territory) Act 1976* 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 Native Title statutory framework in terms of supplementing native title determinations with resource rights to assist Indigenous economic development.

I make only one recommendation: This Inquiry should focus on limitations in the Native Title 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 like Cape York Indigenous affairs policy that is currently focused on Closing the Gap will require Aboriginal people to be in a position to utilize their lands in one of three ways: to use natural resources in the customary non-market economy; to utilize 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 State and national interest conservation values of this bioregion. 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.

Yours sincerely

31 March 2010

Appendix 3: Submission to the Australian government's Indigenous Economic Development Strategy Draft for Consultation

Indigenous Economic Development Policy
Indigenous Economic Development Branch
Department of Families, Housing, Community Services
and Indigenous Affairs
PO Box 7576
Canberra Business Centre ACT 2610

By email: ieds@fahcsia.gov.au

Please find below a brief in response to the Australian government's Indigenous Economic Development Strategy Draft for Consultation (henceforth the Draft Strategy).

The need for a policy framework to enable Indigenous economic development is of critical importance in addressing the marginalized situation of many Indigenous people in Australian society. And so it is very appropriate that the incoming Rudd government committed to the formation of a new Indigenous Economic Development Strategy. This is an area of Indigenous affairs policy that has been especially challenging in the past. While I make clear at the outset that I am not a supporter of the currently dominant 'narrative of failure', there have been areas of exceptional economic development performance in the past and such success needs to be recognised, supported and replicated. Nevertheless, there is currently a national mood to improve the marginal economic situation of many Indigenous Australians captured by the evocative idea 'Closing the Gap' and so it is timely that the issue of Indigenous economic development is rigorously addressed.

It might help if I preface my submission with some biographical information. I have worked as an academic economist and then anthropologist of development since 1977 focusing much of my research on Indigenous economic development issues. My geographic focus has been principally regional and remote Australia where the addressing of Indigenous socio-economic disadvantage is most amendable to the use of a development framework as generally understood in the international literature. However, I am no armchair academic. From 1990–2010 I ran the Centre for Aboriginal Economic Policy Research (CAEPR) that I had established at the Australian National University to advise both the Australian government and many other stakeholders on Indigenous economic policy issues. Over the years, I have participated in many government inquiries into issues associated with development. Of most direct relevance to this submission, in 1985 I advised the Miller Committee that comprehensively inquired into Aboriginal employment and training programs; and in 2004 I assisted Power and Associates engaged by the Ministerial Council on Aboriginal and Torres Strait Islander Affairs develop an Indigenous Economic Development Strategy.

My submission takes the form of commentary on key elements of the Draft Strategy that I summarise under the following seven sub-headings:

1 The contested notion 'economic development'
2 Economic hybridity and interculturality
3 Targeting development assistance

4 Recent policy history
5 Structural politico-economic factors
6 The proper role of the state
7 Policy making processes

I conclude each section with one recommendation and end with an overarching recommendation for an approach to build on the Draft Strategy to make it more practically focused on the economic and social contexts of many Indigenous Australian communities. I take this approach because I am concerned that the proposed Strategy could perpetuate dependence, the unintended consequence of the Australian government's approach to economic development to date, rather than livelihood improvement, empowerment and reduced dependence as is intended. I make my final recommendation for a further parliamentary inquiry based on a more consultative approach.

I would like to emphasise that this submission reflects my views alone. I would be happy to provide further input to your deliberations if requested.

Yours sincerely

Professor Jon Altman
17 December 2010

Submission on the Indigenous Economic Development Strategy Draft for Consultation (the Draft Strategy)

Professor Jon Altman
Centre for Aboriginal Economic Policy Research
Research School of Social Sciences
The Australian National University
Canberra, ACT, 0200

Introduction

The Draft Strategy was released by the Rudd government in May 2010 to fulfil a policy commitment in this important area made during the 2007 election campaign. Initially public submissions were requested by 1 November 2010 and then by 17 December 2010 owing to the change in leadership and August 2010 election. Presumably the Draft Strategy will be finalised during the life of the Gillard government.

The Draft Strategy is brief, totalling just over 20 pages. It consists of a foreword by then Ministers Macklin, Gillard and Arbib, some guiding principles summarised in a 'building blocks' figure, a context statement that identifies Indigenous socioeconomic deficits compared to all other Australians using official statistics, a brief paragraph outlining some unique areas of Indigenous competitive advantage, and a commitment to ongoing engagement with Indigenous Australians, the private sector and governments on strategy implementation (although it is unclear how this will be achieved). The Draft Strategy then focuses on five areas identified as strategic priorities–education and individual capabilities; jobs; business and entrepreneurship; financial security and independence; and strengthening foundations. In this main section reasons are given for the importance of these priorities and in each a set of priorities referred to as either 'the' or 'our' priorities is listed, reflecting the priorities of the Australian government. These priorities are couched in terms of the Draft Strategy's overarching aim 'to increase the well-being of Indigenous Australians by supporting greater economic participation and self reliance' (p.1). The Draft Strategy ends by noting that progress in its implementation will be reported to Parliament in the Prime Minister's annual Closing the Gap speech.

The Draft Strategy is accompanied by an Indigenous Economic Development Action Plan 2010–2012, which summarises action to date on each of the five key strategic areas and planned actions over the next two years. The existence of this Action Plan is a little surprising because while it is stated that it will be further developed after 2012 (and presumably when the Draft Strategy is revised on the basis of submissions), it is likely that path dependency will see a degree of reluctance to adaptively amend existing programs. I have more to say on policy making processes below.

1 The contested notion 'economic development'

The Draft Strategy opens with a broad definition of Indigenous economic development: it is about increasing the economic well-being of Indigenous Australians and improving their overall quality of life. Such a broad definition is reasonably incontestable, especially if Indigenous Australians are afforded opportunity to define what they consider to be well-being and quality of life. Unfortunately in the next sentence, this definition is far more limited: 'It goes beyond the Closing the Gap targets in life expectancy, health, education

and employment by encouraging career development, business and home ownership, building individual and family prosperity and making the most of existing assets' (p.1). And then it is noted that actions taken to support economic development need to take into account the diversity of Indigenous circumstances, where people live, demography, market linkage, cultural, family and community connection and responsibilities and economic and social aspirations. These various definitions indicate that the Draft Strategy is somewhat conflicted: on one hand there is a desire to support the COAG Closing the Gap targets; on the other, there is recognition that economic development cannot just be imposed from above and that it needs to connect with the aspirations, norms and ways of being of the to-be-developed subjects.

I make just three brief points here.

First, Edelman and Haugerud (2005) note in the introduction to the book *The Anthropology of Development and Globalization* that development is an unstable term that is highly ambiguous. It connotes improvement in well-being, living standards and opportunities, but also refers to historical processes of commodification, industrialisation, modernisation and globalisation. They also suggest that development is a legitimising strategy for states, and note that those who are influenced by Foucault's notion of power question the desirability of development because it has the propensity to trap the poor in poverty, to reproduce existing politico-economic inequality. Economist Joseph Stiglitz made a similar critique of the role played by power in influencing the nature of economic development in *Globalisation and Its Discontents* (2003).

Second, in the Draft Strategy, there is a degree of mismatch between the notion of economic development used in the Foreword (by politicians) and that used in the Introduction (by bureaucrats). In the Ministers' Foreword, the idea of economic development is conflated with ideas about economic participation, economic inclusion and economic self-reliance. Furthermore, there is reference to the prime ministerial Apology to Australia's Indigenous Peoples in February 2008 (where the Closing the Gap statistical framework was first introduced without consultation with Indigenous people) and Australia's subsequent endorsement of the UN Declaration on the Rights of Indigenous Peoples in April 2009 (p.iii). At articles 18–24 the Declaration highlights the right of Indigenous Peoples to control the nature of development, including the right to decide how economic development occurs.

Third, in April 2004, Power and Associates prepared an Indigenous Economic Development Policy framework for the Ministerial Council on Aboriginal and Torres Strait Islander Affairs (MCATSIA). Indigenous economic development was defined as a process of enhancing opportunities to maximise the potential of Indigenous people to increase their wealth and well-being. This focus on economic development as a social process whereby people as individuals, but more commonly as various social groupings, improve their well-being by enjoying diverse and robust economic options needs serious consideration. It also needs to be contrasted with the Draft Strategy's primary focus on what I term a 'Closing the Gap Plus' approach.

Recommendation 1: The Draft Strategy is somewhat inconsistent in its use of the term 'economic development' but appears to favour a view that accords with the modernisation paradigm. In this paradigm, the Indigenous development problem is defined using a statistical deficits model, promoting a strategy to close gaps based on a mainstreaming or

‘normalisation’ approach. Such an approach has been challenged in a long trajectory of published research, especially by dependency, post development and ‘alternatives to development’ theories. The Draft Strategy needs to more fully explore the meanings of ‘economic development’ from a diversity of perspectives and canvass options beyond the ‘Closing the Gap Plus’ approach. In particular, consideration should be given to build on the approach of economic development as social process to enhance capacity to improve well-being.

2 Economic hybridity and interculturality

Since 2001 I have used a framework I term ‘the hybrid economy’ in an attempt to highlight three things. First, in many situations, especially in regional and remote Australia, customary (non-market) productive activity continues to make a significant contribution to livelihood. Second, the customary is often closely inter-linked with market and state or private and public sectors. And third, kin-based relations of production continue to have influence in the customary sector.

In 2003, I made a presentation to the Ministerial Council on Aboriginal and Torres Strait Islander Affairs highlighting the existence of a robust customary sector in many situations. For many Indigenous Australians the economy is far more complicated than most policy makers can imagine: choices that individuals face and make are not just limited to private or public sector employment, or work or welfare—there is also the choice to engage in the customary sector often living at remote homelands/outstations. Participation in customary activity can improve livelihoods directly via self-provisioning. But it can also have a significant indirect impact because Indigenous and local knowledge is incubated and reproduced in the customary sector. This knowledge forms key human capital specialities in sectors such as the arts and natural and cultural resource management. These are important components of hybrid economies that generate income and livelihood from private and public sector engagements.

While I have principally applied the notion of economic hybridity in my work in regional and remote Australia, it also has applicability in more densely settled regions of Australia; for example, its applicability has been demonstrated in New South Wales. A crucial element of this model is its acknowledgement that Indigenous economic decision making is influenced by a mix of western, individualistic and market-based norms on one hand and Indigenous, group and kin-based norms on the other. Anthropologists increasingly refer to this mix of norms in terms of interculturality—norms influenced by Indigenous and western ways of living. In many situations there are tensions between kin-based and market based economic norms.

The Draft Strategy recognises that there are areas of Indigenous competitive advantage (p.7) that are generated by ‘traditional and cultural knowledge’. While drawing on David Ricardo’s theory of comparative advantage that constitutes the founding principle of neoliberal globalisation, the Draft Strategy does not then apply the logic of this theory—that people should engage in productive activity in which they are relatively efficient—to the customary sector and hybrid economy. All the strategic priorities in the Draft Strategy focus on mainstream engagement, erroneously assuming the uncontested adoption of western norms and the wholesale abandonment of distinct, but highly diverse, Indigenous (non-western) norms, will deliver development.

Recommendation 2: The Draft Strategy uses the theory of comparative advantage without properly recognising the potential of custom-based productive activity to improve well-being; and the complex inter-linkages between customary, market and state sectors in situations of economic hybridity. Cultural production matters for economic development. Any economic development strategy for Indigenous Australians needs to recognise the diverse forms of contemporary Indigenous economies and the intercultural mix of western and Indigenous norms that inform economic decision-making. To do otherwise is to neglect empirical reality.

3 Targeting development assistance

The Draft Strategy struggles to address the difficult issue of how development assistance will be provided to Indigenous Australians. Throughout the Strategy there is reference to targeting Indigenous Australians and a recognition that support can be provided to individuals, businesses and communities. But the highly problematic issue of how to effectively target development assistance is only discussed in somewhat abstract terms. And while there is a neat division between Indigenous and non-Indigenous Australians, this is a falsely bifurcated, rather than realistically intercultural, world. In line with current policy influenced by neoliberal principles, the emphasis in the Draft Strategy is predominantly on individuals.

At one level this emphasis on individuals makes sense because the majority of Indigenous Australians live in urban and metropolitan situations where there is a high degree of ethnic and residential integration, people often live in mixed households in neighbourhoods that include Indigenous and other Australians. The Draft Strategy needs to acknowledge that actually locating Indigenous people in need of development assistance in many situations where Indigenous people are most populous (e.g. in Sydney), yet constitute a miniscule and barely visible component of the total population, is extraordinarily challenging.

The conceptual basis of the post-war economic development (or modernisation) approach has its origins in targeting assistance to the rural sector in the Third World. It is far better suited to discrete Indigenous communities mainly located in regional and remote Australia. The latest ABS statistics indicate that there are over 1,000 discrete Indigenous communities with a total population estimated at about 100,000 or about 20 per cent of the total Indigenous population. While the term Indigenous community implies that populations are Indigenous only, in reality many and especially the larger townships with populations over 500 have other Australian residents.

I make two key points here.

First, the Draft Strategy, like the Closing the Gap policy framework, creates a statistical and conceptual distinction between Indigenous and other Australians that poorly reflects social and economic reality. Just as Indigenous people live interculturally, they also often live inter-ethnically, in mixed communities and in mixed households, as well as in small and remote communities mainly or solely populated by Indigenous people.

Second, the Draft Strategy assumes that the Australian state can effectively target development assistance to Indigenous individuals without the mediating support of community-controlled and community-based organisations. Paradoxically perhaps if development assistance is to be provided in urban and metropolitan situations such

mediating organisations will be crucially important in locating Indigenous people—often their members or constituents—for development assistance. The Australian state needs to empower and resource such organisations that will be crucially important for the delivery of economic development assistance.

Recommendation 3: The Draft Strategy needs to more clearly address the complexity of Indigenous demographic and residential social reality and the challenges that this presents to effective targeting of economic development assistance. Special attention needs to be paid to the mediation role, between Indigenous people and the state, provided by community-based organisations and the need for these organisations to be strengthened by state policy.

4 Policy and program history

The Draft Strategy's historical perspective only goes back to Kevin Rudd's Apology to Australia's Indigenous Peoples in February 2008. This date also marks the start of the Closing the Gap policy framework. And so the Draft Strategy represents an approach lacking adequate policy or program history. It is impossible to establish an economic development strategy for the present and future if there is no engagement or understanding of the past; and an acknowledgement of deep economic development policy failure.

It is not possible to review all past policies and programs here. I merely wish to briefly note the two policy reviews previously mentioned.

The first is the comprehensive review of Aboriginal employment and training programs undertaken by a committee and secretariat over a period of nearly 12 months, chaired by the late Mick Miller, and completed for the Hawke government in 1985. The Miller Committee produced a 450 page report and its deliberations represent the first and last time that this issue has received serious attention in Australian public policy making some 25 years ago now. I partly highlight this review because of its focus on economic development in a variety of Indigenous geographic contexts and its overarching recommendations to the Australian government to invest in the building of an economic base for development especially in rural and remote situations. The recommendations of the Miller Report were partially implemented in the Aboriginal Employment Development Policy (AEDP) from 1987. The AEDP has the overarching goal of employment and educational statistical equality between Indigenous and other Australians by the year 2000.

The second is the Indigenous Economic Development Policy Framework developed by Power and Associates for the MCATSIA Steering Committee in 2004. This framework was completed for the Howard government under its broad policy umbrella of practical reconciliation. This policy framework has some similarities to the Draft Strategy reflecting in part the similarity in broad policy approach of the Howard and the Rudd/Gillard years.

I highlight these two earlier documents primarily because both sought to address the contested notion of economic development. It is important in the formation of a new Strategy to consider policy making history and more importantly to ask why is it that past approaches failed to deliver development? What lessons can be learnt from the past? Part of the answer I would suggest is that the Australian government made insufficient commitment and investment to implement the forms of community-based participatory development that both earlier approaches advocated.

A similar observation can be made with respect to a wide range of economic development programs that have been implemented in recent years. I do not aim to comprehensively outline these programs here, but merely to note that some have been successful in enabling forms of economic development (especially in the broad sense of improved livelihood) and others have failed. I will however highlight one flexible program, the Community Development Employment Projects (CDEP) scheme that facilitated economic and community development in a diversity of situations ranging from the metropolitan to the very remote. This program is in the process of being 'reformed' without its role in facilitating economic development, in an extremely cost-effective way, being properly assessed.

Recommendation 4: The Draft Strategy makes no reference to past economic development policies and programs. It is imperative that any new Indigenous Economic Development Strategy seriously engages with past policy reviews and analyses the successes and failures of the past.

5 Structural politico-economic factors

In accord with the currently dominant policy and popular discourse of Closing the Gap, the Draft Strategy promotes the view that socio-economic sameness is possible for Indigenous and other Australians. At the same time the historical reasons for Indigenous economic marginality encapsulated within a rich nation state are overlooked. This broad approach overlooks the structural politico-economic basis for inequality and instead adopts the view that it is excessive reliance on welfare and the maladaption of Indigenous cultures to modernity that are at the heart of the economic development problem. The Draft Strategy does not discuss causal factors, like state neglect, capitalist exploitation and asymmetric power relations as explanators of marginalisation. It merely suggests that if mainstream approaches to development are replicated, benefit will trickle down to Indigenous people in need.

Tania Murray Li in *The Will To Improve* (2008) notes (researching in Sulawesi) that by rendering economic development problems technical, and amenable to technical solutions, improvement projects fail to acknowledge that poverty is a symptom of powerlessness and hence fail to address politico-economic relationships, the structural sources of inequality and their historical evolution.

This issue can be briefly demonstrated with reference to property rights. The Draft Strategy notes that land holdings and associated resources constitute unique areas of competitive advantage for Indigenous Australians (p.7). Land rights and native title laws have seen an estimated 1.7 million sq kms returned to Indigenous people, but almost all this land is in very remote Australia. And except in the Northern Territory where free prior informed consent rights constitute a form of de facto property right, elsewhere only customary rather than commercial property rights are guaranteed. It could be readily argued that prospects for economic development would be greatly enhanced if property rights in commercially valuable resources, as well as in real estate, were provided. This is the issue that is at the heart of the current debate over Wild Rivers laws in Queensland. It is also an issue that is highlighted in articles 25–32 of the UN Declaration on the Rights of Indigenous Peoples that refer to rights to country and resources.

At the same time the restricted common property regimes that characterise most Indigenous land tenure and that can be distinguished from individuated private property offer unique opportunity in the provision of environmental services. It is this form of land tenure that is seeing more and more of the Indigenous estate incorporated in the Australian National Reserve System. There are economic changes underway in regional and remote Australia that Professor John Holmes terms multifunctional transitions that are seeing shifts from production (mineral extraction and commercial agriculture) to more environmentally benign consumption and conservation industries. There are possibilities here for innovative economic development that the Draft Strategy should highlight.

Recommendation 5: Consideration needs to be given to strengthening Indigenous property rights in commercial valuable resources so as to address economic and power imbalances. At the same time the comparative advantages afforded by restricted common property land ownership regimes, physical and human assets, need to be recognised and supported. Development prospects that reflect structural economic changes already underway need to be properly considered to ensure innovative approaches.

6 The proper role of the state

Indigenous economic development is in urgent need of proper state support. The Draft Strategy notes what it terms 'Strengthening the Foundations' as a strategic priority. This requirement cannot be questioned. In the past the state (the aggregation of Commonwealth and State and Territory political and bureaucratic processes) has failed Indigenous Australia and this situation needs urgent rectification. There is no question that this is now recognised, especially in a series of National Partnership Agreements that form the National Indigenous Reform Agreement signed off by the Council of Australian Governments. Questions might be asked about whether enough is being done or whether the targeting of a relatively small number of larger communities is appropriate, but the broad principle that rapid catch-up is required is universally accepted.

The Australian government needs to get the institutional arrangements properly set to enable development. This can occur in three broad ways. First, the foundations of health, housing, educational, communications and other infrastructural services need to be provided. Second, legal frameworks need to be streamlined so that property rights regimes are both beneficial and consistent across the nation. At present there are considerable interstate inequities and inconsistencies most evident in the diversity of land rights and native title laws. And third, the state needs to identify and support what works in terms of targeted development assistance. While I will not go into detail here there is no shortage of documentation about successful enterprises with common features being community initiative, expert management, sound governance, state assistance provided at arms-length, and market niches generally based on comparative advantage.

I am not going to comment on the proper relationships between the state and Indigenous citizens here, except to note that when these become marked by excessive political struggle the possibility for economic development is limited. It is important though that the Australian government focuses on its area of expertise, the delivery of public services, rather than on areas where it has limited capacity to deliver, such as directing the private sector or Aboriginal community sector. The state should focus on the effective delivery of its processes because it is here that it can be and should be held accountable for its performance. In setting policy goals the state should retain a high degree of realism rather

than promoting discourses of admirable equality that might prove unachievable: Murray Edelman's warning about 'Words that succeed and policies that fail' should guide the Indigenous Economic Development Strategy.

Recommendation 6: In the formation of the Indigenous Economic Development Strategy it is imperative that the state focuses its efforts on getting the institutional settings right for economic development in all its diverse forms. The limit to the state's ability to drive either private sector or community action needs to be recognised.

7 Policy making processes

Participation and economic empowerment are viewed in the Draft Strategy as resulting automatically from mainstream education and employment or business success, individualism, home ownership and accumulation in a manner that mirrors the processes and social norms of the dominant society. But the fact that empowerment by such a predetermined pathway is itself a relationship of power and one that might not accord with the aspirations of the subjects of such economic development programs is overlooked. An assumption is being made that Indigenous Australians ascribe to the mainstreaming development goals of the state as defined in the Closing the Gap framework; and that they lack aspirations and agency to pursue alternate forms of livelihood from those imagined for them by the Australian government in the mainstream.

In recent years the politics of policy reform have become increasingly fraught. Policy reform processes are especially difficult in the area of economic development where they need to be participatory and bottom up and in Indigenous affairs where they need to be highly consultative. The problem of consultation has been greatly exacerbated in the past six years since the abolition of the Aboriginal and Torres Strait Islander Commission, an elected representative body with national and regional wings.

The Rudd government made a commitment to a new approach to economic development and then charged the appropriate area in the bureaucracy, the Indigenous Economic Development Branch within FaHCSIA, with the very difficult policy development task. This task has been largely undertaken in Canberra constrained by the Rudd and now Gillard governments predetermined commitment to the Closing the Gap framework, a series of five strategies that clearly articulate what is referred to as 'our' priorities (referring presumably to the Australian government) and an existing Action Plan 2010–2012.

The Draft Strategy has been out for comment for some seven months now and a number of consultations have been conducted with stakeholders mainly in State and Territory capital cities. A problem is that the Australian government has set the parameters for the Strategy without appropriate input from Indigenous people. Unfortunately, the call for written submission is unlikely to elicit responses from Indigenous people, especially those living in the most remote and difficult circumstances, owing to cynicism about the process. Other forms of constructive engagement with Indigenous Australians are urgently needed.

And while the policy making process is not yet completed, the means whereby public submissions might influence policy refinement are unclear. In my view, such an approach to policy making is inappropriate and unlikely to result in the shaping of a policy framework that will actually deliver on its articulated goals, in this case economic development. This is especially the case in the very difficult area of economic development where there has

been a high level of state failure to deliver and where both national and international precedents indicate that a participatory and bottom up approach is needed if sustainable development outcomes are to result from state interventions and investments.

Recommendation 7: In addition to the opening recommendation 1 that diverse Indigenous views on economic development are considered, it is also important that the current diversity of Indigenous circumstances and economic development possibilities be assessed. A mechanism is needed to ensure constructive engagement by Indigenous communities with the Draft Strategy from inception rather than at completion.

8 Conclusion and final recommendation

The Draft Strategy articulates an Australian government view that Indigenous Australians have a right to economic sameness that the state cannot deliver, while ignoring the right of Indigenous people to be different, something the state could enable. The latter strategy would mean that the Closing the Gap statistical goals promulgated by the Rudd and now Gillard governments might not be met. But the basic human rights of Indigenous people to choose the form that development might take as articulated in a number of articles in the UN Declaration on the Rights of Indigenous Peoples (supported by the Australian government in April 2009) might be.

Indigenous economic development, however defined, is not just a technical problem that requires a technical solution. It is a political economy and policy formation problem that needs to be addressed from the community level up. This in turn will require a great deal of hard policy development work. A theoretical, abstract, and somewhat reductionist strategy for development is being proposed because those charged with the policy formulation process do not have the means to engage with the empirical reality of communities and regions; or with the inevitable wide range of aspirations that Indigenous people will hold.

Under these circumstances and because the Australian government inevitably acts in its own interests, it might be appropriate to establish a parliamentary inquiry into Indigenous economic development. In such an inquiry, the Draft Strategy could form the Australian government submission to the policy development process. In my view the issue of Indigenous economic development is so important that it requires the multi-partisan attention of the most transparent institution available in Australia in a fraught policy environment where the boundaries between politicians, the bureaucracy and business are becoming increasingly blurred. A proper parliamentary inquiry might enable a higher level of Indigenous participation from the outset and might also invite submission from international expertise. The approach of a parliamentary inquiry includes community visitation and taking of verbal evidence that allows a high degree of direct consultations with Indigenous people.

Recommendation 8: A parliamentary inquiry should be established as soon as possible to examine the issue of Indigenous economic development in Australia with the aim of making recommendations for the establishment of a new and comprehensive policy framework.