PARTY POLITICS SET BACK NATIVE TITLE RIGHTS

Evidently both the Australian Greens and the Liberal National Party coalition under Tony Abbott want the property rights of native title groups greatly strengthened. This has come about in the following way.

First, the Wild Rivers (Environmental Management) Bill 2010 (the Abbott Wild Rivers Bill) used the language of special beneficial measures and article 26 of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) to advocate for the rights of Aboriginal land owners to own, use, develop and control their lands.

While Abbott did not have the numbers to get this Bill through the Senate in June this year, its intent was clear.

It was designed to empower Aboriginal land owners in Wild River areas with an unprecedented form of native title property for their advancement and protection.

Then in the Native Title Amendment (Reform) Bill 2011 (the NTA Reform Bill) Greens Senator Rachel Siewert has tabled a comprehensive bill to reform the *Native Title Act 1993* to further the interests of Indigenous Australians.

The impetus for this reform package is clearly outlined in Senator Siewert's second reading speech. Australia only endorsed UNDRIP in April 2009, nearly 16 years after the passage of the *Native Title Act 1993.*

And so it is timely to apply the principles of UNDRIP, especially those that refer to free prior informed consent, full and direct consultation, and the right of Indigenous peoples to their traditional lands, territories and natural resources, to Australian native title law.

More importantly, there is a need to improve the effectiveness of the native title system and what is called its 'future acts regime', the processes for negotiating use of native title lands, to benefit Indigenous Australians.

The raft of proposed reforms seeks to address concerns that have been articulated by native title groups and their representative organisations for a long time.

Of special significance are proposals to shift the burden of proof of cultural continuity and ongoing connection since colonisation from native title claimants to state parties.

This would be done, in part, through a broadening of the definition of 'traditional'; and a series of measures to strengthen both the property rights and associated negotiation rights of native title groups.

Both are complex areas of native title law. My focus here will be on the latter measures and their potential development benefits.

There have been over 100 native title determinations over 1.2 million square kilometres of Australia since 1993. But with determinations, even for 'exclusive possession', native title groups have reaped limited economic development benefit.

The cliché about Indigenous people being 'land rich but dirt poor' needs to be challenged; the explanation of poverty can be attributed, at least in part, to weak property rights. This is due to three main factors.

First, native title groups have very limited control over their lands or its resources.

Native title groups cannot stop industrial mining development on their lands. They do not have legal rights in commercially valuable resources, especially minerals but also fresh water, fisheries and emerging tradable commodities like carbon credits.

All native title groups have guaranteed customary or non-market rights to resources, to hunt, fish and gather.

Second, the right to negotiate with resource developers has inbuilt biases that further weaken already weak rights.

This is because under the 'future acts regime' native title groups only have a six-month period to negotiate when the value of a mine can influence benefit sharing compensatory agreements.

After this period if an agreement is not reached the negotiation is referred to an arbitral body, the National Native Title Tribunal. However, under S38(2) of the *Native Title Act* the value of minerals cannot be considered in determining compensation in arbitration.

Evidence to date shows that arbitrated decisions favour miners over native title groups and so there is a problem—delay favours resource developers and the threat of delay greatly reduces any negotiation leverage native title groups might have.

Third, the simplistic distinction between commercial and customary rights in resources in the *Native Title Act* (and subsequent court interpretations) is replicated in a western binary distinction between the terrestrial and marine estate—the right to negotiate is available on native title land, but not in the coastal zone or offshore, even if there is a marine determination.

The NTA Reform Bill, currently being reviewed by a Senate Committee, seeks

to systematically address each of these issues. The Bill aims to broaden native title property rights to include commercial resources thus making native title land a potential economic asset. It is proposed the value of a mine can be considered in arbitration thus improving the prospects for negotiations in good faith. It is also recommended that the right to negotiate be extended offshore in situations where there has been an offshore native title determination.

The NTA Reform Bill looks to address concerns increasingly put forward by Indigenous interests that for native title to have economic development potential, groups must enjoy a form of 'free prior informed consent' right that constitutes a meaningful form of property.

This issue has been at the heart of the Wild Rivers debate, as well as acrimonious development disputes in the Pilbara and the west Kimberley.

The passage of the NTA Reform Bill through the Federal Parliament might require an unusual political alliance between the Australian Greens and the Liberal-National Party Opposition. The Rudd, and now Gillard governments, have shown no inclination to beneficially reform the NTA to address development hurdles.

International human rights principles articulated in UNDRIP are being mobilised to amend Australian domestic law in the name of development opportunity for Indigenous people with native title lands.

This is ironic because the Howard government strongly opposed the Declaration when adopted by the General Assembly in 2007, while the Rudd government reversed this opposition, with much fanfare, in April 2009.

The NTA Reform Bill will present conundrums to both major parties. The challenge to the Abbott opposition is whether they will support native title reform based on UNDRIP principles Australia-wide, rather than just on Cape York. The challenge to the Gillard government is whether it will actively strengthen the property rights of native title groups to enhance their development prospects.

Evidently, it is only the Australian Greens who are proactively seeking to close the gap in property rights as a special beneficial measure to Close the Gap in Indigenous disadvantage.

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