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# INDIGENOUS CARBON PROPERTY RIGHTS

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## ABSTRACT

*The commodification of forests to permit carbon sequestration and hence trading in the resultant carbon rights is examined as an emerging dispossession of customary and traditional owners' rights and interests arising from the survival of native title. Indigenous property rights in biota are an important incident of native title, and the disregard of such ownership by national States when creating freestanding legal rights to carbon raises the twin issues of extinguishment, and liability for compensation.*

*As the developed world moves towards carbon offsets and decarbonisation, the unforeseen cost of such responses to climate change is increasingly being borne by indigenous peoples throughout the world. In Australia, a direct conflict already exists between emerging carbon legislation and the Native Title Act 1993 (Cth.).*

## KEYWORDS

Carbon property rights, dispossession, indigenous rights and interests, native title.

### INTRODUCTION

Tom Holland in his seminal narrative history of the collapse of the Roman Republic observes:

*…[r]espect for private property had always been one of the foundation-stones of the Republic, but now, with the Republic superseded, private property could be sequestered on a commissar's whim. Farmers, evicted from their land without recompense…* [1]

[1] Holland, Tom (2004) *Rubicon: The Triumph and Tragedy of the Roman Republic* (London: Abacus), 364.

Holland's sobering analysis of the importance of property rights 2000 years ago resonates in the powerful silence of colonial and post-colonial State, Territory and Commonwealth legislation on indigenous property rights which arguably has continued even beyond the recognition of native title by the High Court in *Mabo & Ors v Queensland (No 2) (1992)* 175 CLR 1 (*Mabo*). This situation has also continued notwithstanding the establishment by the Fraser Government of land rights in the Northern Territory under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth.), and similar statutory rights created in various States, such as the *Aboriginal Land Rights Act 1983* (NSW).

The silence beyond *Mabo* also continues notwithstanding the subsequent enactment by the Keating Government of the *Native Title Act 1993* (Cth.) which affirmed recognition by the common law that indigenous property rights can exist arising from the survival of native title.

Paradoxically, since *Mabo* there have also been decisions which have greatly settled native title law such as *Western Australia v Ward (2002)* 191 ALR 1 (*Ward)* and *Yorta Yorta v Victoria (2002)* 194 ALR 538, which position native title as a multifarious "bundle of rights" markedly susceptible to extinguishment. There has been a marked understanding of the ambit of the indigenous property rights and interests that may comprise a particular native title in a specific locality. It is this complexity which draws attention to the notion of indigenous property in carbon, a subset of indigenous biota property rights.

Recent research as to how carbon property rights as a sub-class of biota property rights, indigenous or non-indigenous, sit within the bundle of rights in land has revealed the "inherent susceptibility"[2] of many rights within the bundle, of which native title is arguably one of the least robust. If emergent rights such as carbon are also less favored over other rights, the position of indigenous carbon rights would seem parlous in the extreme.

This view contrasts with the decision in *Yanner v Eaton (1999) 201 CLR 351* which revealed that indigenous property rights can exist in biota, specifically wild fauna such as Murrandoo Yanner's crocodile. Similarly, flora is an intrinsic part of indigenous rights and interests, and indeed management of country by traditional owners is highly sophisticated. Ross, Young and Liddle observed shortly after the enactment of the *Native Title Act 1993* (Cth.) that:

*[a]boriginal classification of land units, based on combinations of topography, soils and vegetation is a practical demonstration of this [traditional] ecological knowledge. These land classifications help Aboriginal people to predict the availability of different bush foods and manage them accordingly.*[3]

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[2] Boydell, Spike, Sheehan, John, and Prior, Jason (2009) "Carbon Property Rights in Context" *Environmental Practice* (11), 113.

[3] Ross, Helen, Young, Elspeth, & Liddle, Lynette (1994) "Mabo: An Inspiration for Australian Land Management *Australian Journal of Environmental Management* (1) 1 (July), 29.

Further, they point out that:

*[a]boriginal ecological knowledge is embedded in cultural explanations and symbols, a characteristic which has perhaps obscured the inherent sophistication of their understandings. It has been suggested that Aboriginal sacred sites may often have been conservation areas in which resource use was prohibited through supernatural sanctions. Food taboos similarly may have formed part of conservation strategies.*[4]

Given the strength of indigenous rights and interests in flora, the creation of freestanding property rights in carbon arguably represent a subsequent stage in the ongoing dispossession of Australian indigenes commencing with the presence of British settler society on 26 January 1788, when Captain Arthur Phillip sailed into Sydney Harbour, with a fleet of eleven ships and 1030 people on board.[5]

The following section of this paper describes how freestanding property rights in carbon are currently being crystallised out of the inchoate land property right, and how indigenous interests in carbon are being silently discarded and ignored.

## DISPOSSESSION AGAIN?

If freestanding property rights in carbon are to be crystallised out of the inchoate land property right held by the state, recognition of the prior claim by traditional and customary land holders to some or all of these new rights should occur. Should such recognition not be forthcoming as a land based carbon offsets regime is designed, will the native title law that has developed since the 1992 *Mabo* decision be discarded?

The answer lies in whether market freedoms and modern accountable government can achieve a balance with traditional and customary land tenures. Experience suggests that judicial recognition of ancient land ownership is yet to resonate with the actual experience of indigenous people in Australia, and indeed throughout the world. Colonial and post colonial Australian society in particular has always struggled with the issue of whether antipodean liberalism really extends to indigenous Australians.

The emergence of carbon property rights in vegetation in response to decarbonisation, and broader international obligations to adapt to climate change subsequent to Australian Federal government ratification of the Kyoto Protocol in December 2007 now provides an opportunity to test the genuineness of existing recognition of indigenous property rights. Given the remarkable complexity of indigenous tenures, it is almost certain where native title is determined by the

[4] Ross, Young & Liddle.
[5] Hughes, Robert (1987) *The Fatal Shore: A History of the Transportation of Convicts to Australia, 1878-1868* (London: Collins Harvill) 2.

Courts to have survived colonisation, indigenous carbon property rights will also have survived in many parts of Australia.

The establishment of free-standing carbon property rights regimes by State, Territory and Commonwealth governments will in many situations extinguish *ab initio* any underlying indigenous interests. Hence, the price of carbon gained from sequestration in vegetation must include an allowance for compensation for the indigenous interests extinguished. The methodology for assessing this compensation is a task yet to be understood.

Such questions now being raised in the Australian milieu have important lessons for those nations who have indigenous property rights within their borders, or those nations who will be seeking carbon offsets sourced from such countries. The following section of this paper explores briefly such matters.

## EMERGING ISSUES

Indigenous land rights have not ranked highly in global debates on climate change. Beyond perfunctory recognition, little interest has been expressed in the implications for customary and traditional landowners of global resource exploitation for sequestration on the scale needed to achieve significant decarbonisation. The quantity of land which will need to be given over to reafforestation for the purpose of sequestering carbon from the atmosphere is currently not fully understood, however it is certain to involve many billions of hectares of land.

As the FAO World Summit on Food Security in November 2009 revealed, a balance will need to be achieved between protecting increasingly scarce arable land to ensure food security, and the anticipated demands of land-based carbon sequestration. Notwithstanding, much sequestration will still of necessity occur in developing countries with high levels of customary or traditional land tenures, and as a result the six key policy issues are:

- Genuine recognition of indigenous land rights with carbon related components to avoid the imposition of environmental costs on indigenous peoples;
- The provision of a non-price dominated carbon management environment where carbon sequestration occurs on customary or traditional lands;
- Where carbon sequestration occurs on customary or traditional lands, the regime should as much as possible be consistent with traditional or customary land management practices;
- The impact of land based sequestration on customary or traditional communities should be carefully assessed in order for support to occur prior and subsequent to such impact occurring;

- Preferably carbon offset trading generated from sequestration on customary or traditional lands should rest with the land owners, albiet within a national trading framework; and
- Opportunities exist for leasehold carbon sequestration on customary or traditional lands, but on terms and conditions acceptable to the landowners, gained with their genuine consent.

## CONCLUSIONS

In attempting to distil any conclusions from the above discussion, the stark irony is that indigenous peoples throughout the world have probably always been aware of the value of biota, notably vegetation as an integral component of their various customary or traditional land tenures. In some countries such as Australia, judicial recognition of such incidents of native title has already occurred as in the High Court decision *Yanner*. However, just as indigenes seem poised to gain financial rewards for their carbon property rights and continuing time worn land management practices, the State is unwilling to recognise this component of their land rights. Comprehensive strategies are urgently needed to ensure that customary or traditional landowners are not again marginalised as industrialised nations seek carbon offsets in land-based sequestration projects.

The key policy issues listed in this article provide a framework which applies to any country with customary or traditional land ownership, and requires of the State meaningful dialogue with the customary and traditional communities who will be impacted by the carbon sequestration process. Market freedoms and modern accountable government need to achieve a balance with traditional and customary land tenures. The framework proposed in this article identifies the policy tools to achieve this aim.

## CASES CITED

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