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Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs (Legislation Committee)
Parliament House
CANBERRA ACT 2600

By email: ewer.sen@aph.gov.au

RE: Inquiry into Wild Rivers (Environmental Management) Bill 2011

Thank you for the invitation dated 25 March 2011 to make a submission to this Inquiry.

As noted in phone communications with Tim Watling Inquiry Secretary I have now made submission to your earlier Inquiry in 2010 and more recently to the House Standing Committee on Economics Inquiry into Indigenous economic development in Queensland and review of the Wild Rivers (Environmental Management) Bill 2010. So from an academic research perspective I really have nothing new to add.

I note that your Inquiry is only committed to inquire into those provisions of the Wild Rivers (Environmental Management) Bill 2011 which have not been previously examined by the Legal and Constitutional Affairs Legislation Committee in its inquiry and report into the Wild Rivers (Environmental Management) Bill 2010 [No. 2].

I provide for the Committee a copy of my 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. While in this submission I do not systematically analyse changes made between the 2010 and 2011 Bills, in a section titled '**Practical implementation considerations'** I do focus on issues associated with 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. This in turn raises questions about different categories of land owners, the various institutions that might represent their interests, and the possibility that complex implementation issues might arise if this Bill were passed.

I would like to emphasise that the following submission reflects my views alone. Please note that an abridged version of this submission has now been published as CAEPR Topical Issue 6/2011 *Wild Rivers and indigenous economic development in Queensland.*

I would be happy to supplement it with further assistance to the Inquiry if required, although I think the few points I make are pretty clear.

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 members 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 not accompanied by effective property rights to make choices 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 of 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 bipartisan 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 a second best solution 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, these are serious policy issues that deserve multi-partisan constructive debate, Indigenous input and resolution.

Appendix 1: 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 2: 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.